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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHRISTOPHER PAUL GEORGE, Defendant-Appellant.	No. 22-55326 D.C. Nos. 5:21-cv-01705-VAP 5:12-cr-00065-VAP-2 Central District of California, Riverside ORDER (Filed Oct. 25, 2023)

Before: COLLINS and LEE, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 4) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11. No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHRISTOPHER PAUL GEORGE, Defendant-Appellant.	No. 22-55326 D.C. Nos. 5:21-cv-01705-VAP 5:12-cr-00065-VAP-2 Central District of California, Riverside ORDER (Filed Aug. 30, 2023)

Before: SCHROEDER and SANCHEZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

App. 3

22-55326
5:12-cr-00065-VAP-2; 5:21-cv-01705-VAP

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER PAUL GEORGE,
Petitioner-Appellant

v.

UNITED STATES OF AMERICA,
Respondent-Appellee

Appeal from the United States District Court
Central District of California, Riverside
Honorable Virginia A. Phillips

PETITIONER-APPELLANT'S REQUEST
FOR REHEARING *EN BANC*

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Christopher Paul George

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[1] **I.**
Introductory Statement.

En Banc rehearing in this unique case is compelled because the district court deprived Christopher Paul George (Mr. George) his Fifth Amendment due process right when the court arbitrarily failed to abide by the Rules Governing Section 2255 Proceedings for the United States District Court[1] by failing to hold an evidentiary hearing to resolve critical obvious central fact disputes.

In his *habeas* Petition, Mr. George provided, among other uncontradicted declarations and corroborating evidence, a detailed declaration from trial counsel admitting to ineffective assistance of counsel (IAC) *in several material areas.* Faced with George's corroborated *habeas* Petition, the district court issued an order directing the Government to file a Return (herein Opposition), finding by implication that George's facts

[1] 28 USC § 2255(b).

in his "motion and the files and records of the case [did not] conclusively show that [George] is entitled to no relief"[2]. Order Requiring Return Docket of 2255 Motion, 10-13-2021, Docket 5.

[2] The district court's threshold act of directing the Government to file an Opposition to George's *habeas* is uniquely important in this case because binding Local Rule 7-6, for the Central District of California, explicitly mandates:

> Evidence on Motions. Factual contentions involved in any motion ***and opposition to motions shall be*** presented, heard, ***and determined upon declarations*** and other written evidence. . . .

Local Rules, Central District of California, Rule 7-6, emphasis added. Unquestionably, Rule 7-6 is textually mandatory also upon the district court – "opposition to motions shall be . . . ***determined upon declarations***." Emphasis added. Yet, the court ignored its own binding rule and perfunctorily denied George's fully supported *habeas* on the pleadings alone.

The court's perfunctory act was a denial of George's Due Process and Sixth Amendment rights because, cavalierly, the Government filed a contentious Return devoid of any supporting declaration(s). In this failure, the Government also violated the explicit command of Rule 7-6. Despite George's diverse corroborated fact-disputes in the record, the district court

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[2] *United States v. Andrade-Larrios*, 39 F.3d 986, 991 (9th Cir. 1994).

denied George's *habeas without an evidentiary hearing. See generally*, Rules Governing Section 2255 Proceedings in United States District Courts, Rule 8 (a), 2023[3]. In so doing, the lower court [3] eviscerated the letter and spirit of 2255 and its own Local Rule and deprived George his constitutional rights.

The legal significance of the district court's failure to properly resolve the central fact/credibility determinations on the pleadings alone, is highlighted by a recent Fifth Circuit decision taken from the Second Amendment arena. In *United States v. Daniels*, 77 F.4th 337, 360-61 (5th Cir. 2023), the Fifth Circuit noted:

> Specifically, the majority insisted that, as in other legal disputes, "historical evidence" is predicated on our "***adversarial system of adjudication***," in which courts must "***decide [the] case based on the historical record compiled by the parties.***" *Id.* at 2130, n.6. In my view, this suggests that *Bruen*[4] ***requires that an evidentiary inquiry first be conducted in courts of original jurisdiction, subject to party presentation principles, aided by discovery and cross-examination and with authority to solicit expert opinion.*** [footnote omitted]

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[3] https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf (Last accessed 10-3-23).

[4] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, ___ U.S. ___, 142 S. Ct. 2111 (2022).

The same can be said here because the district court failed to fairly consider George's corroborated *habeas* "*based on the historical record compiled by the parties.*" Given that the court did not consider the fact-disputes, the court should have accepted George's allegations *as true* and granted his *habeas.* Instead, it did the opposite.

In *Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir. 1999), this Court noted of evidentiary hearings:

> [4] Under the amended statutory scheme, a district court presented with a request for an evidentiary hearing, as in this case, ***must determine whether a factual basis exists in the record to support the petitioner's claim.***

Emphasis added. The mandated procedure for a § 2255 *habeas*, like George's, should be no different than that in the 2254 in *Ducharme.*

The district court here first properly ordered the Government to file its Opposition as it should have. But then the court defeated the entire letter and spirit of the due process necessary when it *denied George's habeas*, without an evidentiary hearing. *See*, *James v. Ryan*, 679 F.3d 780, 820-21 (9th Cir. 2012), *cent* granted, judgment vacated, 133 S. Ct. 1579 (2023), where the State failed to contradict factual allegations (as here for George) and the district court *granted* the *habeas* without an evidentiary hearing.

