United States Court of Appeals
for the Fifth Circuit

No. 22-20343

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

KENNETH J. COLEMAN,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-2874
USDC No. 4:17-CR-156-1

UNPUBLISHED ORDER

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

Kenneth Coleman, federal prisoner # 29922-479, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion challenging his convictions for conspiracy to structure currency transactions (Count One), conspiracy to commit money laundering (Count Two), two counts of tax evasion (Counts Three and Six), three counts of

(APPENDIX "A")

failure to file (Counts Four, Five, and Seven), and two counts of willfully filing a materially false return (Counts Eight and Nine). He argues that (1) the district court committed various procedural errors as to his § 2255 motion; (2) the district court abused its discretion by denying his motions to amend and rejecting his amended § 2255 motion; (3) the district court erred by failing to conduct an evidentiary hearing before denying his claim of ineffective assistance of appellate counsel; (4) he was deprived of his right to confrontation; (5) the trial court erred by failing to issue a limiting instruction regarding certain evidence; (6) his indictment failed to allege the crime of conspiracy to structure currency transactions; (7) his indictment was constructively amended; (8) certain exculpatory evidence was suppressed when the trial court granted a motion in limine; and (9) the trial court should have conducted a mental competency hearing. He does not address, and has therefore abandoned any challenge to the denial of, his other § 2255 claims. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA, he must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). When a district court has denied claims on the merits, a movant must show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (internal quotation marks and citation omitted); *see also Slack*, 529 U.S. at 484. When a claim is denied on procedural grounds, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Coleman has failed to make the necessary showing. Accordingly, his motion for a COA is DENIED. As Coleman fails to make the required showing for a COA on his constitutional claim, we do not reach whether the district court erred by denying an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KENNETH J. COLEMAN,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action No. H-21-2874
	§	Criminal Action No. H-17-156
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER

Pending before the Court is Petitioner Kenneth J. Coleman's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Civil Document No. 1, Criminal Document No. 283). Having considered the motion, submissions, and applicable law, the Court determines Petitioner's motion should be denied.

I. BACKGROUND

On March 16, 2017, Petitioner Kenneth J. Coleman ("Petitioner")[1] was indicted by a federal grand jury on nine counts: (1) conspiracy to structure currency transactions; (2) conspiracy to commit money laundering; (3) tax evasion on behalf

[1] Petitioner has, at various times throughout the proceedings related to this case, asserted his name is Rahsaan Malik Bey. He does not identify himself with this name in the motion under § 2255, and thus the Court refers to him as Petitioner or Coleman throughout.

of Acacia Pharma Distributors, Inc. ("Acacia"); (4) failure to file income tax returns on behalf of Acacia; (5) failure to file personal income tax returns; (6) tax evasion on behalf of Four Corner Suppliers, Inc. ("Four Corner"); (7) failure to file income tax returns on behalf of Four Corner; and (8 and 9) willfully filing materially false personal income tax returns.[2] These charges related to a Medicaid fraud scheme and an overlapping tax fraud scheme. Also implicated on several of these charges was codefendant Marcus T. Weathersby ("Weathersby"). On September 13, 2017, Petitioner was appointed Richard Kuniansky ("Kuniansky") as counsel. On September 26, 2017, Chief United States District Judge Lee H. Rosenthal granted Kuniansky's unopposed motion to withdraw as counsel, based on Kuniansky's representation of Petitioner's coconspirator, Alex Oria ("Oria"). On September 27, 2017, Petitioner was appointed Wendell Odom ("Odom") as counsel. On February 16, 2018, Weathersby pleaded guilty to conspiracy to commit money laundering related to the schemes pursuant to a plea agreement. On July 25, 2018, Chief Judge Rosenthal denied Petitioner's motion to appoint new counsel. On September 12, 2018, the case was transferred to this Court. On September 14, 2018, the Court denied another motion from Petitioner to appoint new counsel. On September 21,

[2] *Indictment*, Document No. 1. The Government later moved to amend the indictment, redacting some portions and striking some portions as surplusage, which was granted. *United States' Motion to Amend Indictment to Remove Overt Acts and Surplusage*, Document No. 100.

