APPENDIX A

Order Denying Certificate of Appealability

Filed July 13, 2020

FILED

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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. KENNETH SCOTT GORDON, Defendant-Appellant.	No. 20-15820 D.C. No. 1:11-cr-00479-JMS-1 District of Hawaii, Honolulu ORDER

Before: SILVERMAN and COLLINS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) 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 B

Order Denying 2255 Motion

Filed March 27, 2020

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff/Respondent, vs. KENNETH SCOTT GORDON, Defendant/Petitioner.	CR. NO. 11-00479(01) JMS CIV. NO. 18-00198 JMS ORDER (1) DENYING DEFENDANT'S REMANDED MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY; AND (2) DENYING A CERTIFICATE OF APPEALABILITY

ORDER (1) DENYING DEFENDANT'S REMANDED MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY; AND (2) DENYING A CERTIFICATE OF APPEALABILITY

I. INTRODUCTION

On October 29, 2018, this court denied Petitioner Kenneth Scott Gordon's ("Gordon") Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (the "§ 2255 petition"). *See* ECF No. 284 (Cr. No. 11-00479(01) JMS);[1] *United States v. Gordon*, 2018 WL 5499532 (D. Haw. Oct. 29, 2018) ("*Gordon III*" or "the October 29, 2018 Order").

[1] For administrative purposes, the § 2255 petition was filed both in the underlying criminal matter, Cr. No. 11-00479 JMS, and in a separate civil matter, Civ. No. 18-00198 JMS. This order refers to filings in the docket from the criminal matter.

Gordon's § 2255 petition raised two grounds for post-conviction relief: (1) error in denying his motion to suppress evidence from a duffel bag and wallet, and (2) constitutionally ineffective assistance of appellate counsel. *See* ECF No. 272. The October 29, 2018 Order denied the § 2255 petition (1) with prejudice as to the motion to suppress because the issues had been raised (and rejected) on direct appeal, and (2) without prejudice, for lack of jurisdiction, as to ineffective assistance of appellate counsel because the court concluded that only the Ninth Circuit could offer Gordon the specific relief he sought (vacating his conviction, exclusion of evidence, and/or release on bond) where such relief depended upon whether appellate errors would have affected the Ninth Circuit's decision on his direct appeal. *See* ECF No. 284 at PageID #2556.

Nevertheless, on December 13, 2019, the Ninth Circuit vacated the October 29, 2018 Order and remanded the claim of ineffective assistance of appellate counsel for this court to consider its merits in the first instance, explaining that "[s]hould Gordon's claim have merit, the district court can grant relief by vacating Gordon's judgment of conviction." ECF No. 296 at PageID #2633; *United States v. Gordon*, 787 F. App'x 476, 477 (9th Cir. Dec. 13, 2019) (mem.) ("*Gordon IV*"). [3] After the Ninth Circuit issued its mandate, ECF No. 297,

[3] It appears odd that a district court judge would have the power to *vacate* a conviction based on the specific claims of ineffective assistance of appellate counsel brought here—waiving (continued . . .)

the parties agreed at a February 13, 2020 status conference that this court should decide the remanded claim without an evidentiary hearing, without further briefing, and based on the existing record. *See* ECF No. 299.

Accordingly, the court has further reviewed the arguments of the parties and the existing record—including the Declaration of Georgia K. McMillen (counsel on direct appeal) and associated exhibits, ECF Nos. 277-1 to 277-3—and DENIES the § 2255 petition. Gordon has not met his burden to demonstrate that he was deprived of constitutionally effective assistance of appellate counsel.[4]

II. BACKGROUND

The underlying facts of Gordon's criminal conviction and sentence are adequately set forth in (1) the court's September 10, 2012 Order denying his motion to suppress (*see* ECF No. 105, *United States v. Gordon*, 895 F. Supp. 2d 1011 (D. Haw. 2012) ("*Gordon I*")); (2) the Ninth Circuit's memorandum disposition affirming his conviction on direct appeal, including affirming the court's denial of his motion to suppress (*see* ECF No. 267, *United States v. Gordon*, 694 F. App'x 556 (9th Cir. July 24, 2017) ("*Gordon II*"), *cert. denied*, 138 S. Ct. 434 (Nov. 6, 2017)); and (3) the court's October 29, 2018 Order denying his

oral argument before the appellate panel, deciding not to file an optional brief before the panel, and failing to seek en banc review or certiorari—rather than, for instance, permitting a new appeal for a meritorious claim.

[4] The court's October 29, 2018 Order denying relief as to the motion to suppress was not certified for appeal and remains valid. *See Gordon III*, 2018 WL 5499532 at *2-3.

§ 2255 petition, *Gordon III*. The court does not repeat that factual background here.

During Gordon's direct appeal, his appointed appellate counsel—after filing a 59-page opening brief—declined to submit an optional reply brief. ECF No. 277-1 at PageID #2461-62. Appellate counsel attests that her opening brief raised all the pertinent Fourth Amendment arguments and relied on the leading case law; she explains that it would have been redundant to argue the same issues concerning suppression in a reply brief. *See id.* at PageID #2463-64.

Appellate counsel also filed an unopposed motion to decide the appeal on the briefs. *See id.* at PageID #2462. She explains that this motion was a matter of strategy, attesting that, after reviewing the opening and answering briefs, "[b]ecause the record could be construed against [Gordon], as set out in the answering brief, I saw little benefit to oral argument [because] it likely would have exposed the weaknesses in our arguments." *Id.* at PageID #2465. On June 1, 2017, the Ninth Circuit issued an order specifically finding that "[t]he court is of the unanimous opinion that the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." ECF No. 266 at PageID #2311. And on June 14, 2017 the matter was submitted without oral argument. *Id.*

On July 24, 2017, a panel of the Ninth Circuit affirmed Gordon's conviction and sentence on direct appeal. *See Gordon II*, 694 F. App'x at 558. Among other issues, the panel upheld the denial of the motion to suppress evidence from the duffel bag and wallet. *See id*. at 557. In this regard, Judge Paez concurred with the result but indicated he would have reversed the denial of the motion to suppress if not for the holding in *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015), to which, he recognized, he was bound. *See Gordon II*, 694 F. App'x at 558 (Paez, J., concurring). Appellate counsel did not seek rehearing or rehearing en banc. *See* ECF No. 277-1 at PageID #2466-67. She also did not file a petition for certiorari to the Supreme Court, although Gordon filed a petition on a pro se basis, ECF No. 270, which the Supreme Court denied on November 6, 2017. *See Gordon v. United States*, 138 S. Ct. 434 (2017) (mem.). Gordon then filed his § 2255 Petition on May 22, 2018. *See* ECF No. 272.

III. STANDARD OF REVIEW

The court's review is governed by 28 U.S.C. § 2255(a), 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.

A court should hold an evidentiary hearing on a § 2255 motion "unless the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). "In determining whether a hearing and findings of fact and conclusions of law are required, '[t]he standard essentially is whether the movant has made specific factual allegations that, if true, state a claim on which relief could be granted.'" *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011) (quoting *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984)). "Thus, the district court's decision that [the petitioner's] ineffective assistance claim did not warrant an evidentiary hearing [is] correct if his allegations, 'when viewed against the record, do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal.'" *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (quoting *Schaflander*, 743 F.2d at 717).[5] Conclusory statements in a § 2255 motion are insufficient to require a hearing. *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

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[5] As set forth above, both parties concur that an evidentiary hearing is not necessary, and the court should decide the matter on the existing record. ECF No. 299. The court agrees.

IV. DISCUSSION

A. Ineffective Assistance of Appellate Counsel

The court reviews a claim of ineffective assistance of appellate counsel by applying *Strickland v. Washington*, 466 U.S. 668 (1984). *See, e.g.*, *Bailey v. Newland*, 263 F.3d 1022, 1028 (9th Cir. 2001) (citations omitted). Under *Strickland*, "the petitioner must establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists 'that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 688). A court need not determine whether counsel's performance was deficient before examining whether the petitioner suffered prejudice as a result of the alleged deficiencies. *See Strickland*, 466 U.S. at 697. In other words, any deficiency that does not result in prejudice necessarily fails.

"In applying *Strickland* to a claim of ineffective assistance of appellate counsel, [the Ninth Circuit has stated] that

> [*Strickland's*] two prongs partially overlap when evaluating the performance of appellate counsel. In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. . . . Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no

> prejudice (prong two) for the same reason—because she declined to raise a weak issue."

Bailey, 263 F.3d at 1028-29 (quoting *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (internal citations and footnotes omitted)).

Gordon claims his appellate counsel was constitutionally ineffective in four ways: (1) filing the motion to submit the appeal without oral argument, (2) failing to file an optional reply brief, (3) failing to seek rehearing en banc, and (4) failing to file petition for certiorari.[6] All are without merit.

First, Gordon has not demonstrated a reasonable probability that oral argument would have resulted in a different outcome. Indeed, the Ninth Circuit panel specifically determined that it was "of the unanimous opinion that the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." ECF No. 266. He has identified no meritorious argument that could have made a difference if made orally, and thus this district court is in no position to find—even objectively—that oral argument would have led to a different result before the Ninth Circuit. *See also United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986)

[6] It is somewhat unclear whether Gordon raises the failure to file a cert petition as a basis for his claim. His memorandum of law did not specifically argue the issue, but his affidavit states that "I would have asked counsel to seek both panel rehearing en banc rehearing before seeking relief from the U.S Supreme Court." ECF No. 272-2 at PageID #2394. Nevertheless, construing the § 2255 petition liberally, the court briefly addresses this issue as well.

(upholding denial of motion to vacate sentence based on alleged ineffective assistance of appellate counsel, where counsel failed to appear at oral argument, reasoning in part that "[o]ral argument on appeal is not required by the Constitution in all cases; nor is it necessarily essential to a fair hearing") (citation omitted).

Second, *Birtle* also stated that "[a] reply brief also generally is not essential for appellate review." *Id.* Just as Gordon's appellate counsel has attested, *Birtle* reasoned that "parties often decide not to file a reply brief as a matter of appellate strategy or because they perceive no need to do so." *Id.* And just as with oral argument, Gordon has not identified a meritorious written argument that could have been made in a reply brief that might have resulted in a different outcome—especially given the "'general rule . . . that appellants cannot raise a new issue for the first time in their reply briefs.'" *Id.* (quoting *Thompson v. Comm'r*, 631 F.2d 642, 649 (9th Cir. 1980) (other citation omitted)). He has thus "failed to demonstrate that he was denied effective assistance of counsel on appeal," *id.* at 849, for counsel's decision not to file a reply.

