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ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (FEBRUARY 9, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH JOHN PLANY,

Defendant-Appellant.

No. 20-16689

D.C. Nos. 2:19-cv-00370-SRB
2: 12-cr-01606-SRB-2
District of Arizona, Phoenix

Before: McKEOWN and BUMATAY, Circuit Judges.

The request for a certificate of appealability 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.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (JULY 30, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOSEPH JOHN PLANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. CV-19-00370-PHX-SRB

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

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

Debra D. Lucas
Acting District Court
Executive/Clerk of Court

By s/ Rebecca Kobza
Deputy Clerk

July 30, 2020

REPORT AND RECOMMENDATION (APRIL 17, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

JOSEPH JOHN PLANY,

Defendant/Movant.

No. CV-19-00370-PHX-SRB (DMF)
CR-12-01606-02-PHX-SRB

Before: Honorable Susan R. BOLTON,
Senior United States District Judge.

TO THE HONORABLE SUSAN R. BOLTON, SENIOR UNITED STATES DISTRICT JUDGE:

Joseph John Plany ("Movant") is an inmate detained at the Beaumont Low Federal Correctional Institution in Beaumont, Texas.[1] (Doc. 11 at 1)[2] On

[1] Movant was located using the federal inmate locator website on April 6, 2020, at https://www.bop.gov/inmateloc/ using his full name as the search term.

[2] Citations to the record indicate documents as displayed in the official electronic document filing system maintained by the District of Arizona. Citations to documents within Movant's criminal

January 24, 2019, Movant filed through counsel a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion"). (Doc. 1) Respondent filed its response on May 20, 2019 (Doc. 7), after which Movant filed a reply, also through counsel, on June 18, 2019 (Doc. 8). The matter is referred to the undersigned Magistrate Judge pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report and recommendation. (Doc. 6 at 3) For the reasons set forth below, the undersigned Magistrate Judge recommends that the Court deny the Motion without conducting an evidentiary hearing and deny a certificate of appealability.

I. Indictment

On September 11, 2012, Movant was indicted along with co-Defendant Paxton Jeffrey Anderson ("Anderson") on thirty-one counts of bank fraud pursuant to 18 U.S.C. § 1344, and one count of conspiracy under 18 U.S.C. § 1349. (CR Doc. 3) As asserted in the indictment, Movant was employed during the period relevant to the charges by Dynamite Custom Homes ("Dynamite") and subsequently by J.R. Custom Homes. (*Id.* at 2) Co-Defendant Anderson was the owner of Dynamite and worked as a home builder through Dynamite and then through J.R. Custom Homes. (*Id.*) The charges centered on allegations of bank fraud in that Defendants "devised a scheme to purchase real properties that misrepresented both material information in a uniform residential loan application" and required

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case CR-12-01606-02-PHX-SRB are denoted "CR Doc." Citations to documents in Movant's instant § 2255 matter CV-19-00370-PHX-SRB (DMF) are denoted "Doc."

supporting documentation such as the applicant's "assets, income, liabilities, sources of intended down-payment, and intent to occupy the improved property as a primary residence." (*Id.* at 3) The indictment further described the scheme as including falsifying invoices, misrepresenting to lenders that work had been completed, and forging construction draw requests in order to obtain funds from the lenders. (*Id.*)

The conspiracy charge asserted that Movant, Anderson, and others "conspired, confederated and agreed with each other" to commit bank fraud "by engaging in an ongoing conspiracy to obtain real estate based on loan applications misrepresenting material information to the lender and misrepresenting that draw requests were used for construction expenses when in fact the draws were used for personal expenses of Anderson." (*Id.* at 5-6) The indictment alleged that the conspiracy would be accomplished by Anderson recruiting his family members, friends and others as "straw buyers" of construction loans with the purpose of obtaining draw requests from the lender. (*Id.* at 6) As part of the conspiracy, the indictment further alleged that Anderson and Movant "copied and pasted signatures from one document to another in order to qualify buyers for loans or directed others to do so." (*Id.* at 7) The indictment also alleged that Anderson deposited money into prospective borrowers' accounts to make it appear the borrowers had adequate assets to qualify for loans, and also gave the borrowers money for down payments, knowing it was being misrepresented to the lender that such payments were being made by the borrower. (*Id.*) The indictment alleged that

Movant falsified draw requests and also assisted borrowers by "falsely inflating borrower's bank accounts." (*Id.*)

II. Summary of Court Proceedings

On May 8, 2014, the case went to trial before a jury. (CR Doc. 450) At the close of the Government's case and on motion by the Government, the court dismissed with prejudice four bank fraud counts for lack of sufficient evidence. (CR Doc. 459 at 154) After a 13-day trial, on June 4, 2014, the jury found Movant guilty on 23 counts of bank fraud and on the conspiracy count. (CR Doc. 462 at 7-9)

On May 18, 2015, the Court sentenced Movant to 48 months of imprisonment to be followed by 5 years of supervised release. (CR Doc. 486 at 1) Movant and Anderson were ordered to jointly and severally pay restitution in the amount of $2,909,017.46. (*Id.* at 2)