2018, the Court granted a motion from Odom to withdraw, on the basis of Petitioner filing a bar grievance against Odom. On the same day, the Court appointed Gerardo S. Montalvo ("Montalvo") as new counsel. On October 11, 2018, the Court held a *Faretta* hearing where Petitioner indicated he wanted to represent himself and threatened to file a bar grievance against Montalvo if Montalvo attempted to act on Petitioner's behalf. At the hearing, the Court continued the trial date and appointed Montalvo as standby counsel, and Petitioner indicated he had no questions and wanted to represent himself. The Court granted Petitioner's motion to proceed to trial *pro se*.[3] On October 18, 2018, Petitioner filed an "affidavit of fact," asserting he had "erroneously responded" when he waived his right to counsel at the *Faretta* hearing.[4] On October 26, 2018, the Court held a hearing to address the filing, where Petitioner stated he wanted Montalvo reappointed as counsel. The Court noted the numerous continuances granted in the case, Petitioner's previous treatment of Montalvo, and asked Montalvo if he would be ready to proceed to trial on the "current timeline," to which Montalvo responded he would not.[5] The Court denied Petitioner's motion for reappointment of counsel, finding the purpose of the motion

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[3] *Transcript of October 11, 2018 Faretta Motion Hearing*, Document No. 191 at 28.

[4] *Affidavit of Fact*, Document No. 133 at 1.

[5] *Transcript of October 26, 2018 Counsel Determination Hearing*, Document No. 178.

was to delay proceedings.[6] On the first day of trial, November 5, 2018, Petitioner again moved for a continuance and reappointment of counsel, which the Court denied. On November 14, 2018, the jury returned a verdict of guilty on all nine charges.[7] On April 11, 2019, the Court sentenced Petitioner, still representing himself, to 360 months in the custody of the United States Bureau of Prisons ("BOP"), three years supervised release, and ordered a total of $716,986.20 paid in restitution.

On October 29, 2020, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") affirmed the verdict and the sentence. *United States v. Coleman*, 832 F. App'x 876, 881 (5th Cir. 2020) (per curiam). On August 11, 2021, Coleman moved to vacate and set aside his sentence under § 2255.[8]

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[6] *Order*, Document No. 149 at 7.

[7] *Jury Verdict*, Document No. 168.

[8] *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody*, Document No. 283 [hereinafter *Motion Under § 2255*]. The Court notes Petitioner filed a second, amended motion under 28 U.S.C. § 2255. *Amended 2255 Case No. 4:17CR156*, Document No. 288. A petitioner must first receive authorization from the relevant court of appeals to file a second or successive § 2255 motion. 18 U.S.C. 2255(h); *In re Lampton*, 667 F.3d 585, 587 (5th Cir. 2012). "Second or successive" means the motion concerns the same judgment as an earlier motion and no new sentence has been imposed. *Lampton*, 667 F.3d at 588. Because Petitioner's amended § 2255 motion concerns the same judgment and no new sentence had been imposed before its filing, the motion is denied. The Court will only address Petitioner's first § 2255 motion in this order. Further, Petitioner filed two motions to amend relating to his first motion under § 2255. *Motion for Leave to Amend*, Document No. 285; *Motion for Leave to Amend*, Document No. 286. In both these motions, Petitioner contends his § 2255 motion was wrongly construed as a motion under 18 U.S.C. § 3582. It is unclear how Petitioner got

II. STANDARD OF REVIEW

A. Relief Under 28 U.S.C. § 2255

"Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Mimms*, 43 F.3d 217, 219 (5th Cir. 1995) (quoting *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992)). Even if a defendant alleges a constitutional error, he may not raise an issue for the first time on collateral review without showing both cause for his procedural default and actual prejudice resulting from the error. *United States v. Frady*, 456 U.S. 152, 167 (1982); *see also United States v. Acklen*, 47 F.3d 739, 742 (5th Cir. 1995). A petitioner must show "cause" to explain the reason why the objection was not made at trial or on direct appeal and show "actual prejudice" was suffered from the alleged errors. *Frady*, 456 U.S. at 167. To prove "cause," a petitioner must show an external obstacle prevented him from raising his claims either at trial or on direct appeal. *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). To prove "actual prejudice," the petitioner must show he has suffered an actual and substantial disadvantage. *Frady*, 456 U.S. at 170.