Third, as to the failure to seek rehearing en banc, based on other circuits' case law, it appears that a defendant has no constitutional right to counsel at that stage. *See, e.g.*, *Jackson v. Johnson*, 217 F.3d 360, 365 (5th Cir. 2000) (denying habeas petition, holding that "a criminal defendant has no constitutional

right to counsel on matters related to filing a motion for rehearing following the disposition of his case on direct appeal"); *United States v. Chandler*, 291 F. Supp. 2d 1204, 1213 (D. Kan. 2003) (rejecting claim under § 2255 that counsel was ineffective for failing to seek en banc review before the Tenth Circuit, citing *McNeal v. United States*, 54 F.3d 776 (6th Cir. 1995) (table case) for its holding that "there is no constitutional right to counsel in seeking rehearing en banc"—and where there is no constitutional right to counsel, the client's "constitutional rights cannot be violated by the allegedly defective performance of his attorney").

But even if Gordon has such a constitutional right, he has not demonstrated that counsel's failure to file a motion seeking en banc review would have been successful, much less that an en banc panel likely would have vacated the panel's disposition. En banc review is "not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Neither of these circumstances exist here.[8]

[8] Judge Paez's concurrence on direct appeal suggests that he disagreed with Ninth Circuit precedent that required affirming the denial of the motion to suppress. *See Gordon II*, 694 F. App'x at 558. At best, however, this means only that there might have been some basis to *seek* review, and certainly does not mean a petition would have been granted and then been successful before an en banc court. And Judge Paez could have sought en banc review sua sponte if he considered the issue worthy enough. *See* Ninth Cir. Gen. Order 5.4(c)(1) & (3). Moreover, the case he referred to—*United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015)— remains valid precedent to this day.

Finally, the failure to file a petition for certiorari necessarily cannot constitute ineffective assistance—no such right exists. *See, e.g.*, *Miller*, 882 F.2d at 1432 ("Because Miller had no constitutional right to counsel in connection with the filing of a certiorari petition, he had no constitutional right to the effective assistance of counsel for that purpose.").

B. Certificate of Appealability

In denying a § 2255 Motion, the court must also address whether Gordon should be granted a certificate of appealability ("COA"). *See* R. 11(a) Governing Section 2255 Proceedings (providing that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant"). A COA may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The court carefully reviewed all of Gordon's assertions and gave him every benefit by liberally construing them. Based on the above analysis, the court finds that reasonable jurists could not find the court's rulings to be debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that a certificate of appealability should issue only if a prisoner shows, among other things, "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling"). Accordingly, the court DENIES issuing a COA.

V. CONCLUSION

For the foregoing reasons, the court DENIES Gordon's § 2255 Motion and DENIES a COA. The Clerk of Court is directed to close the case file.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 27, 2020.

/s/ J. Michael Seabright
J. Michael Seabright
Chief United States District Judge

United States v. Gordon, Cr. No. 11-00479(01) JMS; Civ. No. 18-00198JMS, Order (1) Denying Defendant's Remanded Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody; and (2) Denying a Certificate of Appealability

APPENDIX C

Memorandum Decision

Filed December 13, 2019

NOT FOR PUBLICATION

FILED

DEC 13 2019

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. KENNETH SCOTT GORDON, Defendant-Appellant.	No. 18-17202 D.C. Nos. 1:18-cv-00198-JMS-KSC 1:11-cr-00479-JMS-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
J. Michael Seabright, District Judge, Presiding

Submitted December 11, 2019**

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

Federal prisoner Kenneth Scott Gordon appeals pro se from the district court's order denying his 28 U.S.C. § 2255 motion. We have jurisdiction under 28 U.S.C. § 2253, and we vacate and remand.

Gordon contends that counsel was constitutionally ineffective on direct

* 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).

appeal. As the government concedes, the district court erred by concluding that it lacked jurisdiction to consider this constitutional claim in a section 2255 proceeding. Our decision in *Williams v. United States*, 307 F.2d 366 (9th Cir. 1962), *overruled on other grounds by Kaufman v. United States*, 394 U.S. 217 (1969), did not hold to the contrary. *Williams* held that a section 2255 motion cannot be used to review this court's action in dismissing an appeal; rather, relief from the dismissal must be obtained from this court. *See id*. at 368. Gordon's section 2255 motion does not seek relief that only this court can provide. Should Gordon's claim have merit, the district court can grant relief by vacating Gordon's judgment of conviction. *See* 28 U.S.C. § 2555. We, accordingly, remand to the district court to consider the merits of Gordon's claim in the first instance.

We express no opinion as to Gordon's claim that an evidentiary hearing is warranted on remand.

In light of this disposition, we do not reach the parties' remaining arguments.

VACATED and REMANDED.

APPENDIX D

Order Denying 2255 Motion, Granting COA

Filed October 29, 2018

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff/Respondent, vs. KENNETH SCOTT GORDON, Defendant/Petitioner.	CR. NO. 11-00479 (01) JMS CIV. NO. 18-00198 JMS-KSC ORDER (1) DENYING MOTION UNDER § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE, ECF NO. 272; AND (2) GRANTING IN PART AND DENYING IN PART CERTIFICATE OF APPEALABILITY

ORDER (1) DENYING MOTION UNDER § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE, ECF NO. 272; AND (2) GRANTING IN PART AND DENYING IN PART CERTIFICATE OF APPEALABILITY

I. INTRODUCTION

Before the court is Defendant/Petitioner Kenneth Scott Gordon's ("Gordon") Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. ECF No. 272. Gordon challenges his conviction and sentence alleging that: (1) his motion to suppress evidence was improperly denied; and (2) he was provided ineffective assistance of counsel on appeal.

For the reasons discussed below, the court DENIES Gordon's § 2255 Motion (1) with prejudice as to Ground One (motion to suppress), and (2) without prejudice as to Ground Two (ineffective assistance of appellate counsel).

II. BACKGROUND

On May 18, 2011, Gordon was indicted with two co-defendants for conspiracy to distribute methamphetamine, and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). ECF No. 6. Arguing that a warrantless search violates the Fourth Amendment, on May 11, 2012, Gordon moved to suppress evidence seized from a bag he was carrying when arrested and from a wallet and cellphone found on him when arrested. ECF Nos. 74, 75. After a hearing, the court denied the motions to suppress on September 10, 2012. ECF No. 105; *United States v. Gordon*, 895 F. Supp. 2d 1011 (D. Haw. 2012). After a jury trial, Gordon was found guilty as charged on October 17, 2012, ECF No. 161, and later sentenced to 164 months of imprisonment with five years of supervised release, ECF No. 227.[1] Gordon filed a "Motion for a New Trial for Sentencing," ECF No. 230, which was denied, ECF No. 233.

Gordon appealed. ECF No. 234. The Ninth Circuit affirmed, concluding, among other things, that this court did not err in denying Gordon's motion to suppress the evidence from the bag and wallet. *United States v. Gordon*, 694 F. App'x 556 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 434 (2017).

[1] Gordon's sentence was later reduced from 164 to 151 months of imprisonment (with no changes to supervised release) after the court retroactively applied Amendment 782 of the United States Sentencing Guidelines. ECF No. 261.

On May 22, 2018, Gordon filed the instant Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (the "Motion"). ECF No. 272. The Government filed its Response on July 23, 2018, ECF No. 277, and Gordon filed his Reply on August 27, 2018, ECF No. 278. On September 6, 2018, the court requested both parties to provide additional briefing on whether the court has jurisdiction over Ground Two of the Motion (ineffective assistance of appellate counsel). ECF No. 279. On October 3, 2018, the Government filed a Supplement to its Response. ECF No. 280. On October 4, 2018, Gordon filed his Memoranda[2] as to the District Court's Jurisdiction. ECF No. 281, 282. On October 18, 2018, Gordon filed a Motion to Strike unresponsive portions of Government's Supplement. ECF No. 283.

III. STANDARD OF REVIEW

Title 28 U.S.C. § 2255(a) 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.

[2] Gordon filed two nearly identical Memoranda on October 4, 2018. ECF Nos. 281, 282. The court has reviewed both.

A court may dismiss a § 2255 motion if "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief." Rule Governing Section 2255 Proceedings 4(b). A court need not hold an evidentiary hearing if the allegations are "palpably incredible [or] patently frivolous," *Blackledge v. Allison*, 431 U.S. 63, 76 (1977), or if the issues can be conclusively decided on the basis of the evidence in the record. *See United States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998) (noting that a "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"). Conclusory statements in a § 2255 motion are insufficient to require a hearing. *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993). A petitioner must "allege specific facts which, if true, would entitle him to relief." *United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003) (internal quotation marks and citation omitted).

III. DISCUSSION

A. Ground One: Motion to Suppress

Gordon's claim regarding his motion to suppress evidence fails because it was already raised in his direct appeal. "When a defendant has raised a claim and has been given a full and fair opportunity to litigate it on direct appeal, that claim may not be used as basis for a subsequent § 2255 petition." *United*

States v. Hayes, 231 F.3d 1132, 1139 (9th Cir. 2000) (citation omitted); *see also Olney v. United States*, 433 F.2d 161, 162 (9th Cir. 1970) ("Having raised this point unsuccessfully on direct appeal, appellant cannot now seek to relitigate it as part of a petition under § 2255."). In his Motion, Gordon argues that his motion to suppress should have succeeded under *Arizona v. Gant*, 556 U.S. 332 (2009) (holding unreasonable a search of defendant's car after defendant was handcuffed and secured inside a patrol car). *See* ECF No. 272-1 at 19-26. But the Ninth Circuit addressed this issue on direct appeal and distinguished Gordon from the defendant in *Gant* because, unlike that defendant, Gordon was "within reaching distance" of the duffel bag during the search. *Gordon*, 694 F. App'x at 557 (citing *Gant*, 556 U.S. at 351). Further, the Ninth Circuit reasoned that the search was "roughly contemporaneous" with the arrest because it occurred within seconds of Gordon being handcuffed. *Id.* (citing *United States v. Camou*, 773 F.3d 932, 938 (9th Cir. 2014); *United States v. Cook*, 808 F.3d 1195, 1197, 1199-1200 (9th Cir. 2015); *United States v. Nohara*, 3 F.3d 1239, 1243 (9th Cir. 1993)).

Finally, the Ninth Circuit concluded that the search of Gordon's wallet was lawful because Gordon stipulated that officers would testify that the wallet was taken from his person at the time of his arrest and then transported to the DEA office. *Id.* Thus, Gordon is simply trying to relitigate his direct appeal, which cannot be a basis for a § 2255 petition.