Through appointed counsel, Movant filed a notice of appeal with the Ninth Circuit on August 25, 2015. (CR Doc. 488) Movant and Anderson appealed the Court's order denying their motion for acquittal and alternative motion for a new trial. (Doc. 509-2 at 2) In an unpublished memorandum opinion filed on October 10, 2017, the Ninth Circuit held there was not sufficient evidence to support Count 1 in the indictment for bank fraud because "the evidence was insufficient to allow any rational juror to find, beyond a reasonable doubt, that M&I Bank was the lender for Count One." (Doc. 1-2 at 3-4 (emphasis in original)) Movant had been acquitted on Count 1, and the Ninth Circuit's decision reversed Anderson's conviction on Count 1. (CR Doc. 462 at 7; Doc. 1-2 at 8) However, the Ninth Circuit held there was "sufficient evidence to allow reasonable

jurors to find that M&I Bank and TierOne were FDIC[3]-insured institutions and were the lenders on the remaining counts." (Doc. 1-2 at 3-4) Among other holdings, the Ninth Circuit held that the conspiracy count in the indictment was not duplicitous, the Court did not err by "failing to give a specific unanimity instruction sua sponte" or by failing to reduce Movant's sentence, or in its restitution order. (*Id.* at 5-8)

At trial, Movant was represented by retained counsel Thomas Hoidal. On appeal, Movant was represented by Michael J. Bresnehan. Counsel Anders V. Rosenquist represents Movant in these habeas proceedings.

III. Movant's Habeas Grounds

Movant asserts three grounds for relief (Doc. 1 at 8-16) In Ground One, Movant claims his trial counsel's performance was deficient because counsel failed to recognize early on in the case that Movant was not a "major participant" in the crimes alleged and failed to approach the prosecutor to negotiate a cooperating witness agreement. (Doc. 1 at 8-10)

Movant's Ground Two claim is that his due process rights were violated due to his trial counsel's malfeasance when counsel agreed to a joint defense with co-defendant Anderson under which Movant agreed not to testify. (*Id.* at 10-12)

In Ground Three, Movant complains the Court lacked jurisdiction on several counts charged in his case because FDIC insurance for M&I Bank did not extend to M&I Mortgage Company, and "[m]any of the

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[3] Federal Deposit Insurance Corporation.

financial transactions supporting the charges in this case were made by M&I Mortgage Company, not M&I Bank." (*Id.* at 13-16)

IV. Standards of Review

A. Section 2255 Motion to Vacate, Set Aside, or Correct Sentence

A federal prisoner is entitled to relief from his sentence if it was "imposed in violation of the United States Constitution or the 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." 28 U.S.C. § 2255(a).

B. Ineffective Assistance of Counsel

To obtain relief for a claim of ineffective assistance of counsel ("IAC"), a movant must show both that counsel's representation fell below an objective standard of reasonableness and also that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984). In reviewing counsel's performance, courts "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. The standard for judging counsel's representation is "highly deferential." *Id.* It is "all too tempting" to "second guess counsel's assistance after conviction or

adverse sentence." *Id.* "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690).

To establish prejudice, a movant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.* The court need not reach both components of *Strickland* if there is an insufficient showing on one of the components. 466 U.S. at 697 ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

C. Standard for Warranting Evidentiary Hearing

Under 28 U.S.C. § 2255, a court shall grant an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . . . " 28 U.S.C. § 2255(b). To state a claim for ineffective assistance of counsel such that a movant would be entitled to an evidentiary hearing, a movant must allege facts showing that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 at 686.

To show that he is entitled to an evidentiary hearing, a movant must allege "specific factual allegations that, if true, state a claim on which relief could be granted." *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (internal quotations and citations omitted). In determining whether to grant an evidentiary hearing, a court must consider whether, accepting the truth of a movant's factual assertions that are not directly and conclusively refuted by the record, the movant could prevail on his claims. *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002).

V. Discussion

A. Ground One: IAC — Failure to Negotiate for a Plea Agreement

In Ground One, Movant asserts his trial counsel's performance was deficient when counsel failed to "make himself aware of [Movant's] role in the case" and that Movant was "not a major participant" in the alleged conspiracy and thus failed to approach the Government to negotiate a cooperating witness agreement. (Doc. 1 at 9) Movant argues that under the facts of this case his defense counsel must have known that timing was critical to approach the prosecutor early to negotiate a cooperating witness agreement, particularly as Movant was "[a] lower level person who could testify to how the conspiracy worked, which [Movant] could." (*Id.*) Movant contends that his trial counsel waited three years before approaching the prosecutor to try and resolve his case, at which time it was too late because Movant's co-conspirators and others had already made favorable plea and immunity agreements and Movant's participation was unnecessary. (*Id.* at 10)

Movant's argument that he was not a "major participant" in the conspiracy is inconsistent with the evidence presented at trial. First, the testimony of witnesses was that Movant was in charge of the office used by Dynamite Custom Homes ("Dynamite') and later, by J.R. Custom Homes. Prosecution witness Shawna Smith, who worked for Dynamite and J.R. Custom Homes in the same office with Movant, testified that Movant was the office manager and that co-defendant Anderson was seldom in the office and came in once every one or two weeks for only brief periods of time. (Doc. 457 at 169, R.T. 05/27/2014) Witness Mike Blemaster described Movant as Paxton Anderson's "right-hand man" in the Dynamite Custom Home's office who did all of Anderson's "paperwork, draw work, . . . maybe talking to clients[.]" (Doe. 454 at 77, R.T. 05/16/2014) Blemaster stated that Movant performed in-house management of the business, including cutting checks to subcontractors. (*Id.*) Witness Bill Bailey testified that "more often than not," Movant was the only person in the office and that Movant ran the office. (Doc. 455 at 72, R.T. 05/20/2014)

Second, evidence establishes that Movant was the person who carried out the majority of the "clerical" tasks associated with the falsification of loan applications, construction loan draw requests, and invoices for work not performed. Several witnesses testified that Movant was instrumental in assisting at least some borrowers to complete applications for construction loans by providing falsified supporting documentation. Witness Greg Sanchez testified that Anderson created documents involving false statements of prepaid expenses for borrowers to qualify for loans and said that he believed Movant had assisted. (Doc. 456 at 36-37, R.T.