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this impression, but the Court is considering his motion as a § 2255. Accordingly, the motion for leave to amend are both denied as moot.

To succeed under the "cause" and "actual prejudice" standard, a petitioner must meet a "significantly higher hurdle" than the plain error standard required on direct appeal. *Id.* at 166. This higher standard is appropriate because once the petitioner's chance to direct appeal has been exhausted, courts are allowed to presume the petitioner was fairly convicted. *Id.* at 164; *see also United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998) (presuming defendant to be fairly and finally convicted after direct appeal). Ineffective assistance of counsel, if shown and applicable, will satisfy the requisite cause and prejudice. *Acklen*, 47 F.3d at 742. Additionally, a claim for ineffective assistance of counsel is properly brought for the first time in a § 2255 motion. *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (en banc).

B. Ineffective Assistance of Counsel

The Court analyzes an allegation of ineffective assistance of counsel in a § 2255 motion under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Willis*, 273 F.3d 592, 598 (5th Cir. 2001). The movant must show his counsel's performance was both deficient and prejudicial to prevail on an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700; *Willis*, 273 F.3d at 598. To show deficiency, the movant must show his counsel's assistance was outside a broad range of what is considered reasonable. *Strickland*, 466 U.S. at 669. To establish prejudice, the petitioner "must demonstrate '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.' " *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 694). Thus, when a petitioner challenges his conviction, this issue is whether "a reasonable probability exists that the jury would have had a reasonable doubt as to guilt." *Hernandez v. Johnson*, 213 F.3d 243, 249 (5th Cir. 2000). "This is a heavy burden which requires a 'substantial,' and not just a 'conceivable,' likelihood of a different result. *United States v. Wines*, 691 F.3d 599, 604 (5th Cir. 2012). "Counsel's errors must be 'so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.' " *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 687). The movant must prove both prongs of the analysis: counsel tendered deficient performance and the movant suffered prejudice. *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997).

III. LAW & ANALYSIS

Petitioner moves, *pro se*, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 on ten separate grounds: (1) having Weathersby testify regarding his plea agreement violated Petitioner's right to cross examination under the Sixth Amendment; (2) the Court failed to instruct the jury on the limited purposes of impeachment testimony; (3) the Court's failure to disclose a favorable sentencing deal with Weathersby violated Petitioner's constitutional rights; (4) Petitioner was

given inadequate time to prepare for trial; (5) the jury instructions constructively amended the indictment; (6) ineffective assistance of counsel in pretrial and on appeal; (7) the indictment fails to allege an essential element of the structing currency count; (8) the jury was unconstitutionally impaneled; (9) Petitioner did not receive a copy of the presentence investigation report (the "PSIR"); and (10) an exceptional sentence outside the guideline range violated Petitioner's constitutional rights. The Court will address each ground for the motion in turn.

"Usually, after a conviction and exhaustion or waiver of any right to appeal," courts presume "that the defendant stands fairly and finally convicted. *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001). "For this reason, [the Supreme Court of the United States has] long and consistently affirmed that a collateral challenge may not do service for an appeal." *United States v. Frady*, 456 U.S. 152, 165 (1982). As a result, motions to vacate "may raise only constitutional errors and other injuries that could not have been raised on direct appeal that will result in a miscarriage of justice if left unaddressed." *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999).

Pro se filings are held to a less stringent standard than those drafted by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). However, *pro se* litigants are still required to provide sufficient facts in support of their habeas claims, and "mere conclusory allegations on a critical issue are insufficient to raise a

constitutional issue." *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993). "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions of a critical issue in his *pro se* petition, unsupported . . . by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983).

1. Denial of Petitioner's Right to Cross Examination (Ground One)

Petitioner alleges he was denied his right to cross-examine Weathersby after the Government questioned Weathersby regarding his plea deal where he acknowledged his role and that of Petitioner in the Medicaid scheme. There is no factual basis for this claim. Petitioner did cross-examine Weathersby, as reflected in the trial transcript.[9] Accordingly, the Court finds Petitioner has failed to produce probative evidentiary support for this claim and the motion is denied as to this ground.