B. Ground Two: Ineffective Assistance of Appellate Counsel

Gordon next alleges that his appellate counsel was ineffective for failing to: (1) file a Reply brief; (2) request oral argument; or (3) petition for rehearing. *See* ECF No. 272-1 at 30-35. On September 6, 2018, the court requested supplemental briefing on the issue of whether this court has jurisdiction over this claim. ECF No. 279. Upon review of the briefing[3] and relevant case law, the court determines that it does not have jurisdiction over Gordon's claim of ineffective assistance of appellate counsel.

Both Gordon and the Government argue that this court has the authority to review Gordon's claim of ineffective assistance of appellate counsel. ECF No. 281 at 2; ECF No. 280 at 2. The Government argues that the Ninth Circuit has assumed in some cases that the district court had jurisdiction over similar claims. ECF No. 280 at 3 (citing *Simmons v. United States*, 2013 WL 3455770, at *11 (D. Haw. July 9, 2013) ("*Simmons I*")). The Government also argues that this court is "in the best position to conduct an evidentiary hearing and/or perform fact-finding in the first instance . . . ." *Id.* at 3-4.

The court has addressed this issue in *Simmons I*. In that case, the petitioner asserted that his appellate counsel was ineffective because counsel

[3] Gordon filed a Motion to Strike unresponsive portions of Government's Supplement, ECF No. 280. ECF No. 283. The court does not consider any arguments in the Government's Supplement beyond the scope of the jurisdiction question. Thus, Gordon's Motion to Strike, ECF No. 283, is DENIED as moot.

allowed the petitioner to sign a declaration to the Ninth Circuit agreeing to dismissal of his appeal. 2013 WL 3455770, at *11. Like in *Simmons I*, Gordon is "effectively asking this court to change what happened before the Ninth Circuit" — in this case, appellate counsel's failure to file a Reply brief, request oral argument, or petition for rehearing. *Id.*

Simmons I recognized that "the Ninth Circuit has assumed in some cases (without specifically addressing) that the district court had jurisdiction to decide claims alleging ineffective assistance of appellate counsel." 2013 WL 3455770, at *11 (citing *United States v. Gamba*, 541 F.3d 895, 896 (9th Cir. 2008); *United States v. Skurdal*, 341 F.3d 921 (9th Cir. 2003); and *United States v. Birtle*, 792 F.2d 846, 847 (9th Cir. 1986)). And *Simmons I* acknowledged that these cases "may recognize that the district court may be in the best position to conduct an evidentiary hearing and/or perform fact-finding in the first instance." *Id.*

But, *Simmons I* concluded that it did not appear that the court had jurisdiction over the claim because of *Williams v. United States*, 307 F.2d 366, 368 (9th Cir. 1962), *overruled on other grounds by Kaufman v. United States*, 394 U.S. 217 (1969), which stated:

> [A] section 2255 proceeding [cannot] be utilized as a method of reviewing the action of [the Ninth Circuit] in dismissing an appeal. If an appeal is improvidently dismissed in [the Ninth Circuit] the remedy is by way of a motion directed to [the Ninth Circuit] asking for a recall of the mandate or certified judgment so that [the

> Ninth Circuit] may determine whether the appeal should be reinstated. The recall of the mandate or certified judgment for such a purpose is entirely discretionary with [the Ninth Circuit].

See Simmons I, 2013 WL 3455770, at *10 (collecting cases). And this makes sense. This court could not offer Gordon any relief he seeks based on ineffective assistance of appellate counsel. Only the Ninth Circuit could do so.[4]

Ultimately, the court denied Simmons' § 2255 motion (as to ineffective assistance of appellate counsel) without prejudice and granted petitioner leave to renew the ineffective assistance of appellate counsel claim "if the Ninth Circuit determines in connection with [petitioner's] expected proceedings to recall the mandate that this Court has jurisdiction to adjudicate it and grant relief on it, notwithstanding *Williams*, in [petitioner's] § 2255 proceeding." *Simmons v. United States*, 2013 WL 11318851, at *3 (D. Haw. July 26, 2013) ("*Simmons II*"). As in *Williams*, the remedy for Gordon, if any, appears to be "by way of a motion directed to [the Ninth Circuit] asking for a recall of the mandate or certified judgment." *Williams*, 307 F.2d at 368.

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[4] In his § 2255 Motion, Gordon requested the following relief: "(i) conviction should be vacated; (ii) direct trial court to exclude any evidence found in the bag in any subsequent trial or proceeding, and (iii) order my release on signature bond." ECF No. 272 at 12. But this type of relief is not appropriate for an ineffective assistance of appellate counsel claim. If Gordon succeeded on his claim, at best he may be entitled to have the Ninth Circuit vacate its prior opinion and reinstate his direct appeal.

C. Certificate of Appealability

Because the court denies Gordon's § 2255 Motion, the court next addresses whether Gordon should be granted a certificate of appealability ("COA"). *See* Rule Governing Section 2255 Proceedings 11(a) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). The court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). *See* Rule Governing Section 2255 Proceedings 11(a) ("If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).").

"The standard for a certificate of appealability is lenient." *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc), *overruled on other grounds by Swarthout v. Cooke*, 562 U.S. 216 (2011). The petitioner is required to demonstrate only "that reasonable jurists could debate the district court's resolution or that the issues are adequate to deserve encouragement to proceed further." *Id.* (citations and internal quotation marks omitted). *See also Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that a certificate of appealability should issue only if a prisoner shows, among other things, "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling").

Applying that standard, the jurisdictional issue concerning Ground Two (ineffective assistance of appellate counsel) is debatable by jurists of reason — the Ninth Circuit has assumed (without discussion) that district courts have jurisdiction over ineffective assistance of appellate counsel, while its opinion in *Williams* seems to say otherwise. But the claim in Ground One (motion to suppress) is not debatable by jurists of reason — Gordon was given a "full and fair opportunity to litigate" this issue on direct appeal (and did so) and cannot use this § 2255 petition to relitigate the issue. *See Hayes*, 231 F.3d at 1139.

V. CONCLUSION

For the foregoing reasons, the court DENIES Gordon's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (1) with prejudice concerning Ground One (motion to suppress), and (2) without prejudice concerning Ground Two (ineffective assistance of appellate counsel). The court GRANTS issuance of a COA as to Ground Two, and DENIES issuance of a COA as to Ground One.

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IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 29, 2018.

/s/ J. Michael Seabright
J. Michael Seabright
Chief United States District Judge

United States v. Gordon, Cr. No. 11-00479-01 JMS, Civ. No. 18-00198 JMS-KSC, (1) Order Denying Motion Under § 2255 to Vacate, Set Aside, or Correct Sentence, ECF No. 272; and (2) Granting In Part and Denying in Part Certificate of Appealability

APPENDIX E

2255 Motion and Memorandum ISO 255

Filed May 22, 2018

AO 243 (Rev. 09/17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Hawaii	
Name *(under which you were convicted)*: Kenneth Scott Gordon		Docket or Case No.: CR. No. 11-00479-01
Place of Confinement: SPC-Tucson		Prisoner No.: 13678022
UNITED STATES OF AMERICA V.		Movant *(include name under which convicted)* Kenneth Scott Gordon

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
United States District Court, District of Hawaii
U.S. Courthouse
300 Ala Moana Blvd.
Honolulu, HI 96813

(b) Criminal docket or case number (if you know): CR. No. 11-00479-01

2. (a) Date of the judgment of conviction (if you know): August 2, 2013
(b) Date of sentencing: August 1, 2013

3. Length of sentence: 164 months; reduced to 151 months January 20, 2016

4. Nature of crime (all counts): Conspiracy to Distribute and Possess with intent to Distribute 50 Grams or more of Methamphetamine in violation of 21 USC Sections 841(a)(1) and (b)(1)(A) and 846; Possession with Intent to Distribute 50 Grams or more of Methamphetamine in violation of 21 USC Sections 841(a)(1) and (b)(1)(A).

5. (a) What was your plea? (Check one)
(1) Not guilty ☑ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?
N/A

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☑ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☑

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8. Did you appeal from the judgment of conviction? Yes ☑ No ☐

9. If you did appeal, answer the following:

(a) Name of court: U.S. Court of Appeals, Ninth Circuit

(b) Docket or case number (if you know): C.A. No. 13-10463

(c) Result: Affirmed District Court

(d) Date of result (if you know): Judgment filed August 2, 2013.

(e) Citation to the case (if you know): _____

(f) Grounds raised: 1. whether the district court erred in denying Gordon's motion to suppress & If so, was the error harmless.
2. whether the district court abused its discretion in denying Gordon's motion to strike a 35-second video.
3. whether the district court erred in denying Gordon's request for a minor role adjustment.
4. whether the concurrent sentences imposed were substantially unreasonable.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☑ No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: Cert. Denied

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: whether the district court erred in denying Gordon's motion to suppress.

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐ No ☑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☑

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket of case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☑

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☑

(2) Second petition: Yes ☐ No ☐ N/A

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

N/A

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Motion to Suppress Evidence obtained from warrantless search after scene of arrest was secured with suspect handcuffed

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Should have been granted.

1. The government did not dispute and the trial court found that at the time of the search incident to arrest, that "Gordon was under custody and control of law enforcement" at the time of the search. "Gordon offered no resistance to the arrest, and was surrounded by several officers. The testifying witnesses did not observe any other persons at the scene that they deemed to be potential threats; weapons were neither observed at the scene or found in the bag."
2. There was no possibility that Gordon could reach into the arrest area that law enforcement sought to search at the time of the search.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes [✓] No [ ]

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes [✓] No [✓]

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: Petition for writ of Certiorari

Name and location of the court where the motion or petition was filed:

U.S. Supreme Court

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available): Cert. Denied

(3) Did you receive a hearing on your motion, petition, or application?

Yes [ ] No [✓]

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(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☑

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL AT CRITICAL STAGES OF APPELLATE PROCESS THAT RENDERED PROCESS PRESUMPTIVELY AND ACTUALLY UNRELIABLE.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. Counsel waived right to file a Reply issues without consulting with Gordon and without his consent where meritorious, non-frivolous arguments were readily available to competent counsel.
2. Counsel waived previously set oral argument without consulting with Gordon and without his consent were meritorious non frivolous arguments had a reasonable probability of altering the outcome.
3. Counsel failed to seek rehearing by panel or en banc ~~that case was a close call~~ notwithstanding ~~[illegible] majority opinion~~ ~~and but for~~ majority opinion that case was a "close call" and concurring opinion that Justice would have voted for reversal and suppression of evidence but for case that was easily distinguishable.