05/21/2014) Shawna Smith confirmed that Movant had issued company checks to put in borrowers' accounts. (Doc. 457 at 201-202, R.T. 05/27/2014) Ms. Smith also testified to seeing Movant "fix a number on a bank statement on a deposit number" when Dynamite "didn't have enough money to put into a borrower's account to get approved for a loan." (*Id.* at 212)

There was repeated testimony by trial witnesses that Movant had signed construction loan draw requests that also featured the borrower's forged signatures, without the borrower's approval. Witness Mark Acre testified this occurred in December 2005 (Doc. 451 at 109-110, R.T. 05/09/2014), and in February, March, and April 2005 (*Id.* at 111-112). Witness Jason Rongstad, the nominal owner of J.R. Custom Homes, identified Movant's signature on a draw consent form associated with a home being built for Will Henstein. (Doc. 452 at 177-178, R.T. 05/13/2014) Rongstad confirmed he had never given Movant authority to sign on his behalf. (*Id.* at 179) Mr. Rongstad testified that Movant had signed similar draw consent forms without authorization, including one where Movant is designated as the general contractor for J.R. Custom Builders, although Movant was not a licensed contractor. (*Id.* at 181-186) Greg Sanchez confirmed that his signature had been forged on several draw requests that were accompanied by an "affidavit of contractor" form that were signed by Movant. (Doc. 456 at 90-91, R.T. 05/21/2014) Sanchez declared that although Movant signed as the contractor on a construction loan draw, Movant was not a contractor. (Doc. 457 at 67, R.T. 05/27/2014) Witness Tasha Henstein testified that Movant's signature was on "a lot of documents" the Hensteins were involved with respecting their real estate dealings

with Dynamite and Anderson. (*Id.* at 99) She attested that Movant signed draw requests on which her's and her husband's signatures were forged. (*Id.* at 125-127) Ms. Henstein denied ever authorizing Movant to forge her name on draw requests. (*Id.* at 163)

Witness Shawna Smith reported she worked for Dynamite beginning in August or September 2006 to help in the office, specifically to assist in keeping track of projects. (*Id.* at 167-168) Smith declared that she had observed Movant cutting and pasting borrower's signatures onto draw requests. (*Id.* at 205-206) Ms. Smith said she observed Movant take a document out of a borrower's file, copy and cut out the signature, affix the signature to the document requiring a signature, make a copy, white out any lines and then make a final copy including the borrower's copies signature. (*Id.* at 206) Ms. Smith said these documents were always transmitted by fax "so if it was just garbled, it didn't really — it wasn't questioned." (*Id.*) Smith further testified that after she had been in the office for three to four months, Movant asked her to assist with cutting and pasting signatures onto draw requests. (*Id.* at 207) Additionally, Smith said she recalled Movant copying and pasting the Hensteins' signatures on to a contract. (*Id.* at 209) She stated that "whenever there was a draw request, the cutting and pasting of signatures was done." (*Id.* at 210)

Additionally, prosecution witnesses who had been borrowers in the scheme testified that Dynamite paid them money so that they could afford to write a monthly mortgage payment to the lender and explained that when they applied for their loan they hid from the lender that Dynamite would be covering their monthly payment for them. (*See, e.g.* testimony of witness Bill

Bailey, Doc. 455 at 76-77, 84-85, 90-92, R.T. 05/20/2014) Mr. Bailey said he would sometimes collect the checks from Dynamite at the office from Movant, although Bailey said he did not actually observe Movant signing the checks. (*Id.* at 92) Witness Oliver Adam, a borrower, testified that he would receive checks signed by Movant from Dynamite Custom Homes so that Mr. Adam and his wife could make mortgage payments. (*Id.* at 204) Shawna Smith testified that she learned that money was being put in borrower's accounts by Dynamite and J.R. Custom Homes "through conversations with [Anderson and Movant] on speaker phone and e-mails sent from [Anderson] copying [Movant] and myself." (Doc. 457 at 201, R.T. 05/27/2014) Ms. Smith further testified that she witnessed Movant creating invoices for use in the scheme, at the direction of Anderson. (*Id.* at 202-203)

Third, testimonial evidence establishes that Movant was aware of the bank defrauding scheme and knowingly furthered the purposes of the conspiracy. Mortgage broker Mike Blemaster testified that he engaged in discussions with borrower Paul Jennett, Movant and Anderson regarding whether Jennett had an "interest reserve into the construction loan to make the interest payments during the construction process." (Doc. 454 at 97, R.T. 05/16/2014) Mr. Blemaster said he had an exchange with both Anderson and Movant about Movant's sister qualifying for a loan as a potential borrower in the scheme. (*Id.* at 130) Blemaster further testified that Movant had frequently interacted with him, the mortgage broker, while Blemaster was helping borrowers obtain construction loans, and that Movant also communicated with the lenders, including Tier One and M&I Bank. (*Id.* at 142) Mr.