2. Failure to Provide Limiting Instruction as to Impeachment Testimony (Ground Two)

Petitioner contends the Court failed to provide a limitation instruction to the jury regarding the impeachment testimony the Government elicited from Weathersby. Failure to give an impeachment-only limiting instruction is assessed for plain error, which appears only when the impeaching testimony is extremely

[9] *Transcript of Jury Trial Day 2*, Document No. 249 at 61–63.

damaging, the need for the instruction is obvious, and failure to give it is so prejudicial as to affect the substantial rights of the accused. *United States v. Okpara*, 967 F.3d 503, 508 (5th Cir. 2020) (citing *United States v. Waldrip*, 981 F.2d 799, 805 (5th Cir. 1993)). Such testimony is "extremely damaging" when, e.g., it was the only evidence from which the jury could infer an element of the offense. *Id.* at 509–10. Here, Weathersby's testimony was not the only evidence of various elements of Petitioner's convictions. Petitioner's main argument contends Weathersby's impeachment testimony was impermissibly used to show Petitioner was the true beneficial owner of Acacia and maintained complete control over the company.[10] However, testimony elicited from Stephen Cox ("Cox"), a pharmaceutical wholesaler who had done business with Coleman, also could be construed by a jury to determine Petitioner owned and controlled Acacia.[11] The Court thus finds the failure to provide a limiting instruction to the jury was not extremely damaging, and thus Petitioner has failed to meet his burden. Accordingly, the motion is denied as to this ground.

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[10] *Motion Under § 2255*, *supra* note 8, at 17–18.

[11] *Transcript of Jury Trial Day 2*, Document No. 249 at 143–44, 152 (discussing his business dealings with a representative he later found out was Petitioner, and his retrieving of the pharmaceuticals from the trunk of Petitioner's car).

3. Failure to Disclose Weathersby's Plea Deal (Ground Three)

Petitioner contends Weathersby agreed to testify against Petitioner as a term of a favorable plea agreement, and such agreement should have been disclosed to the jury. The Government contends, although there was a plea agreement, cooperation against Petitioner was not a condition. Regardless, the jury did know Weathersby had entered into a plea agreement with the Government, as evidenced by Petitioner's own motion.[12] Further, Weathersby made clear on the stand he was not cooperating with the Government and did not want to testify.[13] To the extent Weathersby can be said to have cooperated with the Government, the Court finds Petitioner has not shown actual prejudice and thus cannot meet his burden. Accordingly, the motion is denied as to this ground.

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[12] *Motion Under § 2255*, *supra* note 8, at 21 ("Q: You were looking at page 13 and 15 of what's been marked as Government Exhibit 383? A: (MR. WEATHERSBY) Yes. Q. That is the plea agreement you signed? A. Right. . . . THE COURT: You signed that agreement. Is that correct, sir? THE WITNESS: Yes, sir.").

[13] *Transcript of Jury Trial Day 2*, *supra* note 8, at 32–63. Some examples of Weathersby's testimony include: "Q: Mr. Weathersby, you participated in a scheme to sell prescription drugs. Is that right? A: I refuse to answer that question. Q: Okay. . . . Q: Who established Acacia Pharma Distributors? A: I refuse to answer the question. . . . Q: In furtherance of this scheme and at Mr. Coleman's direction, you established Acacia Pharma Distributors. Is that correct? . . . THE WITNESS: (No response.) . . . Q: Is that what the plea agreement says, Mr. Weathersby? . . . THE WITNESS: That's what y'all put on there. . . . Q: Is that what that sentence of paragraph 15 says? A: That's not what I said, but that's what the paragraph said. . . . THE WITNESS: This is bullshit right here. . . . THE COURT: That is your [signature] on that [drug pedigree]? THE WITNESS: That is me saying whatever y'all put in there is what y'all want to put in there. I understand what is going on, too."