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

DID NOT EXIST AT TIME OF DIRECT APPEAL.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: DID NOT EXIST UNTIL RESULT OF APPEAL BECAME FINAL.

_____

GROUND THREE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Yes. Ineffective assistance of counsel on appeal. It did not exist in full until after counsel made her unauthorized waivers and failed to seek rehearings.

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14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised..

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:

(b) At the arraignment and plea:

(c) At the trial:

(d) At sentencing:

(e) On appeal: Georgia K. Mc Millen, P.O. Box 1512, Wailuku Maui, HI. 96793

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☑ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

N/A

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

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Therefore, movant asks that the Court grant the following relief: (i) conviction should be vacated; (ii) direct trial court to exclude any evidence found in the bag in any subsequent trial or proceeding, and (iii) order my release on signature bond or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____.
(month, date, year)

Executed (signed) on MAY 10, 2018 (date)

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

Kenneth Scott Gordon
No. 13678022
SPC-Tucson
P.O. Box 24549
Tucson, Arizona 85734

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CR. NO. 11-00479-01

UNITED STATES OF AMERICA,
PLAINTIFF
VS.
KENNETH SCOTT GORDON,
DEFENDANT

MEMORANDUM OF LAW IN SUPPORT OF HABEAS CORPUS MOTION TO VACATE CONVICTION AND SET ASIDE SENTENCE PURSUANT TO 28 U.S.C. SECTION 2255

I. Introduction

This Memorandum will establish that Defendant Kenneth Scott Gordon ("Gordon") has been convicted and imprisoned in violation of his Fourth Amendment right to be free from an unconstitutional search incident to arrest and his Sixth Amendment right to effective assistance of counsel on appeal.

As to the search, it is undisputed that at the time of the warrantless search of the dufffle bag here in issue, Gordon was standing by his automobile surrounded by four officers and handcuffed and the closed duffel bag he had been carrying was in the "complete control" of the arresting officers from the moment Gordon was arrested until and after it was searched. (District Court Decision, at 3). In denying the motion to suppress, the trial court stepped outside the boundaries establshed by the Supreme Court in Arizona v. Gant, 556 U. S. 332, 129 S. Ct. 1710, 173 L. Ed 2d 485 (2009) for searches incident to arrest where the scene is secured and thus sanctioned an unconstitutional search of the bag.

Both the trial court and the Ninth Circuit Court of Appeals cited decisions of the Ninth Circuit Court of Appeals to support their Decision denying Gordon's motion to suppress. These cases cited cases that likewise exceeded the boundary established by Gant and thereby violated settled principles of stare decisis as both the results and reasoning employed therein are irreconcilable with Gant's holding and the Gant court's mode of analysis. Gant at 173 L. Ed 2d 485 at 499; County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U. S. 573, 668, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989); See also, Miller v. Gammie, 335 F. 3d 889, 900 (9th Cir. 2003) (citing Allegheny with approval).

The claim of ineffective assistance of counsel on appeal will be established herein for several reasons. First, Gordon's Opening Brief argued that Gant required suppression of the duffel bag and its contents but failed to argue that (i) Gant requires lower court's to apply its mode of analysis,

i.e., looking to the two Chimel factors as the boundaries which must be met to legitimize a warrantless search incident to arrest after the scene of arrest is secured; (ii) the trial court's reliance on Cook, Maddox, Turner and Nohara improperly failed to apply Gant's mode of analysis or holding; and (iii) Cook's facts are clearly distinguishable from Gordon and Gant due to the trial court's factual finding of potential danger to the evidence in Nohara.

Second, the opportunity to cover those omissions arose as a matter of course with the arrival of the Government's Answering Brief (AB). All of the arguments briefly identified above and detailed hereafter should have been raised in a Reply Brief. Instead, without Gordon's knowledge or consent Gordon's counsel waived Gordon's right to Reply to the Government's Answering Brief.

The waiver of the right to file a Reply Brief without the client's consent was below the objective standard of reasonableness under prevailing professional norms. The implied proposition of counsel's letter to Gordon (Gordon Affidavit, Exhibit) that it would have been improper to attack and criticize the reasoning and authorities posited by the Government in a Reply Brief is by itself resounding evidence of a judgment far below professional norms for appellate advocacy. This deficiency standing alone renders the result unreliable as counsel failed at a critical stage to "render the [appeal] a reliable adversarial testing process." Id. at 688.

Third, counsel thereafter waived Gordon's right to oral argument without Gordon's consent and over his written request

to attend oral argument. (Gordon Affidavit , # 8 , Exhibit 3). These unconsented to waivers to avoid further efforts with a reasonable probability of success at hand rendered counsel's work on appeal below the norm of a "legally competent attorney", and are not "within the range of competence demanded of attorneys in criminal cases" and thus ineffective. Strickland v. Washington, 466 U.S. 668, 80 L. Ed 2d 674, 104 S. Ct. 2052 (1984); Rowe v. Flores-Ortega, 528 U.S. 470 (2000) (failure to consult client before deciding not to file notice of appeal). Indeed, these waivers which fly in the face of Gordon's written communication to counsel of his desire to attend oral argument establish two instances of presumed ineffectiveness as those two critical stages of the proceeding did not occur. Roe at 483-484. Alternately, they add to the chorus of actual ineffective assistance.

Fourth, Appellate counsel's reaction to the Decision of the Court of Appeals reveals that she had long ago abandoned Gordon. A reasonably competent counsel would have surely petitioned for rehearing by the panel and rehearing en banc since the panel stated this case with constitutional issues is a close call and a concurring Justice flat out stated in a concurring opinion that he would have reversed the District Court and suppressed the evidence found in the search but for his view that an easily distringuishable case on the facts [Cook] required his affirmance.

A reasonably competent appellate counsel would have and should have been encouraged to pursue rehearing by the panel and to the Court en banc. Instead, counsel's post Decision advice to Gordon was that she "did not believe meritorious,

non-frivolous grounds exist for further Appellate Review of the Decision for Panel Rehearing, Rehearing En Banc or Appeal to the Supreme Court (Gordon Affidavit, # 11 , Exhibit 5). She did not even ask him if he nevertheless wanted her to pursue either or both of those paths to reversal. Prejudice here should again be presumed as there was no reason to believe that Gordon would not want those processes to occur and he had reasonably demonstrated to counsel that he was interested in pursuing all available avenues of relief. Roe at 997. The highly relevant fact that he went to trial was ignored. Again, in the alternative, these errors contributed to pervasive actual ineffective assistance and prejudice which rendered the adversary process itself presumptively unreliable as Gordon lacked effective assistance at critical points of the proceeding. Roe at 843.

As demonstrated with particularity hereinafter, Gordon's case involves a question of exceptional importance [the scope of the exception for searches incident to arrest after the scene of arrest is secure]; or the opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court [here, Gant and Allegheny] and substantially affects a rule of national application in which there is an overiding need for national uniformity [the scope of the exception for searches incident to arrest after the scene of arrest is secure].

From Gant, a case that is arguably the most important search and seizure authority since Chimmel in 1967, appellate counsel found nothing to argue in a Reply Brief or at oral argument that she did not deem as frivolous and waived

Gordon's right to either means of advocacy. She then advised Gordon that appellate review had no chance of success when under controlling authority from the United States Supreme Court, further argument had at least a reasonable probabilty of success. By these failures of omission, appellate counsel fell below an objective standard of reasonableness which left Gordon without effective assistance of counsel at critical stages of the appellate process and thereby rendered the outcome of the appellate process both presumptively and actually unreliable.

For the reasons stated above as amplified hereinafter, Gordon's conviction should be vacated, the trial court should be directed to (i) exclude any evidence found in the bag in any subsequent trial or other proceeding, (ii) order that Gordon be released from custody pending any further proceedings on signature bond only, and (iii) provide such other directions as appear appropriate and consistent with those requested.

II. Statement of the Case

On May 14, 2011, local and federal officers arrested Gordon based on a tip from a co-conspirator. A warrantless search was conducted after the arrestee was handcuffed and surrounded by officers and the scene had been secured.

On October 11, 2011, the government filed a Second Superseding Indictment against co-defendant Tyrone Fair and Gordon charging both with: (1) Conspiracy to Distribute and Possess with Intent to Distribute 50 Grams or More of

Methamphetamine in violation of 21 U.S.C. Sections 841 (a)(1), 841 (b)(1)(A) and 846; Possession with Intent to Distribute 50 Grams or More of Methamphetamine in violation of 21 U.S.C. Sections 841 (a)(1) and (b)(1)(A). ER IA 10-11). The original indictment charged only Gordon under Counts 1 and 2. ER IB; DR 6. A superseding indictment charged Gordon and Richelle Higa under Counts 1 and 2.

On May 11, 2012, Gordon filed a motion to suppress evidence obtained from his duffel bag, wallet and cell phone. After a hearing on these motions, the district court denied the same on September 10, 2012. ER IA 132.

The case proceeded to trial from October 10, to October 16, 2012 before United States District Judge J. Michael Seabright. ER IB 179-181; DR 148-160. The contents of the duffel bag and wallet were used as evidence against Gordon as were other items not here in issue. After the close of the government's case, both defendants moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, which motion the court denied. ER III 185, 189. Neither Fair nor Gordon testified on their own behalf. The jury returned guilty verdicts on both counts against both defendants. EV IV 145.

On August 1, 2013, the Court imposed sentence against Gordon, which included 164 months custody for both counts to run concurrently. ER IV 202. Judgment was entered on August 2, 2013. ER IA 3.

On August 16, 2013, Gordon sought a re-sentencing hearing under the document "First MOTION for New Trial for Sentencing by Kenneth Scott Gordon as to Kenneth Scott Gordon", which

motion the court denied on August 23, 2013. ER IB 185; DR 230, 231, 233. Gordon timely filed a notice of appeal on September 4, 2013. ER IA 1.

On January 20, 2016, pursuant to 18 U.S.C. Section 3582(c)(2) the District Court granted a motion for sentence reduction, reducing Gordon's custodial term from 164 months to 151 months, concurrent as to both Counts 1 and 2. See DR 261.

In the Ninth Circuit, on September 16, 2013, the Court sua sponte consolidated Gordon's appeal (C.A. No. 13-10463) and Tyrone Fair's appeal (C.A. No. 13-10081). On February 26, 2015, the Court affirmed Fair's convictions and sentence. Meanwhile, Gordon's appeal was delayed due to the death of his retained counsel. See, Ninth Circuit Docket for April 21, 2014.