Blemaster confirmed in the factual basis for his plea agreement with the Government that Movant, along with Anderson, was involved in the conspiracy to defraud the banks. (Doc. 455 at 55, R.T. 05/20/2014) Greg Sanchez, who had been a friend of Movant for many years, testified that he had warned Movant that Movant "was going down the wrong path with Anderson and [Movant] should not do it." (Doc. 456 at 70, R.T. 05/21/2014) Sanchez stated that Movant told him that Movant was "covering himself in case anything were to ever happen." (*Id.*) Sanchez said he spoke with Movant after Sanchez realized his signature on a draw request had been forged, and that he had also witnessed Movant forging Mike Blemaster's name on a document. (*Id.* at 92, 95)

On this evidence, Petitioner's argument that he was merely a lower-level participant is not supported, and accordingly does not establish his claim that trial counsel was ineffective for failing to immediately approach the Government to attempt to obtain a cooperating witness agreement. As the Court accurately recognized at Movant's sentencing, while Movant's role in the conspiracy was significantly less than that of Anderson's, Movant was nonetheless "an integral participant in this fraud on a day-to-day basis. He was the person that produced the documentation that resulted in the fraudulent draws. He cut and pasted. He forged. He created false invoices." (Doc. 503 at 64, R.T. 05/18/2015) The Court further concluded that "[Movant] did all the paperwork. And [Movant] knew that the paperwork he was producing was fraudulent, whether it's because he actually put a fraudulent signature on it or because he created a fraudulent invoice or he created a fraudulent company to go along with

the fraudulent invoice." (*Id.* at 65) The Court emphasized that "[e]ven if Mr. Anderson was the one that was directing it, it really probably couldn't have happened or at least happened for as long as it did without [Movant] on a day-to-day basis committing all of these fraudulent acts." (*Id.*)

Further, the record indicates that Movant himself was not inclined to pursue a witness agreement. In August 2010, more than two years before he was indicted, Movant was interviewed by an FBI agent and an IRS agent. (Doc. 7-1 at 2) Movant told the agents he had worked as an accountant for the businesses owned by co-defendant Paxton Anderson and that Anderson made the final decisions. (*Id.* at 2) Movant advised the agents that he had "nothing to hide." (*Id.*) The agents reported that Movant had advised them he "did not know if loan documents were falsified, but he did not believe this would have happened." (*Id.*) Movant explained that draw requests were usually faxed to borrowers for signatures but sometimes were e-mailed. (*Id.* at 3) Movant reportedly declared he was unaware of "anyone copying and pasting signatures on documents," that he had been aware of all draw requests, and that copying and pasting of signatures "did not occur on the draw requests." (*Id.*)

In April 2011, Movant's defense counsel wrote the Government prosecutor about the mortgage fraud investigation of Paxton Anderson. (Doc. 7-2 at 2-3) Counsel discussed Movant's cooperation with the interviewing agents when they had interviewed him in August 2010 and reiterated that Movant had informed the agents then "that he was unaware of any wrongdoing in connection with his involvement with Paxton Anderson and does not believe it would serve

any purpose for him to repeat that information in another interview." (*Id.*) Defense counsel advised the prosecutor he was "investigating the allegations" in materials the prosecution had provided and that counsel would update the prosecutor if Movant intended "to provide documentary evidence or witness statements further supporting [Movant's] statements and refuting the allegations of the confidential informants." (*Id.* at 3) Movant's position throughout trial was that he was innocent of the charges. At sentencing, Movant's counsel advised the Court that "because we have an appeal brewing here, I have recommended that [Movant] not say anything substantive about the offenses of conviction." (Doe. 503 at 49)

Nowhere in Movant's argument does he state that the Government approached his counsel to discuss a cooperative witness agreement, or, significantly, that he would have been willing at that time to enter such an agreement. (Doc. I at 8-10, Doc. 8 at 3-4) To the contrary, as discussed above, the record shows that during the pre-indictment period in April 2011, Movant's defense counsel advised the Government essentially that Movant had already cooperated with the FBI and IRS investigating agents and that it would not serve any purpose to tell them the same things in a subsequent interview.

Movant highlights the prosecution's statements in a March 2014 e-mail from the prosecutor to defense counsel that the prosecution had been "absolutely interested in cooperation of [Movant] preindictment. Indeed, many of the witnesses during trial prep have expressed surprise that he did not come in to help himself Given [Movant's] insider role, he should have cooperated but didn't." (Doe. 1-2 at 14 (emphasis in

original)) The prosecutor then advised Movant's counsel that Movant's "last ditch effort" shortly before trial to cooperate held no interest for the Government. (*Id.*) However, this circumstance, occurring shortly before trial, is in stark opposition to Movant's position early in the investigation when other co-conspirators were cooperating in the investigation and when the prosecution stated it would have been interested in his cooperation.

In light of the record indicating no evidence that Movant was interested in a cooperating witness agreement until the window for such an opportunity had closed, and abundant evidence that Movant was a critical participant in the conspiracy, Movant has not established and the record does not support a finding that trial his counsel's representation fell below an objective standard of reasonableness or that that counsel provided ineffective assistance that prejudiced Movant's defense. *Strickland*, 466 U.S. at 687-88, 692.