In *Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005), this Court held of evidentiary hearings:

> Assuming that the petitioner has not failed to develop his claim and can meet one of the *Townsend* factors, "***an evidentiary hearing on a habeas corpus petition is required whenever petitioner's allegations, if proved, would entitle him to relief***." *Turner v. Marshall*, 63 F.3d 807, 815 (9th Cir. 1995) (citations omitted).
>
> The petitioner's allegations need only amount ***to a colorable claim***. [citations omitted]

[5] Emphasis added.

II.

Hearing *En Banc* is necessary for this Court to interpret the extent of a Petitioner's showing required under *Buck v. Davis*, 580 U.S. 100, 115 (2017) and the *Rules Applicable to Section 2255 Proceedings*, for a Certificate of Appealability.

George submits that *en banc* rehearing is necessary because he established that the district court's denial of his *habeas* and refusal to issue a Certificate of Appealability (COA), unconstitutionally ignored establishes procedural rules. When it ruled on George's disputed facts, the district court ignored *Buck v. Davis*, 580 U.S. 100, 115 (2017) and *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

Moreover, the petit panel disregarded *Miller-El* where the Court noted: "When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on

its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Miller-El* at 336-37.

The facts ignored by the court went directly to one of the central issues for the jury in George's trial – whether he had extricated himself from the illegal conduct of his co-defendants. The court's ignoring facts improperly enabled it to imagine nonexistent "facts" like the court's divining that trial counsel's admissions to IAC were somehow George's "***post-hoc complaints about the strategy or tactics*** [6] ***employed by defense counsel***". District court's Order denying 2255, Exhibit "A", page 4 Docket 9, 21-cv-01705-VAP, emphasis added.

George provided the court the sworn declaration of Dana Cephas, his trial counsel. Exhibit "B" here. It is obvious from the content of its order that the court failed to meaningfully consider the substance and legal significance of Cephas's specific assertions. This unusual act by the district court deprived George of his Sixth Amendment Right to the effective assistance of counsel and his Fifth Amendment Right to basic equal treatment and due process.

Trial counsel's declaration was critical to George's Petition because it raised non-conclusory facts that the district court had to either accept as true *and grant* the Petition; or, had to resolve central credibility disputes in an evidentiary hearing. The court did neither.

One of the central compelling facts in Attorney Cephas's declaration was:

> On February 2, 2015, at a status hearing when the defense was requesting a continuance of ***the March 2015*** trial date, ***I informed the Court that I was not ready for trial***. *I* specifically stated, among other things, "If we have to go to trial, I'm going to go to trial, but I really could use more time . . . there just is ***a lot of discovery***, and unfortunately, I did have some other cases I had to get rid of. I stopped taking cases when I got assigned to this case. . . ."

[7] Declaration of Attorney Dana Cephas ISO Motions for Judgment of Acquittal or New Trial, *July 6, 2015*, pages 24-27, paragraph 2, emphasis added. 12-cr-065-VAP, Docket 751. The district court granted a continuance of the trial; but the continuance was appeasing *and insufficient.*

Shortly thereafter, trial counsel again informed the court that he was *still* not ready for trial:

> At a status hearing on April 20, 2015, I requested CJA authorization for funds for a trial paralegal to assist me during trial. I requested such authorization ***because I felt I was overwhelmed with the massive amount of discovery and had been unable to review a vast amount of it.***

Id., paragraph 3, emphasis added. Expressly, Attorney Cephas still had a "massive amount of discovery" to review, assess, and competently digest in, by then, only a two-week period.

The trial itself ended up lasting *thirteen days*, with the jury deliberating for several days. Significantly, the jury acquitted George on Counts 1-4 - *the principal conspiracy allegations* - and convicted him of Counts 6-12, the counts *related to the two co-defendants* jointly tried with George. Dockets 733. Clearly not a case of overwhelming evidence of guilt at all.

In its Order denying George's *habeas*, the court incorrectly opines: "George's arguments lack merit. The jury acquitted George of the counts related to the conduct [8] of Hamid Shalviri and thus he was not prejudiced by any questioning referencing the Shalviri lease. (Cr. Doc. No.811.)" Exhibit A, page 5. In reaching this conclusion, the court ignored that George's jointly-tried co-defendants were also accused of having *conspired* with the main defendant (who earlier pleaded guilty) – Andrea Ramirez. Dockets 1 and 629. The acts of the co-defendants would be attributable to George because he was alleged to be part of their conspiracy despite the acquittal of the facts "related to the conduct of Hamid Shalviri."