On December 1, 2014, Gordon's newly appointed counsel filed an Anders Brief and a motion to withdraw as counsel. On January 15, 2016, the Court struck the Anders Brief, granted the motion to withdraw, ordered the appointment of Ms. McMillen as new appellate counsel, and briefing of the issues of (i) whether the district court erred in denying Gordon's motion to suppress the contents of his duffel bag and wallet, finding these warrantless searches valid searches incident to arrest? If the court erred in admitting this evidence, was the error harmless beyond a reasonable doubt?; (ii) Whether the district court abused its discretion in denying Gordon's motion to strike a 35-second video purportedly showing him enter and leave a drug trafficker's apartment on May 14, 2011; and (iii) whether the district court erred at sentencing in

denying Gordon's request for a minor role adjustment?

On April 11, 2016, Gordon's replacement Opening Brief was filed.

On June 10, 2016, the Government's Amswering Brief was filed. Dkt. 60.

On June 20, 2016, on appellate counsel's motion and without notice or consultation with Gordon, the court granted Gordon's motion to waive the filing of a Reply Brief.

On April 6, 2017, the Court set oral argument in the case for June 14, 2017 at 9:00 a.m.

On or about June 1, 2017, the court cancelled the oral argument at the request of Gordon's counsel but without his consent or knowledge.

On July 24, 2017, the court issued its Decision adverse to Gordon.

Gordon is currently in custody at the Satellite Prison Camp in Tucson, Arizona. His scheduled release date is August 26, 2022.

III. Statement of the Facts.

A. The facts as to the search of the duffel bag.

The facts as found by the trial judge are described or quoted below as applicable. As described by the trial court, DEA Agents set up a sting operation based upon information from cooperating co-defendant Richelle Higa ("Higa") that a courier was scheduled to arrive at her apartment to pick up money derived from the sale of methamphetamine at a time certain. Gordon arrived at the scheduled time in his vehicle.

"Carrying a black duffel bag, Gordon entered Higa's apartment and stayed approximately thirty seconds...Gordon then left the apartment with his bag hanging by a strap from his shoulder...As Gordon approached his vehicle, Officers Marumoto and Fujinaka, and two other HPD Officers detained him. Officer Narumoto grabbed Gordon's right arm and another officer grabbed his left arm.

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As officers detained Gordon, the duffel bag was removed from Gordon's shoulder and Gordon was handcuffed...[A]fter Gordon was arrested and placed in handcuffs, [Agent Rumschlag] immediately placed the bag on the ground and opened it....

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..Gordon was right in front of the bag when [Rumschlag] looked inside of it.

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The Government does not dispute that Gordon was under custody and control of law enforcement when Agent Rumschlag initially searched the bag. Gordon offered no resistance to the arrest, and was surrounded by several officers. The testifying witnesses did not observe any other persons at the scene that they deemed to be potential threats. Weapons were neither observed at the scene or found in the bag.

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It [was] undisputed .. that the bag remained in the complete control of law enforcement from when it was removed from Gordon's shoulder at the scene of the arrest until it arrived at the Federal Building.

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After Agent Rumschlag made his initial search of the bag, it was transported by law enforcement, along with Gordon, to the DEA office at the PJKK Federal Building (the "Federal Building") in Honolulu. The Federal Building is an approximately twenty or thirty minute drive from where the arrest took place. Agent Rumschlag returned to the Federal Building at the same time...

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Shortly after arriving at the Federal Building, Agent Rumschlag opened the bag and conducted a more thorough [warrantless] search of its contents. This involved removing all of the items from the bag and completing an inventory of thoses items. Agents found the macadamia nut candy boxes that they had planted (i.e., the boxes containing paper to simulate the weight of the currency). They also found other boxes of a different brand of macadamia nut candy, which they had planted, containing bundles of United States currency.

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Agent Rumschlag and Special Agent Joe Cheng took photographs of the bag and its contents at the DEA office. Government Exhibit 2B is a photogtaph of at least nine bundles of $20 and $100 bills found inside the opened candy boxes. The first of these photographs contains a time stamp which indicates that it was taken at 11:24 a.m., approximately one hour after the initial arrest.

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Gordon agreed at the hearing [on the motion to suppress]

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that if the court upholds Agent Rumschlag's initial search of the bag, then the subsequent search at the Federal Building would be valid..."

B. The facts as to ineffective assistance of counsel on appeal.

1. Gordon's counsel on appeal was appointed by the Court of Appeals on January 15, 2016 under the circumstances and on the conditions set forth in the Statement of the Case.

2. Gordon's Opening Brief was filed on or about April 1, 2016.

3. Gordon's Opening Brief argued that Gant required suppression of the black bag and its contents but failed to argue that (i) Gant requires lower court's to apply its mode of analysis, i.e. looking to the two Chimel factors as the boundaries which must be met to legitimize a warrantless search incident to arrest after the scene of arrest is secured; (ii) the trial court's reliance on Cook, Maddox, Turner and Nohara improperly failed to apply Gant's mode of analysis or holding; and (iii) Cook's facts are clearly distinguishable from Gordon and Gant due to the trial court's factual finding of potential danger to the evidence.

4. On June 10, 2016, the Government's Answering Brief was filed. Dkt. 60.

5. By letter dated June 20, 2016, appellate counsel informed Gordon that she had waived his right to file a Reply Brief without his consent by the attached letter to the Clerk of the Court of Appeals, Ninth Circuit of the same date. By

way of explanation, counsel stated in pertinent part: "The focus of a reply brief would be responding to additional issues raised in the AB. The government raised no additional issues in their AB, and responded directly to our issues using the same case law. The government made no concessions and responded to each issue in the opening brief-- their failure of which could have been grounds to file a reply brief." (Gordon Affidavit, # 5 , Exhibit 1).

6. Neither before that waiver or at any other time during her representation of Gordon did his appellate counsel call him or otherwise speak with him. (Gordon Affidavit, # 6).

7.Gordon's attorney wrote him by letter dated April 6, 2017, that oral argument in the case had been set for June 14, 2017 at 9:00 a.m. (Gordon Affidavit, # 7, Exhibit 2)

8. By letter dated April 12, 2017, Gordon wrote appellate counsel asking if he would be allowed to attend the oral argument and informing her about an Arizona case which he thought might be useful in his case. (Gordon Affidavit, # 8, Exhibit 2).

9. By letter dated April 18, 2017, appellate counsel responded that incarcerated inmates such as Gordon are not be entitled to attend oral argument and that the case from Arizona was on point with "the point we raise in the appeal but through federal case law. Nonetheless, I appreciate your assistance."
Gordon Affidavit, # 9, Exhibit 3).

9. By her next letter dated June 1, 2017, appellate counsel informed Gordon that without his consent, she had waived his right to the oral argument he had asked to attend as follows:

"Enclosed please find the Ninth Circuit's decision concerning the recent motion I filed seeking to have the appeal decided on the briefs, and without oral argument.

As you can see, the court's decision was unanimous that the decisional process would not be significantly aided by oral argument. Therefore, the court granted the motion.

At this point, there is nothing further to do."...(Gordon Affidavit, # 10, Exhibit 4).

10. By letter dated July 25, 2017, counsel forwarded the Decision of the Court of Appeals to Gordon and stated in pertinent part: "(i) it is my conclusion that further appellate preceedings will not bring about the desired result, which is a further reduction of your sentence." (ii) There are several options available: 1. within 14 days of the Decison, a petition for a rehearing before the panel of three judges who rendered the decision; 2. within 14 days of the Decison, a petition for a rehearing en banc before the full Ninth Circuit, and/or; 3. within 90 days of the Decision, a petition for a writ of certiorari to the U.S. Supreme Court. (Gordon Affidavit, # 11. Exhibit 5).

11. As to each of the three options, counsel informed Gordon that "I do not believe meritorious, non-frivolous grounds exist for further appellate review of the Decision." (Gordon Affidavit, # 12, Exhibit 5).

12. Specifically as to Panel Rehearing, counsel informed Gordon that "a party should seek a panel rehearing only id one or more of the following grounds exist: a material point offact or law was overlooked in the Decision; a change in the law occurred after the case was submitted which appears to

have been overlooked by the panel; or an apparent conflict with another decision of the Court was not addresses in the opinion. Parties are expressly precluded from filing a petition for panel rehearing merely to reargue the case. After carefully reviewing the Decision I have determined that none exist to establish rehearing." (Gordon Affidavit # 13, Exhibit 5).

13. Specifically as to rehearing en banc, counsel informed Gordon that "a party should seek en banc rehearing only if one or more of the following grounds exist: consideration by the full court is necessary to secure or maintain uniformity of the Court's decisions; or the proceeding involves a question of exceptional importance; or the opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overiding need for national uniformity. Again, I have reviewed the Decision with respect to these options, as well as review of key cases in our briefs, and the case law in the Decision. In my considerable efforts to formulate legal grounds for further appellate review, I see no supportive legal grounds that will overcome the Court's legal conclusions." (Gordon Affidavit, # 14, Exhibit 5).

14. As to a petition for a writ of certiorari to the United Staes Supreme Court, counsel informed Gordon that in addition to finding "no grounds for seeking Supreme Court review that are non-frivilous and consistent with the standards for filing a petition [for writ of certiorari]...I am only permitted to petition the Supreme Court for certiorari "if in counsel's

considered judgment sufficient grounds exist for seeking Supreme Court review....I see no sufficient grounds." (Gordon Affidavit, # 15, Exhibit 5).

15. In conclusion, counsel informed Gordon: "I regret that more could not have been done on your appeal. Please let me know immediately whether you intend to file a pro se petition for certiorari, since I will need to file a motion to withdraw." (Gordon Affidavit, # 16, Exhibit 5).

16. Exhibit 5 did not contain a request for immediate notice if Gordon wanted a petition for rehearing by the panel or a petiton for rehearing en banc to be filed within the 14 day deadline from July 24, 2017. (Gordon Affidavit, # 17, Exhibit 5).

17. Gordon never demonstrated any conduct to lead appellate counsel to reasonably believe that he would agree to counsel's waiver of the opportunity to file a Reply Brief. If Gordon had been consulted he would have instructed counsel to file a Reply Brief. (Gordon Affidavit, # 18).

18. Gordon never demonstrated any conduct that could have reasonably be interpreted by counsel that he would agree to a waiver of oral argument and such waiver ignored Gordon's April 12, 2016 letter expressing his desire to be present at oral argument. If Gordon had been consulted he wouls have demanded that counsel attend oral argument. (Gordon Affidavit, # 19).

19. Gordon never demonstrated any conduct which appellate counsel could have reasonably interpreted as support for her statement that the "desired result" of the appeal was a reduction in Gordon's sentence. Indeed, that sentence

indicates that Exhibit 5 which counsel sent Gordon was a standard template that was poorly edited and did not represent the result of a purported thorough review of the post Decision options based on the record in Gordon.