B. Ground Two: IAC — Counsel's Agreement to a Joint Defense

Movant argues his due process right to testify at trial was violated because of ineffectiveness of defense counsel due to a joint defense agreement with Anderson that prevented Movant from testifying. (Doc. 1 at 11) Movant alleges that under the agreement, counsel for co-defendant Anderson took the lead in presenting the defense. (*Id.*) Movant also states that the majority of the evidence presented was against Anderson who masterminded the conspiracy and, unlike Movant, received substantial sums of money as a result. (*Id.*) In hindsight, Movant now argues that if he had been able to testify, he would have been able to draw distinctions

between himself and Anderson and that because he was not able to testify, the jury "was left with the only logical conclusion they could make, based on the prosecutor's allegations, that [Movant] was as guilty as Anderson." (*Id.* at 12) Movant argues his trial counsel was ineffective for purportedly "abandoning" Movant's defense and that there was no "logical or tactical reason" for Movant not to testify, "and every reason for him to testify." (*Id.*)

In closing argument, defense counsel emphasized that Movant made a relatively modest salary working for Anderson with Dynamite Custom Homes and J.R. Custom Homes, citing income of $2,193.00 every two weeks. (Doc. 461 at 81-82, R.T. 06/03/2014) Additionally, counsel highlighted for the jury that when the conspiracy fell apart, the homeowners blamed Anderson, not Movant, (*Id.* at 84) Defense counsel further argued the evidence established that Movant had "no independent authority to do much of anything at Dynamite or J.R." and that Anderson was pulling the strings. (*Id.* at 97) Counsel contrasted Movant's position in the conspiracy with the positions of prosecution witnesses and co-conspirators Mike Blemaster and Greg Sanchez; counsel argued that the evidence showed that Blemaster and Sanchez, who pled guilty for their roles in the conspiracy, were trying to get rich, while Movant was simply earning a salary with the object of trying to get homes built. (*Id.* at 99) Thus, by Movant's counsel allowing Anderson's counsel to take the lead, the jury likely associated the bulk of the prosecution's evidence with Anderson, not Movant. Further, Movant's counsel was better able to distinguish Movant from Anderson and attempt to cast Movant as a mere office worker lacking in authority and influence in the conspiracy. Movant's

trial counsel succeeded with this strategy to some extent in that the jury found Movant not guilty on three counts on which they found Anderson guilty. (Doc. 462 at 7-9)

The United States Supreme Court instructs that joint trials of co-defendants within a conspiracy serves an important purpose in the federal criminal system:

> Rule 8(b) states that "NIA) or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." There is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials "play a vital role in the criminal justice system." *Richardson v. Marsh*, 481 U.S. 200, 209, 107 S.Ct. 1702, 1708, 95 L.Ed.2d 176 (1987). They promote efficiency and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts," *Id.*, at 210, 107 S.Ct., at 1708. For these reasons, we repeatedly have approved of joint trials. *See ibid.; Opper v. United States*, 348 U.S. 84, 95, 75 S.Ct. 158, 165, 99 L.Ed. 101 (1954); *United States v. Marchant*, 12 Wheat. 480, 6 L.Ed. 700 (1827); *cf.* 1 C. Wright, Federal Practice and Procedure § 223 (2d ed. 1982) (citing lower court opinions to the same effect).

Zafiro v. United States, 506 U.S. 534, 537-38 (1993). The Supreme Court also recognized in *Zafiro* that in certain circumstances, a joint trial of co-defendants may be improperly prejudicial against one or more co-defendant:

> But Rule 14 recognizes that joinder, even when proper under Rule 8(b), may prejudice either a defendant or the Government. Thus, the Rule provides:
>
> > If it appears that a defendant or the government is prejudiced by a joinder of . . . defendants . . . for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.
>
> In interpreting Rule 14, the Courts of Appeals frequently have expressed the view that "mutually antagonistic" or "irreconcilable" defenses may be so prejudicial in some circumstances as to mandate severance. . . . Notwithstanding such assertions, the courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses. See, *e.g., United States v. Tootick*, 952 F.2d 1078 (CA9 1991); *United States v. Rucker*, 915 F.2d 1511, 1512-1513 (CA11 1990); *United States v. Romanello*, 726 F.2d 173 (CA5 1984). The low rate of reversal may reflect the inability of defendants to prove a risk of prejudice in most cases involving conflicting defenses.

Id. at 538. The Supreme Court recognized that "[w]hen the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson v. Marsh*, less drastic measures, such as limiting instructions, often will

suffice to cure any risk of prejudice. *See* 481 U.S., at 211, 107 S. Ct., at 1709."

Here, the Court gave the jury the limiting instruction that "[s]eparate crimes are charged against each defendant. The charges have been joined for trial. You must consider and decide the case for each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant." (Doc. 461 at 10-11, R.T. 06/03/2014)

Further, as detailed in Section V(A) above, the Government presented abundant evidence at trial that Movant was a critical participant in the conspiracy and that specifically supported Movant's guilt on the charges that went to the jury.

Movant has not shown a "reasonable probability that . . . the result of the proceeding would have been different" if Movant had been tried separately from Anderson and if Movant had testified at trial. *Strickland*, 466 U.S. at 694. Applying the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[,]" *Id.* at 692, and based on the record, the undersigned concludes that Movant's trial counsel's decision to enter into a joint defense agreement neither fell below an objective standard of reasonableness nor can be considered deficient performance that prejudiced Movant's defense.