4. Inadequate Time to Prepare for Trial (Ground Four)

Petitioner contends the Court violated his right to present a defense under the Sixth Amendment by giving him insufficient time to prepare for trial. "It is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 [m]otions." *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986). As noted in the Fifth Circuit's holding on Petitioner's appeal, "the right to counsel is qualified by a court's valid but entirely distinct interest in avoiding delay." *Coleman*, 832 F. App'x at 880. A trial court is entitled to deny continuances if the court determines granting such a continuance would require delay. *See id.* (holding a court may deny a continuance for the purposes of appointing counsel when such appointment will require delay). "[A] defendant is 'not entitled to . . . repeatedly alternate his position on counsel to delay his trial or otherwise obstruct the orderly administration of justice,' " when the court has a basis for concluding the defendant is attempting to delay or obstruct proceedings. *United States v. Smith*, 895 F.3d 410, 421 (5th Cir. 2018). Here, the Court issued a written order finding that Coleman was attempting to delay proceedings.[14] Petitioner presents no argument as to why his own dilatory tactics rise

[14] *Order*, Document No. 149 at 7.

to the level of depriving him of his Sixth Amendment right. Accordingly, the motion is denied as to this ground.

5. Constructive Amendment of Indictment (Ground Five)

Petitioner contends the jury instructions impermissibly differed from the language of the indictment, namely that the indictment alleges Petitioner was the "owner" of the companies which allegedly evaded taxes, and the jury instructions charge the jury with determining whether Petitioner was the "beneficial owner" of these companies. "A constructive amendment occurs when the government changes its theory at trial, allowing the jury to convict on a broader basis than that alleged in the indictment, or when the government proves an essential element of the crime on an alternate basis authorized by the statute but not charged in the indictment." *United States v. Stanford*, 805 F.3d 557, 565 (5th Cir. 2015). An indictment is sufficient when it is "sufficiently specific to put [the defendant] on notice" and the defendant is unable to show he was "surprised or prejudiced in any way" by the information contained therein. *United States v. Girod*, 646 F.3d 304, 317 (5th Cir. 2011); *see Stanford*, 805 F.3d at 565. Here, Count Four and Count Seven of the indictment allege Petitioner violated 26 U.S.C. § 7203 by failing to file a corporate tax return for Acacia and Four Corner, respectively.[15] The jury instructions charge the jury with

[15] *See Indictment*, Document No. 1.

determining whether Petitioner was the beneficial owner of Acacia and Four Corner for the purposes of determining if Petitioner violated 26 U.S.C. § 7203. Petitioner does not contend he did not know what crime he was charged with, what year he was alleged to have committed the violation, or which businesses had allegedly failed to file a tax return. Instead, Petitioner contends he was prejudiced because the indictment used the term "owner" instead of "beneficial owner." Petitioner does not explain how his defense would have been different had the instructions used the specific term of art defined in the case law, or how he thinks he would have defeated the Government's attempts to show he was the beneficial owner. The Court thus finds Petitioner has not shown he was prejudiced by the language used in the indictment. Accordingly, the motion is denied as to this ground.

6. Ineffective Assistance of Counsel (Ground Six)

Petitioner contends he received ineffective assistance of counsel from both Odom, his second pretrial counsel, and Brian Newman ("Newman"), who represented Petitioner on appeal. The Court addresses each in turn.

a. Pretrial Counsel

Petitioner contends Odom's assistance was constitutionally ineffective because Odom was not sufficiently communicative about his trial strategy to Petitioner, he did not move to dismiss all the counts in the indictment for the reasons

Petitioner wanted them dismissed, and was unwilling to subject the case to adversarial testing.

When a petitioner challenges his conviction, the issue is whether "a reasonable probability exists that the jury would have had a reasonable doubt as to guilt." *Hernandez*, 213 F.3d at 249. "This is a heavy burden which requires a 'substantial,' and not just a 'conceivable,' likelihood of a different result. *Wines*, 691 F.3d at 604. "Counsel's errors must be 'so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.' " *Harrington*, 562 U.S. at 104. Defense counsel's strategic choices made after an investigation of law and facts relevant to plausible options are "virtually unchallengable." *Meija v. Davis*, 906 F.3d 307, 316 (5th Cir. 2018). A court reviewing those choices is required not simply to give counsel the benefit of the doubt, but to affirmatively entertain the range of possible reasons he may have had for proceeding as he did. *Id.*