(Gordon Affidavit, # 20).

20. Gordon expected that appellate counsel would vigourously forward his defense at each and every opportunity so that the judicial process would work to require exclusion of the evidence obtained from the unconstitutional search here at issue. (Gordon Affidavit, # 21).

21. If counsel desired to assist Gordon and to in fact determine what he expected of her, i.e., whether he would waive any right or opportunity to advance his defense on any issue notwithstanding his decison not to waive his right to a trial by jury, she should have arranged through existing channels to discuss those matters by phone and her failure to do so deprived Gordon of his Sixth Amendment Right to the effective assistance of counsel at each important stage of the appellate process except for the arguably competent but deficient opening brief.

(Gordon Affidavit, # 22).

22. At the time he received Exhibit 5, Gordon did not understand that he had a better chance for success as to the three options presented for further filings through a Petition for Rehearing and/or a Petition for Rehearing in Banc as compared to a Petition for Writ of Certiorari or sufficient knowledge or time as to how to write either petition to the Court of Appeals. If he had been consulted, Gordon would have instructed counsel to seek both panel rehearing and en banc

rehearing. (Gordon Affidavit, # 23).

23. Gordon did file a pro se Petiton for Writ of Certiorari because he recieved the forms to do so from appellate counsel with instructions. and it was denied. (Gordon Affidavit, # 24).

IV. GANT'S HOLDING COUPLED WITH SETTLED PRINCIPLES OF STARE DECISIS REQUIRED THAT GANT'S HOLDING AND MODE OF ANALYSIS BE APPLIED IN GORDON AND REQUIRED THAT THE EVIDENCE FOUND IN GORDON'S BAG BE SUPPRESSED AS THE PRODUCT OF AN UNCONSTITUTIONAL WARRANTLESS SEARCH INCIDENT TO ARREST.

A. The Supreme Court granted the Gant Writ of Certiorari to declare the boundaries of searches incident to arrest after an arrest scene has been secured.

Rodney Joseph Gant ("Gant") was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket. The Arizona trial court denied his motion to suppress the evidence, and he was convicted of drug offenses. Reversing, the State Supreme Court distinguished New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981)-which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of a recent occupant's lawful arrest- on the ground that it concerned the scope of a search incident to arrest but did not answer the question whether officers may conduct such a search once the scene has been secured. Because Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), requires that a search incident to arrest be justified by either the interest of officer safety or the interest in preserving evidence and the circumstances of Gant's arrest implicated neither of those interests, the State Supreme Court found the search

unreasonable. Gant, at 489-490.

The Supreme Court granted Certiorari and held "that the Chimel rationale authorizes police to search a vehcle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." at 496.

Thus, the governing test in all circuit courts as to the boundaries of a lawful warrantless search incident to arrest WHERE THE SCENE HAS BEEN SECURED (EMPHASIS ADDED) is set forth with clarity in Arizona v. Gant, 556 US 332, 129 S. Ct. 1710, 173 L Ed 485 (2009). In announcing that test, the Court restated its holding in Chimel v. California, 395 US 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969) that "a search incident to arrest may only include "the arrestee's person and the "area within his immediate control"-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Ibid. That limitation, WHICH CONTINUES TO DEFINE THE BOUNDARIES OF THE EXCEPTION (emphasis added), ensures that the scope of the search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy... IF THERE IS NO POSSIBILITY THAT AN ARRESTEE COULD REACH INTO THE ARREST AREA THAT LAW ENFORCEMENT SEEK TO SEARCH, BOTH JUSTIFICATIONS FOR THE SEARCH -INCIDENT TO ARREST ARE ABSENT AND THE RULE DOES NOT APPLY (emphasis added)."

In this case, both the trial court and the court of appeals failed to follow the clear Supreme Court precedent

stated above and instead utilized circuit court decisions which themselves overstepped the Gant "continuing boundaries' to reach results which impermissably ignore the doctrine of stare decisis which requires the circuit courts to apply both the holdings and mode of analysis of the Supreme Court in all cases. Allegheny County, supra. Unlike the Supreme Court, district court and circuit court judges are compelled to follow Supreme Court decisions whether they believe that court's rationale no longer withstands "careful analysis" or otherwise. Lawrence v. Texas, 539 U.S. 558, 577, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), Gant at 499. County of Allegheny, supra. As the Ninth Circuit proclaimed en banc in its decision in Miller v. Gammie, 335 F. 3d 889, 900 (2003):

THE UNDERLYING PRINCIPLE [of Stare Decisis] HAS BEEN MOST NOTABLY EXPLICATED BY JUSTICE SCALIA IN A LAW-REVIEW ARTICLE DESCRIBING LOWER COURTS AS BEING BOUND NOT ONLY BY THE HOLDINGS OF HIGHER COURTS' DECISIONS BUT ALSO BY THEIR 'MODE OF ANALYSIS.' ANTONIA SCALIA, 'THE RULE OF LAW AS A LAW OF RULES, 56 U. CHI. L. REV. 1175,1177 (1989). JUSTICE KENNEDY EXPRESSED THE SAME CONCEPT IN TERMS OF A DEFINITION OF STARE DECISIS IN COUNTY OF ALLEGHENY V. ACLU GREATER PITTSBURGH CHAPTER, 492 U. S. 573, 106 L. ED. 2D 472, 109 S. CT. 3086 (1989). 'AS A GENERAL RULE, THE PRINCIPAL OF STARE DECISIS DIRECTS US TO ADHERE NOT ONLY TO THE HOLDINGS OF OUR PRIOR CASES, BUT ALSO TO THEIR EXPLICATIONS OF THE GOVERNING RULES OF LAW.' ID AT 668 (KENNEDY, J., CONCURRING IN PART AND DISSENTING IN PART).

B. Application of the Gant mode of analysis and Holding

requires that Gordon's motion to suppress be granted.

Applying Gant to the facts in Gordon as found by the trial court, it is undisputed that at the time of the search, Gordon could not have accessed his duffel bag to obtain a weapon, destroy evidence, or for any purpose whatsoever as he was handcuffed and surrounded by several officers and law enforcement had control of the bag. Thus, the predicates to the application of the exception being wholly absent, the search in Gordon violated Gordon's Fourth Amendment right to be free from unreasonable searches. This violation required exclusion of the evidence found in the bag.

To support its decision, the Court of Appeals, citing United States v. Camou, 773 F. 3d 932, 938 (9th Cir. 2014) (quoting United States v. Smith, 389 F. 3d 944, 951 (9th Cir. 2004[pre-Gant], stated that "Law enforcement agents searched the duffel bag within seconds of Gordon being handcuffed. It was therefore "roughly contemporaneous with the arrest" and thus lawful." To the contrary, the only thing the cited fact establishes is that the warrantless search was incident to arrest. The subject statement has no logical connection to the only relevant legal inquiry under Gant's holding and "mode of analysis", i.e., could the arrestee reach the evidence to obtain a weapon or destroy evidence at the time of the search. Here, the trial court answered the required question of fact: NO. That finding required suppression of the evidence found in the duffel bag and foreclosed other modes of analysis. The error here is plain.

Next, the court of appeals cited U.S. v. Cook, 797 F. 3d

713 (9th Cir. 2015) in support of its decision as follows: ("upholding search of a backpack after a suspect was handcuffed where there were reasonable security concerns"). Cook is clearly inapposite to the facts in Gordon as no such concern existed. Gant permits the search in Cook based on the factual finding that "reasonable security concerns" existed. Here, the trial court found as a fact that:

" The Government does not dispute that Gordon was under custody and control of law enforcement when Agent Rumschlag initially searched the bag. Gordon offered no resistance to the arrest, and was surrounded by several officers. The testifying witnesses did not observe any other persons at the scene that they deemed to be potential threats. Weapons were neither observed at the scene or found in the bag."

Next, the Court of Appeals cited United States v. Nohara, 3 F. 3d 1239, 1243 (9th Cir. 1993) [pre-Gant], ("upholding a search of a bag two to three minutes after the suspect was handcuffed and seated in an apartment hallway.). Clearly, the quoted claimed supportive language of Nohara is irreconcilable with the holding and mode of reasoning of Gant. Thus, it does not support affirming of the trial court's decision not to suppress the evidence found in the bag in violation of the Fourth Amendment.

Finally, the Court of Appeals attempts to distinguish Gant by stating that "Unlike the suspect in Gant, Gordon was "within reaching distance" of the duffel bag when it was first searched." 556 U.S. 332, 351(2009). This rationale, or "mode of analysis' is irreconcilable with Gant's holding and analysis (the issue is lack of reasonable access not distance)

as it ignores the again quoted message of Gant:

IF THERE IS NO POSSIBILITY THAT AN ARRESTEE COULD REACH INTO THE ARREST AREA THAT LAW ENFORCEMENT SEEK TO SEARCH, BOTH JUSTIFICATIONS FOR THE SEARCH -INCIDENT TO ARREST ARE ABSENT AND THE RULE DOES NOT APPLY (emphasis added).

Additionally, the "within reaching distance" quotation ignores the factual finding that:

" The Government does not dispute that Gordon was under custody and control of law enforcement when Agent Rumschlag initially searched the bag. Gordon offered no resistance to the arrest, and was surrounded by several officers. The testifying witnesses did not observe any other persons at the scene that they deemed to be potential threats. Weapons were neither observed at the scene or found in the bag."

The trial court's legal conclusion likewise fails to follow and apply the holding and mode of analysis required by Gant. Instead, in support of its Decision, the trial court cited the Ninth Circuit cases of United States v. Turner, 926 F. 2d 883, 887 (9th Cir. 1991) and United States v. Maddox, 614 F.3d 1046, 1048 (9th Cir. 2010). This was clear error because the test applied in Turner and Maddox both conditioned the constitutional validity of the search based on the circumstances existing AT THE TIME OF ARREST, and not AT THE TIME OF THE SEARCH AFTER THE SCENE WAS SECURED as required

by Gant. (emphasis addded). One need only read the Gant Court's reason for accepting certiorari discussed above and the oft quoted language limiting a lawful search incident to arrest after the scene is secured to the Chimel factors to recognize the flaws in the trial court's Decision notto suppress the evidence found in the duffel bag.

The trial court's avoidance of Gant based on circuit court decisions to support its Decision illustrates just how important it was for Gordon's appellate counsel to seek rehearing before the panel and en banc as:

" consideration by the full court is necessary to secure or maintain uniformity of the Court's decisions; or the proceeding involves a question of exceptional importance; or the opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overiding need for national uniformity." (Ninth Circuit Rule 35-1 to 3).