C. Ground Three: Lack of Jurisdiction Over Charges

Movant argues the Court lacked jurisdiction for a number of charges in this case in which loans were obtained from the M&I Mortgage Corporation ("MIMC"), a subsidiary of M&I Bank, which Movant contends

was not covered by FDIC insurance. (Doc. 1 at 13-16) The bank fraud charges on which Movant was convicted alleged violation of 18 U.S.C. § 1344, which defines a "financial institution" in part as one for which the deposits are insured by the FDIC. (18 U.S.C. § 20(1)) Movant contends that charges involving loans made by subsidiaries to banks, such as MIMC, were therefore outside the Court's jurisdiction. (Doc. 1 at 13-16)

Movant asserted this argument in his oral motion for acquittal or for a motion for a new trial (Does. 174, 277) as a question of insufficient proof on the charges, and reasserted it on appeal. Appellant's Consolidated Opening Brief, *United States v. Plany*, Nos. 15-10270, 15-10429, 2016 WL 919808, at "86-109 (9th Cir. Mar. 1, 2016). Movant's appellate brief stated that to obtain a conviction under § 1344, the Government must prove the lending bank was FDIC-insured, and stated this requirement is an element of the crime of bank fraud, but also "a jurisdictional prerequisite." Appellant's Consolidated Opening Brief, 2016 WL 919808, at **87-88 (citing *United States v. Dennis*, 237 F.3d 1295, 1303 (11th Cir. 2001) and *United States v. Bennett*, 621 F.3d 1131, 1138 (9th Cir. 2010)).

The Ninth Circuit held that the evidence was insufficient for the jury to find beyond a reasonable doubt that M&I Bank was the lender on Count 1 only, on which Anderson had been found guilty and Movant in any case had been found not guilty. (Doc. 1-2 at 3-4) However, the Ninth Circuit also held there was sufficient evidence to allow the jury to find that M&I Bank was the lender on all of the remaining counts involving M&I loans. (*Id.* at 4)

Although the Ninth Circuit did not expressly take up Movant's claim as a jurisdictional issue, it rejected

the claim Movant relies on here for his jurisdiction argument. At oral argument on direct appeal, the court of appeals was made aware that the record contained imprecise documents that could support a conflict in the evidence, such as loan and draw consent documents that referred to both M&I Bank and MIMC, or only to MIMC, including some forms used at trial that omitted MIMC from under the loan number line. Oral argument, *United States v. Plany*, No. 15-10270, 2017 WL 4037875 (9th Cir. Aug. 7, 2017). The evidence the Ninth Circuit found sufficient to allow the jury to find that M&I Bank was the lender on the remainder of the M&I-related counts included "certificates of proof of insured status; testimony from [Wil] Daly[4], Blemaster, and Sanchez; Tasha Henstein's testimony regarding draw requests to M&I Bank; copies of loan applications and draw requests; and payment information." (Doc. 1-2 at 4)

Movant has attached to the Motion fourteen draw consent forms related to loans to borrowers Greg

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4 Prosecution witness Wil Daly, who was an M&I Bank manager of the bank's wholesale mortgage operations, testified that M&I Bank funded loans through wholesale origination where a broker would originate a loan and then the loan would be "booked" to M&1 Bank. (Doc. 453 at 32-33) He explained that "a local broker would meet with a borrower. Originate the loan application. Then sell one of our mortgage products which would then close in our name and then it would stay on our bank's books, whether it be construction loan, land loan, or just a home purchase[.]" (*Id.* at 33) Mr. Daly explained that M&I Bank also offered direct loan origination when a customer came directly to the bank and dealt directly with an M&I loan officer rather than using a broker outside of the bank. (*Id.)* Mr. Daly identified witness Mike Blemaster as a broker using M&I's wholesale origination loan products. (*Id.* at 34) Mr. Daly also identified Greg Slater as an employee of M&I Bank who originated direct loans. (*Id.)*

Sanchez and also to Will and Tasha Henstein, each bearing the name "M&I Mortgage Corp." at the top of the form and each including a line for the "M&I Mortgage Corp. Loan Number" with a loan number supplied. (Doc. 1-2 at 22-35) However, these fourteen draw consent forms are associated with only two loans. Movant also attaches "Affidavit of Contractor Forms" that each also list "M&I Mortgage Corp." at the top of the page and include an "M&I Mortgage Corp. Loan Number." (*Id.* at 37-47) Most of the latter forms are associated with the draw consent forms Movant supplied, and they all involve the same two loan numbers as the fourteen draw consent forms. (*Id.* at 37-41, 45-47) Movant erroneously argues that the draw consent forms and affidavit of contractor forms "unequivocally show M&I Mortgage Company was the lender in a number of loans the charges were based on[.]" (Doc. 1 at 15 (emphasis supplied) (referring to the two loans, one to the Hensteins, and one to Greg Sanchez)). These documents were part of the evidence at trial and were also subject to the Ninth Circuit's review on direct appeal, in which the court found the evidence sufficient to establish that M&I Bank was the lender, not MIMC.

In its response to the Motion, Respondent also discusses and highlights trial evidence supporting the conclusion that M&I Bank was the lender, not MIMC. (Doc. 7 at 18-21) Respondent's cited evidence includes: Wil Daly's testimony; testimony of borrowers Greg Sanchez, Tasha Henstein, and Bill Bailey about obtaining their loans through M&I Bank; Uniform Residential Loan Applications for three borrowers indicating the loan officer worked for M&I Bank; loan application papers directed to "M&I Bank"; bank statements indicating wire payments were made to

Dynamite from M&I Bank; and references to trial evidence of monthly loan payments from borrowers or from Anderson's companies to M&I Bank. (*Id.*) This is the evidence or type of trial evidence the Ninth Circuit stated it relied on in holding the evidence was sufficient to support a reasonable juror to find M&I Bank was the lender. (Doc. 1-2 at 4)

Movant's argument that the federal trial and appellate courts lacked jurisdiction wholly depends on facts and legal argument that he already raised on direct appeal and that the Ninth Circuit rejected. Both the District Court on Movant's motion for acquittal or for a new trial and the Ninth Circuit on appeal of the Court's ruling on the motion addressed the sufficiency of the evidence regarding whether M&I Bank was FDIC-insured and whether the M&I Bank or MIMC was the lender on the loans. (CR Doc. 277, Doc. 1-2 at 2-8) For Movant to prevail on his jurisdiction argument would require the Court to reconsider the same evidence and arguments Movant made unsuccessfully at trial and on appeal. Additionally, as noted, Movant's appellate brief stated that FDIC-insured lender status is a jurisdictional issue.