Here, Odom's alleged lack of communication quite plainly does not rise to the level of creating a substantial likelihood of a different result in the outcome of the trial. Further, Odom's failure to move to dismiss the indictment for the reasons Petitioner felt the indictment should be dismissed are strategic choices. Odom may have made the choice to not file these motions because he, for example, thought the arguments would be unlikely to prevail and his time would be better spent focusing

on other aspects of the case.[16] Finally, it is not clear how Petitioner feels he was prejudiced by Odom's alleged failure to subject the case to adversarial testing. Odom withdrew from the case and Petitioner had new counsel appointed before eventually representing himself. Petitioner and his subsequent counsel had ample opportunity to subject the case to adversarial testing. Petitioner made use of this opportunity, cross examining witnesses at trial and raising numerous objections. The Court thus finds Petitioner does not show prejudice as to any alleged failure to subject the case to adversarial testing. Accordingly, the motion is denied as to ineffective assistance of Petitioner's pretrial counsel.

b. Appellate Counsel

Petitioner contends Newman provided ineffective assistance because Newman did not include in the appeal that Petitioner allegedly had no prior notice of the *Faretta* hearing. Appellate counsel "need not advance *every* argument, regardless of merit, urged by the appellant." *Evitts v. Lucey*, 469 U.S. 387, 394 (1985). Appellate counsel is expected to winnow out weaker arguments on appeal and focus on one central issue if possible, or at most on a few key issues. *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983). Appellate counsel who files a merits brief need not raise every nonfrivolous claim, but rather may select from among them in

[16] Montalvo, Petitioner's subsequent pretrial counsel, also did not file a motion to dismiss based on the grounds Petitioner desired, perhaps evincing similar judgment.

order to maximize the likelihood of success on appeal. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). The prejudice analysis on an appellate counsel claim is the same as that on a trial counsel claim. *Id.* Petitioner fails to point to any law to suggest the outcome would have been different if Newman had included the issue Petitioner brings up in his motion. The Court thus finds Petitioner has failed to show prejudice. Accordingly, the motion is denied as to the ineffective assistance of counsel ground.

7. Defective Indictment (Ground Seven)

Petitioner contends the indictment fails to sufficiently allege a crime in Count One (conspiracy to structure financial transactions) because the indictment "does not expressly allege the structured transaction involved more that [sic] ten thousand dollars."[17] Petitioner cites no authority for the proposition that an indictment for structured transactions must specifically state the reporting threshold for the indictment to stand. However, even if Petitioner were correct, Count One of the indictment contains a table of 241 itemized alleged structured transactions, which include the name of the company on whose behalf the withdrawal was allegedly made, which financial institution the withdrawal was made from, the last four digits of the account number, the date, and the amount withdrawn.[18] The Court finds Petitioner has not shown he was not reasonably put on notice by the indictment's

[17] *Motion Under § 2255*, *supra* note 8, at 40.

[18] *Indictment*, Document No. 1 at 4–10.

allegations of structured transactions, and that he has not shown he was surprised or prejudiced by the failure to include the federal financial reporting threshold. Accordingly, the motion is denied as to this ground.

8. Unconstitutional Jury Selection (Ground Eight)

Petitioner contends the jury was unconstitutionally selected and impaneled because he was "just not ready" at the time of jury selection.[19] Petitioner cites no law, case or statutory, supporting this as a means for invalidating a jury selection process. The Court thus finds Petitioner is unable to meet his burden and the motion should be denied as to this ground.

9. Failure to Deliver Copy of PSIR to Petitioner (Ground Nine)

Petitioner alleges he failed to receive a copy of the PSIR before sentencing, in violation of the Sixth Amendment. The record reflects that BOP employees attempted to deliver the PSIR and related information to Petitioner on March 26, 2019 ahead of his April 4, 2019 sentencing hearing, and that Petitioner refused delivery at this time.[20] Petitioner does not dispute this sequence of events.[21]

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[19] *Motion Under § 2255*, *supra* note 8, at 41.