The warrantless search of the duffel bag was not a close call under Gant. It was a clear violation of the holding and mode of analysis of Gant and this motion to undo the injustice of that violation should be granted.

C. The failure to suppress the evidence found in the duffel bag was not harmless beyond a reasonable doubt.

An error is harmless if "it is more probable than not that the error did not materially affect the verdict. United States v. Seschillie, 310 F. 3d 1208, 1214, (9th Cir.2002). cert.

denied, 538 U.S. 953, 123 S. Ct. 1644, 155 L. Ed. 2d 500 (2003). The government bears the burden of persuasion and "we must reverse...unless it is more probable than not" that the error was harmless." Id., at 1215.

The evidence in the bag was the most significant evidence tying Gordon to the alleged criminal conspirary and was thus obviously material to the verdict. Additionally, this contention was raised in Gordon's Opening Brief and the Government did not contest this argument in its Answering Brief and is thereby deemed to have admitted it.

V. GORDON DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL BECAUSE HIS COUNSEL LEFT GORDON WITHOUT COUNSEL AT CRITICAL STAGES OF THE APPELLATE PROCESS AND THEREBY RENDERED THE PROCESS AND THUS ITS RESULT PRESUMPTIVELY AND ACTUALLY UNRELIABLE.

A. The Sixth Amendment right to the effective assistance of counsel attaches to appellate proceedings and is tested by the same standards that apply to trial counsel.

The Sixth Amendment to the U.S. Constitution states in pertinent part that:

"In all criminal prosecutions, the accused shall enjoy the right..to have the Assistance of Counsel for his defense." Strickland v. Washington, 466 U.S. 668, 685, 80 L. Ed 2d 674, 104 S. Ct. 2052 (1984).

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"The right to counsel plays a crucial role in the

adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which it is entitled. [citations omitted]. Id at 685.

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"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's role that is CRITICAL TO THE ABILITY OF THE ADVERSARIAL SYSTEM TO PRODUCE JUST RESULTS. (emphasis added)...

***

"The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial...An ineffectiveness claim.., as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeous corpus, [citation omitted], no special standards ought to apply to ineffectiveness claims made in habeous proceedings. Id at 697-698.

B. Appellate Counsel's representation fell below the objective standard of reasonableness enunciated in Strickland.

In Strickland, the court held that the first prong of the test for ineffective assistance of counsel is a showing that counsel's representation "fell below an objective standard of

reasonableness. at 687-688."

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"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. at 688. Applying several of the norms addressed in Strickland to Gordon's appellate counsel's actions and inactions demonstrates her performance falls below the objective standard of reasonableness.

In identifying some of the basic duties of defense counsel, the court stated that "from counsel's function as assistant to the defendant derive the OVERARCHING DUTY TO ADVOCATE THE DEFENDANT'S CAUSE and the more particular duties to CONSULT WITH THE DEFENDANT ON IMPORTANT DECISIONS...Counsel also has the duty to bring to bear such skill and knowledge as will render the [proceeding] a reliable adversarial testing process. [citation omitted] Id at 688." IN ORDER TO INSURE THAT RELIABLE TESTING PROCESS, VIGOROUS ADVOCACY OF THE DEFENDANT'S CAUSE MUST BE EXHIBITED IN EACH CRITICAL STAGE OF THE PROCEEDING. (enphasis added). id at 688-689.

Appellate counsel failed to perform either of the two basic duties of effective counsel identified in Strickland.

First, Gordon's Opening Brief competently argued that Gant required suppression of the duffel bag and its contents. However, it failed to argue that (i) Gant requires lower court's to apply its mode of analysis, i.e. looking to the two Chimel factors as the boundaries which must be met to legitimize a warrantless search incident to arrest after the scene of arrest is secured; (ii) the trial court's reliance on Cook, Maddox, Turner and Nohara improperly failed to apply

Gant's mode of analysis or holding; (iii) Cook's facts are clearly distinguishable from Gordon and Gant due to the trial court's factual finding of potential danger to the evidence.

While advocacy is in part an art, Gant was and is Gordon's great Fourth Amendment standard bearer as to a warrantless search incident to arrest where the scene is secured as it was in Gordon. The boudaries set in Gant restricting such searches is the reason the court accepted certiorari of the case. The Opening Brief did not even mention the terms " mode of analysis" and "stare decisis" or "irreconcilable" when control of the scene was the key to victory and a block to the trial court's reasoning. However, these omissions did not rise to the level of ineffective assistance of prejudicial magnitude until counsel completely abandoned any further advocay on appeal.

More specifically, the Government's Answering Brief cites Maddox and Turner's version of the test to determine whether a search incident to arrest is valid. AB at 16-17. That test is irreconcilable with Gant. The first prong of the inquiry under Turner, a 1990 decison, as applied in the post Gant Maddox opinion, was whether the searched item was within the arrestee's immediate control when he was ARRESTED. Under Gant, "the Chimel rationale authorizes police to search a [container] incident to a recent arrest only when the arrestee is UNSECURED and within reaching distance of the [container] at the time of the SEARCH. 173 L. Ed. 2d 485, 496.

Here, the trial court found that Gordon was secured, the scene was not threatened and Gordon did not have access to the duffel bag at the time of the search. That finding required

suppression of the items found in the duffel bag. Reasonably competent counsel had to make that argument in a Reply Brief.

Next, the Government argued that the District Court's decision was correct even if Gordon was handcuffed before the search under Nohara. AB at 17. Again, Nohara is irreconcilable with Gant and reasonably competent counsel would have made that argument in a Reply Brief.

Next, the Government maintained that the District Court, having viewed the totality of the circumstances, properly concluded that the search of the duffel bag was lawful as incident to arrest without citation. AB at 17-18. From that unsupported contention, the Government pointed to the Stipulation that IF the first search was valid, the subsequent search at the Federal Building was also valid. Of course, that has nothing to do with whether the first search was valid and the record establishes that it clearly was not as it does not pass muster under Chimel and Gant. Again, that argument would have been made by reasonably competent counsel in a Reply Brief.

Unfortunately, appellate counsel decided after receiving the Government's Answering Brief that filing a Reply Brief would be inappropriate and waived that right without Gordon's knowledge or consent. Based on this conclusion, by letter dated June 20, 2016, appellate counsel informed Gordon that she had waived his right to file a Reply Brief without his consent by the attached letter to the Clerk of the Court of Appeals, Ninth Circuit of the same date. By way of explanation, counsel stated in pertinent part: "The focus of a reply brief would be responding to additional issues raised in

the AB. The government raised no additional issues in their AB, and responded directly to our issues using the same case law. The government made no concessions and responded to each issue in the opening brief-- their failure of which could have been grounds to file a reply brief." (Gordon Affidavit, # 5, Exhibit 1).

The waiver of the right to file a Reply Brief without the client's consent was below the objective standard of reasonableness under prevailing professional norms. Flores-Ortega, 528 U.S. 478-79. Indeed, as the facts cited herein show, Gordon never gave any indication that he would authorize or approve any waiver of the opportunity to forward his defense. Additionally, the "mere presence of non-frivolous issues to appeal[brief] is generally sufficient to satisfy the defendant's burden to show prejudice. Id at 486.

The implied proposition of counsel's letter that it would have been improper to attack and criticize the reasoning and authorities posited by the Government in a Reply Brief is by itself resounding evidence of a judgment far below professional norms for appellate advocacy. This deficient bad advice standing alone renders the result unreliable as counsel failed at a critical stage to "render the [appeal] a reliable adversarial testing process." Id. at 688. As stated in Gordon's affidavit and as evidenced by Gordon's decision to go to trial and interest in suggesting authorities to counsel and a desire to attend oral argument, Gordon would have wanted counsel to file a Reply Brief on his behalf if he had received reasonably competent advice on the subject.

All of the arguments under Gant forwarded in detail above

as to the flaws in the trial court's Decision should have been forwarded in the Reply Brief.

The next episode of ineffective assistance involves counsel's waiver of Gordon's scheduled oral argument. By letter dated April 12, 2017, Gordon wrote appellate counsel asking if he would be allowed to attend the oral argument and informing her about an Arizona case which he thought might be useful in his case. (Gordon Affidavit, # 8, Exhibit 3).

By letter dated April 18, 2017, appellate counsel responded that incarcerated inmates such as Gordon are not be entitled t o attend oral argument and that the case from Arizona was on point with "the point we raise in the appeal but through federal case law. Nonetheless, I appreciate your assistance." Gordon Affidavit, # 9, Exhibit 3).

By her next letter dated June 1, 2017, appellate counsel informed Gordon that without his consent, she had waived his right to the oral argument he had asked to attend as follows:

"Enclosed please find the Ninth Circuit's decision concerning the recent motion I filed seeking to have the appeal decided on the briefs, and without oral argument.

As you can see, the court's decision was unanimous that the decisional process would not be significantly aided by oral argument. Therefore, the court granted the motion.

At this point, there is nothing further to do."...(Gordon Affidavit, #10, Exhibit 4).

The waiver of oral argument without client consent fell below the objective standard of reasonableness and deprived the defendant of vigorous advocacy of his cause which was required at this critical stage to "render the [appeal] a

reliable adversarial testing process." Stickland. at 688.. As described above, counsel's client had voiced in writing an interest in his cause being argued. His decision to go to trial belied any inclination to give up any opportunity to vindicate his legal rights under the constitution. Here, there is more than mere silence which alone would have been more than enough to require that defense counsel not waive the opportunity for vigorous advocacy which oral argument allows. The Court would not have placed the matter on the calendar for argument if it deemed it purposeless.

In this regard, it must be noted that counsel's description to Gordon of the Court's order approving of the waiver based on her unopposed self serving motion was disingenuous at best:

"As you can see, the court's decision was unanimous that the decisional process would not be significantly aided by oral argument. Therefore, the court granted the motion." (Gordon Affidavit, #10, Exhibit 4).

Appellate counsel's reaction to the Decision of the Court of Appeals reveals that she had long ago abandoned Gordon. A reasonably competent counsel would have clearly understood that the panel labeling the case a "close call" and one Justice writing a separate concurring opinion that flat out said he would have reversed the District Court and suppressed the evidence found in the search but for his view that Cook required his affirmance presented an excellent opportunity to obtain review by the panel or en banc.

A reasonably competent appellate counsel would have and should have been encouraged to pursue rehearing by the panel

and to the Court en banc. None of the Court's decisions had recognized Gant's mode of analysis and holding as to a secured arrest scene nor had stare decisis or irreconcilability been addressed at all. These concepts were as the bible says, not so far away that we can not see them. They are in Gant. They touch the reasons why the Supreme Court took up Gant. Why it sought to clarify Belton in response to "[t]he chorus that has called for us to revisit Belton includ[ing] courts, scholars, and Members of this Court who have questioned that decision's clarity and fidelity to Fourth Amendment principles. at 492.