"Issues raised at trial and considered on direct appeal are not subject to collateral attack under 28 U.S.C. § 2255." *Egger v. United States*, 509 F.2d 745, 748 (9th Cir. 1975); *see also United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985) (holding that because the defendant had "raised this precise claim in his direct appeal, and this court expressly rejected it[,] . . . this claim cannot be the basis of a § 2255 motion.") (citing *Egger*, 509 F.2d at 748). Moreover, "[g]rounds which were apparent on original appeal cannot be made the basis for a second attack under § 2255." *Egger*, 509

F.2d at 748. Movant's revisiting here of the same evidence and challenges he raised on direct appeal is improper.

D. Evidentiary Hearing

Movant, who is represented by counsel, requests that Movant's convictions be set aside and the case dismissed, but does not request an evidentiary hearing. (Does. 1, 8) As discussed, in Grounds One and Two, Movant alleges ineffective assistance of trial counsel. To state a claim for ineffective assistance of counsel such that he would be entitled to an evidentiary hearing, a petitioner must allege facts showing that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). This requires a showing that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Id.* at 687. The Court shall hold an evidentiary hearing on a Movant's Motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief[.]" 28 U.S.C. § 2255(b). The standard for holding an evidentiary hearing is whether the movant has made specific factual allegations that, if true, state a claim on which relief could be granted. *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984). A court need not hold an evidentiary hearing if the allegations are "palpably incredible or patently frivolous," or if the issues can be conclusively decided on the basis of the evidence in the record. *See Blackledge v. Allison*, 431 U.S. 63, 76 (1977); *see also 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").

In Ground One, Movant asserts his trial counsel's performance was deficient when he failed to "make himself aware of [Movant's] role in the case" and thus failed to approach the Government to negotiate a cooperating witness agreement. (Doc. 1 at 9) As is discussed above in Section V(A), on the evidence presented, Movant's claim that his trial counsel failed to make himself aware of Movant's role in the case is amply refuted by the record. Movant's counsel represented him during pretrial investigations and throughout trial, and the record convincingly contradicts Movant's argument that counsel could have been unaware of Movant's role and involvement. Undersigned recommends that an evidentiary hearing is unnecessary on Ground One because the record conclusively shows Movant's counsel did not provide ineffective assistance.

In Ground Two, Movant argues that his due process right to testify at trial was violated because of ineffectiveness of trial counsel, who entered into a joint defense agreement with Anderson that prevented Movant from testifying. (Doe. 1 at 11) As discussed in Section V(B) above, Movant summarily states without any basis in the record that because of his counsel's representation under the alleged agreement, the jury "was left with the only logical conclusion they could make, based on the prosecutor's allegations, that [Movant] was as guilty as Anderson." (*Id.* at 12) The record definitively shows that Movant's counsel did not provide ineffective counsel and accordingly undersigned recommends that an evidentiary hearing is unnecessary as to Ground Two.

As is discussed above in Section V(C), Movant's Ground Three attempts to assert a claim that is entirely premised on an issue already rejected by the Ninth Circuit. The evidence Movant attaches to support his argument was either introduced at trial (Doc. 1-2 at 22-58) or addresses a legal conclusion that was considered and conclusively decided by the Ninth Circuit on appeal (*Id.* at 16-20).

Movant has not requested an evidentiary hearing. For the reasons set forth above, Movant has failed to establish he is entitled to an evidentiary hearing on any of the Grounds in the Motion. Thus, undersigned recommends that the Motion be denied without an evidentiary hearing.

VI. Conclusion

As discussed above, the grounds in the Motion are without merit and do not warrant an evidentiary hearing. The Motion should be denied without an evidentiary hearing. Further, Movant has not made a substantial showing of the denial of a constitutional right in any ground of his Motion; thus, a certificate of appealability should be denied. *See* 28 U.S.C. § 2253 (c)(2).

Accordingly,

IT IS RECOMMENDED that Movant Joseph John Plany's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 1) be denied without an evidentiary hearing.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability be denied because Movant has not

made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections.

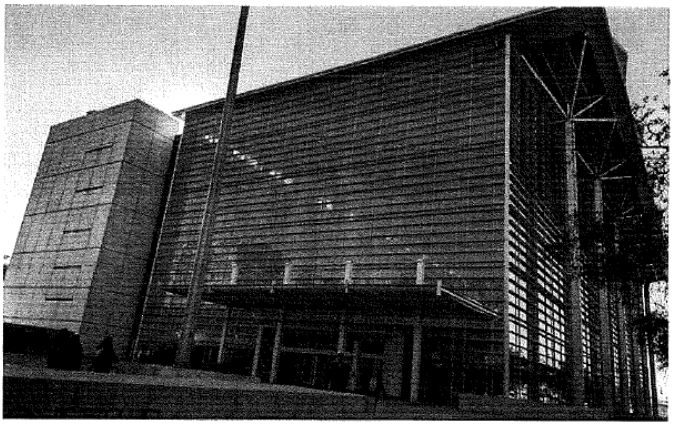
Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

Dated this 17th day of April, 2020.