[20] *March 26, 2019 Email from Gerard Rawls to Sean Beaty*, Document No. 208.

[21] The Court notes the delivery of the PSIR may not have made a difference for Petitioner, because at the sentencing hearing Petitioner refused to acknowledge his own identity, refused to recognize the Court had jurisdiction over his case, and asserted other tenets of the Moorish American sovereign citizen movement. *See Sentencing Hearing Transcript*, Document No. 266; *see also Bey v. Indiana*, 847 F.3d 559, 560–61 (7th Cir. 2017) (distinguishing the tenets of the Moorish Science Temple of America from

Petitioner cites no law requiring the delivery of the PSIR even when the defendant refuses to accept its delivery. Accordingly, the Court finds Petitioner has not met his burden and his motion is denied as to this ground.

10. Sentence Outside the Guideline Range (Ground Ten)

Petitioner contends the Court's sentence is outside the guideline range and thus violates his Eighth Amendment right to be free from cruel and unusual punishment. The sentencing guidelines do not require notice of a sentencing court's intention to vary upward, and Federal Rule of Criminal Procedure 32(h) does not apply to variances. *Irizarry v. United States*, 553 U.S. 708, 714 (2008). A sentence that does not exceed the statutory maximum is not cruel and unusual punishment. *See Castle v. United States*, 399 F.2d 642, 652 (5th Cir. 1968). The sentence does not exceed the statutory maximum for the crimes Petitioner was convicted of, and the Court announced a variance, not a departure, at sentencing. Thus, the Court finds Petitioner has not met his burden and the motion is accordingly denied as to this ground.

IV. CONCLUSION

Based on the foregoing, the Court hereby

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discredited theories asserted by so-called Moors associated with the sovereign citizen movement).

ORDERS that Petitioner Kenneth J. Coleman's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Civil Document No. 1, Criminal Document No. 283) is **DENIED**. The Court further

ORDERS that Petitioner's Motion for Leave to Amend (Document No. 285) and Petitioner's Second Motion for Leave to Amend (Document No. 286) are **DENIED AS MOOT**. The Court further

ORDERS that Petitioner's Amended 2255 Case No. 4:17CR156 (Document No. 288) is **DENIED**.

THIS IS A FINAL JUDGMENT.[22]

SIGNED at Houston, Texas, on this 20 day of May, 2022.

DAVID HITTNER
United States District Judge

[22] A district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). After careful review of the pleadings and the applicable law, the Court concludes reasonable jurists would not find its assessment of the claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 483–84 ("To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that . . . includes showing that reasonable jurists could debate whether . . . the petitioner should have been resolved in a different manner . . . ."). Because Petitioner does not allege facts showing his claim could be resolved in a different manner, a certificate of appealability will not be issued.

United States Court of Appeals for the Fifth Circuit

No. 22-20343

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

KENNETH J. COLEMAN,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-2874

ON PETITION FOR REHEARING EN BANC

UNPUBLISHED ORDER

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R. 35 I.O.P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

(APPENDIX "C")

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States of America,	§	
	§	
	§	
v.	§	C.R. ACTION NO. 4:17-156
	§	
Kenneth Coleman,	§	

ORDER

Pending before the Court is the Motion to Alter or Amend a Judgment (Document # 292). Having considered the motion and the applicable law, the Court determines that the foregoing motion should be denied. Accordingly, the Court hereby

ORDERS that the Motion to Alter or Amend a Judgment (Document # 292) is DENIED.

SIGNED on the 27 day of June, 2022.

DAVID HITTNER
United States District Judge

"APPENDIX D"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
v.	§	CRIM. No.: H-17-156 (01)
	§	CIVIL No: H-21-2874
Kenneth Coleman,	§	

O R D E R

Pending before this Court is a Motion to Reduce Sentence Pursuant to 18 USC 3582 (Inst. # 283). The Government shall file a response addressing the merits of the motion on or before October 25, 2021. Failure to respond shall be construed as nonopposition to Defendant's motion.

SIGNED at Houston, Texas, on this 3 day of September, 2021.

DAVID HITTNER
UNITED STATES DISTRICT COURT

"APPENDIX E"