Instead, by letter dated July 25, 2017, counsel forwarded the Decision of the Court of Appeals to Gordon and stated in pertinent part: "(i) it is my conclusion that further appellate preceedings will not bring about the desired result, which is a further reduction of your sentence." [??]

Specifically as to Panel Rehearing, counsel informed Gordon that "a party should seek a panel rehearing only if one or more of the following grounds exist: a material point of fact or law was overlooked in the Decision; a change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or an apparent conflict with another decision of the Court was not addressed in the opinion. Parties are expressly precluded from filing a petition for panel rehearing merely to reargue the case. After carefully reviewing the Decision I have determined that none exist to establish rehearing." (Gordon Affidavit # 13, Exhibit 5).

Yet again, appellate counsel's advice does not meet accepted norms. Clearly, "a material point of fact or law was

overlooked in the Decision." The scene was secure; Gant directly addressed that fact pattern; Gant's mode of analysis and holding was not followed; the cited cases did not support the Decision which is irreconcilable with Gant. These contentions are not the product of "hindsight, to reconstruct the circumstances of counsel's challenged conduct." Gant contained all of the concepts contained and argued in this motion. They are and were readily apparent. There is no excuse for not beating the drum of Gant to the last breath under the facts of this case and the motivation of the Decision's lack of supportive authority or panel consensus.

Specifically as to rehearing en banc, counsel informed Gordon that "a party should seek en banc rehearing only if one or more of the following grounds exist: consideration by the full court is necessary to secure or maintain uniformity of the Court's decisions; or the proceeding involves a question of exceptional importance; or the opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overiding need for national uniformity. Again, I have reviewed the Decision with respect to these options, as well as review of key cases in our briefs, and the case law in the Decision. In my considerable efforts to formulate legal grounds for further appellate review, I see no supportive legal grounds that will overcome the Court's legal conclusions." (Gordon Affidavit, # 13, Exhibit 5).

Consistently, counsel gave advice to Gordon that was scarily below accepted norms. Gordon's case met several of the

extremely difficult criteria to obtain en banc rehearing. It was and is in practical terms a dream opportunity for an attorney representing a criminal defendant on appeal to get a case with constitutional national importance with a record showing clear disregard or misreading of governing Supreme Court authority and underlying decisions that are easily argued as unsupportable (because they are irreconcilable with Gant and Allegheny).

As demonstrated above, Gordon's case involves a question of exceptional importance [the scope of the exception for searches incident to arrest after the scene of arrest is secure]; or the opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court [here, Gant and Allegheny] and substantially affects a rule of national application in which there is an overiding need for national uniformity [the scope of the exception for searches incident to arrest after the scene of arrest is secure].

From Gant, a case that is arguably the most important search and seizure authority since Chimel in 1967, appellate counsel found nothing to argue in Reply or at oral argument. She advised Gordon after receipt of the Ninth Circuit's Decision that appellate review had no chance of success and would be frivolous when under controlling authority from the United States Supreme Court, further argument had at least a reasonable probabilty of success. By these failures of omission, appellate counsel fell far below an objective standard of reasonableness which left Gordon without effective assistance of counsel at critical stages of the appellate process. Based on the facts and the law, a reasonable

probability of success on appeal but for the omissions exists which is a probablity sufficient to undermine confidence in the outcome. The breakdown of the adversary process in this case renders the result unreliable.

C. A probability sufficient to undermine confidence in the reliability of the outcome is evident from the record and requires reversal.

Under Strickland, in addition to establishing the ineffective assistance of counsel, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability IS A PROBABILITY SUFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME." AT 80 L. Ed. 2d at 698.

As Strickland teaches, 'the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong pressumption of reliability, the result of a particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. Id. at 696.

Under Strickland and Roe, the record shows ineffective assistance of counsel in waiving the right to file a Reply Brief without consulting with or obtaining consent from Gordon and notwithstanding the existence of non-frivilous available argyments. This failure both presumtively and actually

undermined the reliability of the appellate process.

Likewise, the record shows ineffective assistance of counsel in waiving the right to oral argument without consulting with or obtaining consent from Gordon and his expressed interest in oral argument and notwithstanding the existence of non-frivilous available argyments. This failure both presumtively and actually undermined the reliability of the appellate process. Thomas v. O'Leary, 856 F. 2d 1011, 1018 (1988). ("On the other hand, we do have a good idea of the tremendous value of legal briefs and, in many cases, oral argument, to appellate courts).

Additionally, counsel's failure to seek rehearing either by the panel or en banc represented a third serious waiver of Gordon's right to vigorous advocacy without his consent based on an incompetent evaluation of the viability of such recourse in light of the lack of panel consensus and an objective reading of the facts of record and applicable law.

By these failures of omission, appellate counsel fell below an objective standard of reasonableness which left Gordon without effective assistance of counsel at critical stages of the appellate process. Based on the facts and the law, a reasonable probability of success but for those omissions exists which is a probablity sufficient to undermine confidence in the present outcome. The breakdown of the adversary appellate process in this case was pervasive and renders the result unreliable.

Conclusion

For the reasons stated above, Gordon's comviction should be vacated, the trial court should be directed to (i) exclude any evidence found in the duffel bag in any subsequent trial or other proceeding, (ii) order that Gordon be released from custody pending any further proceedings on signature bond only, and (iii) provide such other directions as appear appropriate and consistent with those requested.

Dated this day of May, 2018

Respectfully Submitted,

Kenneth Scott Gordon

Pro Se

Copy of the foregoing
mailed this 15 day of May
2018 to :

Clerk, U.S. District Court
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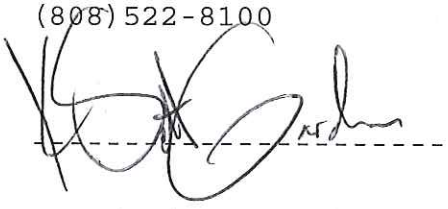

APPENDIX F

Memorandum Decision

Filed July 24, 2017

NOT FOR PUBLICATION

FILED

JUL 24 2017

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. KENNETH SCOTT GORDON, Defendant-Appellant.	No. 13-10463 D.C. No. 1:11-cr-00479-JMS-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
J. Michael Seabright, Chief Judge, Presiding

Submitted June 14, 2017**
Honolulu, Hawaii

Before: FISHER, PAEZ and NGUYEN, Circuit Judges.

Kenneth Scott Gordon was arrested and convicted for conspiring to distribute and possessing with intent to distribute large quantities of methamphetamine. The evidence against him largely came from a duffel bag and

*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).

wallet seized from his person at the time of his arrest and the testimony of a co-conspirator, Richelle Higa. The jury returned a verdict of guilty. The district court sentenced him to 164 months, denying Gordon's request for a minor role adjustment. Gordon timely appealed.

Gordon argues the district court erred by: (1) denying his motion to suppress evidence from the duffel bag and wallet; (2) admitting a 35-second video; (3) refusing to apply a minor role downward adjustment; and (4) imposing a procedurally and substantively unreasonable sentence. We affirm.

First, the district court properly denied Gordon's motion to suppress evidence from the duffel bag and wallet. Law enforcement agents searched the duffel bag within seconds of Gordon being handcuffed. It was, therefore, "roughly contemporaneous with the arrest" and, thus, lawful. *United States v. Camou*, 773 F.3d 932, 938 (9th Cir. 2014) (internal quotation marks omitted) (quoting *United States v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004)); *see also United States v. Cook*, 808 F.3d 1195, 1197, 1199-1200 (9th Cir. 2015) (upholding search of a backpack after a suspect was handcuffed where there were reasonable security concerns); *United States v. Nohara*, 3 F.3d 1239, 1243 (9th Cir. 1993) (upholding search of a bag two to three minutes after the suspect was handcuffed and seated in an apartment hallway). Unlike the suspect in *Arizona v. Gant*, Gordon was "within reaching distance" of the duffel bag when it was first searched. 556 U.S. 332, 351

(2009). Although a close call, the initial search was lawful. Further, the district court's conclusion that the duffel bag remained in the uninterrupted control of law enforcement was not clearly erroneous. Gordon points to no evidence that anyone other than law enforcement had access to the duffel bag after he was arrested. As to the wallet, Gordon stipulated that officers would testify the wallet was taken from his person at the time of his arrest. He also stipulated that the wallet was then transported to DEA headquarters. The district court properly relied on these stipulations in finding the search of the wallet was lawful. *See United States v. Passaro*, 624 F.2d 938, 944 (9th Cir. 1980).

Second, the district court did not abuse its discretion by admitting a 35-second video. A DEA agent testified the video was made on the day of Gordon's arrest, so a reasonable jury could conclude the erroneous time and date stamp was due to technical error.

Third, the district court did not clearly err by concluding Gordon was not entitled to a minor role adjustment. That Gordon was far less culpable than the leaders of the conspiracy is not dispositive. Rather, the question is whether Gordon's behavior was substantially less culpable than the average participant, including the other couriers. Gordon did not show his behavior was substantially less culpable than average.

Fourth, the district court did not procedurally or clearly err by treating the

$18,020 found in the duffel bag as drug money. The money was found in a macadamia candy box, the method used to conceal the proceeds from drug sales. Higa was not so incredible that the court could not believe her. In any event, as Gordon concedes, the district court's treatment of the $18,020 as drug money did not affect his total offense level. The district court did not clearly err.

Fifth, Gordon's sentence was substantively reasonable. The district court properly considered the sentencing factors under 18 U.S.C. § 3553(a) and concluded a "substantial sentence above the mandatory minimum" was appropriate. That reasoning was not "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (internal quotation marks omitted) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 577 (1985)). Indeed, although Gordon's sentence was lengthy, it was still two years shorter than the lowest guidelines range sentence.

AFFIRMED.

United States v. Gordon, No. 13-10463

PAEZ, J., concurring:

I agree with the majority in full. I write separately only to clarify that I would reverse the denial of the motion to suppress, in accordance with *Arizona v. Gant*, 556 U.S. 332 (2009) and our decision in *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014), if not for *United States v. Cook*, 808 F.3d 1195 (9th Cir. 2015). On similar facts as here, the court in *Cook* concluded that the dual purposes of the search-incident-to-arrest doctrine were sufficiently served to uphold the search. Although, in light of *Gant* and *Camou*, I would not have concluded the same, I view *Cook* as controlling here.