/s/ Deborah M. Fine
United States Magistrate Judge

ARTICLE: *JUDGE TELLS LAWMAKERS ARIZONA FEDERAL COURTS ARE OVERLOADED, OVERWORKED*
(FEBRUARY 24, 2021)

By Ryan Knappenberger
CRONKITE NEWS
February 24, 2021



The Sandra Day O'Connor Courthouse in Phoenix is one of several federal district court facilities in Arizona, but court officials told Congress they need more judges to help handle the staggering caseload. The 13 judges in the district were assigned an average of 663 cases in fiscal 2020, a court report said. (File photo by Harrison Mantas/Cronkite News)

WASHINGTON - The federal district court in Arizona has been struggling to keep pace with a staggering civil and criminal caseload in the growing state, and it needs more judges to keep up, a judge from the court told lawmakers Wednesday.

U.S. District Judge Diane Humetewa was joined by other judges and law professors who called on Congress to fill vacancies and consider reforms for the justice system to streamline operations and share some of the load.

"In Arizona, the status quo simply cannot meet the constitutional mandate to administer meaningful justice to all," Humetewa told a House Judiciary subcommittee Wednesday.

Even after a. sharp drop in cases from the year before, the 8,614 criminal and civil cases filed in the Arizona district in fiscal 2020 still meant an average of 663 cases for each of the 13 judges in the district, according to a report by the Administrative Office of the United States Courts. That was the 16th-highest per-judge caseload among the 94 federal districts in the nation, the report said.

But Arizona is not the only district that is struggling. Kimberly J. Mueller, chief judge for the Eastern District of California, likened federal judges' situation to Sisyphus of Greek myth, "condemned eternally to roll a boulder uphill, only to have it roll down again when he reaches the top."

"For 20 years plus, we've been in a judicial emergency, we cannot fulfill our obligations without Congressional action creating new judgeships," Mueller said.

Their pleas had a receptive audience at the hearing, with lawmakers from both parties expressing support for judicial relief.

"Arizona desperately needs more federal district judges and the district court has been working with

too little for too long, at the expense of Arizonans, who should have fair unobstructed access to our country's judicial system," said Rep. Greg Stanton, D-Phoenix.

U.S. District Judge Diane Humetewa told a House subcommittee that the 13 judges CM the federal district court in Arizona "cannot meet the constitutional mandate to administer meaningful justice to all." (Photo courtesy House Judiciary Committee)

Humetewa described how felonies committed on tribal lands are handled in federal district courts, often forcing parties to travel hundreds of miles from reservation lands to Phoenix to argue their case.

Stanton called for a new judgeship in Flagstaff to handle cases in northern Arizona, particularly cases from tribal lands. Such a judge would allow for grand juries "made up of peers . . . more accurately representative of the community," and would ease travel burdens on other judges in the district, he said.

Rep, Darrell Issa, R-Calif., said "while the decision for new judgeships is overdue, it is also important that we do it on a bipartisan basis?'

But Andrew Coan, professor of law at the University of Arizona, said in an email Wednesday that the "crisis of volume" courts face is a political as well as a logistical one.

"The country could certainly use more judges, but this is tricky politically because a large expansion of judiciary would give the current president a lot of new appointments," Coan said. "One way to overcome this would be to stagger appointments over time."

That suggestion came up at the hearing.

"I don't think the right way to do this is to add a bunch of judgeships," said Brian Fitzpatrick, law professor at the Vanderbilt Law School. "That's going to have a predictable partisan effect.

"The right way to do this is to push off the effective date of the new judgeships until there is a new presidential administration," Fitzpatrick said during his testimony.

But Duke University Law Professor Marin K. Levy pointed out that there has never been an instance of staggering appointments in such a way.

"If there's a leak in your roof, you don't want to hear that you're going to have someone fix it a year from now or four years from now, you want it fixed as soon as possible," Levy said.

However it's done, Mueller said, Congress needs to help the courts now. "Without your help, justice delayed is in fact justice denied," she said.

PODCAST EXCERPT: *WHY LEGAL EXPERTS AND FEDERAL JUDGES CALL FOR A JUDICIARY EXPANSION IN ARIZONA* (FEBRUARY 24, 2021)

Martiza Dominguez
ARIZONA REPUBLIC
June 2, 2021

The House Judiciary Committee held a hearing on Feb. 24 to hear arguments from federal judges across the country about the need to expand the bench including Diane Humetewa, a federal judge in Arizona and the former U.S. Attorney for the District of Arizona.

She testified about the longstanding, unmet need for more federal judges in her state.

Arizona is one of the nation's fastest-growing states, but the number of judges has been stagnant for most of the past three decades. This has caused a legal backlog. It's been more than 30 years since Congress passed a broad expansion of the judiciary. In that

time, the nation's population has grown, technology has raised an array of previously unimaginable legal concerns and globalization has upended the economy.

Democrats and Republicans agreed at the February hearing that the nation is overdue for more judges.

In this week's episode of The Gaggle: An Arizona politics podcast, hosts Yvonne Wingett Sanchez and Ronald J. Hansen break down why and how this legal bottleneck affects Arizonans.

Joining the show are Carl Tobias, a law professor at the University of Richmond, and Rep. Greg Staton, D-Ariz., a judiciary committee member.

LISTEN TO THE EPISODE

The best way to listen is to subscribe to The Gaggle on your favorite podcast app, but you also can stream the full episode below.