Indisputably, Attorney Cephas was still unprepared one month before trial, candidly admitting – "I was worried because by April 2015, only one month before trial, I had been able to review ***only 'a fraction' of the massive discovery***. And that was the main reason why I knew I needed the help of a paralegal during trial. See, Docket 751, my Declaration of 7-06-2015." *Id.*, paragraph 4, emphasis added.

At paragraph 2 of Attorney Cephas' *July 6, 2015*, post-trial declaration, he included the following admission:

> As I informed the Court ***on several occasions***, I was only able to review ***a fraction*** of the discovery prior to trial, because over 780,000 bates-numbered pages were produced, and there were ***over a million other pages*** of un-numbered pages of documents in this case. As a result, ***the Government was able to present false arguments that I was not aware of and/or was unable to challenge at the time***.

[9] *Id.*, at page 24 of Docket 751, emphasis added. Clearly, Cephas was not prepared for trial and his admissions in paragraph 2 of his declaration, established that his warnings to the court about lack of preparation had metastasized into prejudicial harm to his client.

Cephas' admissions also underscored the exploitation of his announced lack of preparation by the Government when it introduced "false arguments" of which Cephas was "not aware of and/or was unable to challenge at the time." *Id.* None of these admissions would be meaningfully discussed by the district court in its perfunctory Order denying the Petition. *See*, discussion of district court's Order denying the 2255, below,

In his post-trial July 6, 2015, declaration Cephas cited two examples of how the Government was able to exploit his lack of preparation. The first - "For

example, when the Government asked Mr. George (during [cross-examination of] his direct testimony) why Hamid Shalviri [a Government witness and alleged co-conspirator] had signed a lease for RC Mortgage (Mr. George's separate business), I was unaware of the lease the Government was referring to." The second example was:

> Along the same lines, the Government encouraged/requested Agent Carol Mace to provide testimony ***suggesting that Agent Mace had never heard of RC Mortgage Quest until the second interview of Mr. George*** – that occurred in October 2010 (a year after the [10] raid) when in fact documents in discovery ***(that I was unfamiliar with) prove that Agent Mace had conducted several interviews concerning RC Mortgage Quest prior to the raid***, and Agent Mace participated in the search of RC Mortgage Quest on the day of the raid.

Id, emphasis added. The district court never meaningfully resolved Cepha's assertion that Agent Mace's false testimony went directly to George's trial credibility as he testified to the jury.

Attorney Cephas' additional uncontradicted declarations, provided by George in his *habeas*, are critical to this Court's en banc consideration because the district court speculated in its Order denying the *habeas*:

> ***Post-hoc complaints about the strategy or tactics employed by defense counsel*** are typically found insufficient to satisfy the first

> prong *of Strickland.* See 466 U.S. at 690; see also *People of Territory of Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir. 1984) ("***A tactical decision by counsel*** with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel."); *United States v. Simmons*, 923 F.2d 934, 956 (2d Cir. 1991) (***appellant's displeasure with strategy employed by trial counsel insufficient to establish ineffectiveness***).

Exhibit A, page 4 Docket 9, emphasis added. Cephas' declarations expressly noted that his decisions were *not strategic nor tactical*, exposing the speculative nature of the court's imagined intent by Cephas.

[11] Contrary to the court's continued speculations, George's Petition did not present one of the typical *habeas* cases - where a petitioner was simply providing "*post-hoc* complaints about the strategy or tactics employed by defense counsel." Nor was it a case where a "defendant disagrees" with "[a] tactical decision by counsel." Rather, George's facts included credible, *uncontradicted* declarations by Cephas himself. There was no "*post-hoc"* second-guessing by George of his trial attorney because, shortly after trial, Cephas *himself* had already filed *his own declaration on July 6, 2015*. Cephas' *habeas* declaration stood independently of anything George himself raised.

Predictably, the district court's Order is devoid of any meaningful discussion or analysis of the specific facts raised in trial counsel's two separate declarations. Instead, unmoored from logic and unavoidable

facts, the district court wrote of trial counsel that supposedly because he had not requested another continuance of the trial, the court simply *guessed* that Cephas' "Proceeding to trial thus was a tactical choice considering the Court's disposition to granting continuances, and any *post-hoc* complaints about this strategy are insufficient to satisfy the first prong of *Strickland*." These were naked speculations by the court and Cephas himself had contradicted them. This is but one of the many factual disputes in the record compelling an evidentiary hearing.

[12] The court also disregarded largely uncontradicted facts and misapplied the lenient standard governing issuance of a COA. In *Buck*, the Court reaffirmed the *relatively low standard* required for issuance of a COA – "the ***only*** question is whether the applicant has shown 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." Quoting *Miller-El* at 336. In a twist of irony, the Petit panel itself, without any helpful analysis, cited to a lone one-sentence quote from *Miller-El*, in its Order denying a COA.

III.
En Banc review is also compelled to cure the district court's improper denial of George's Fifth Amendment Due Process Right to fair hearing.

1. Over the Holidays, the Court Bypasses an Evidentiary Hearing and Swiftly Returns its Denial.

The district court correctly noted in its Order that George filed his Petition on October 7, 2021. 21-cv-01705-VAP, Docket 9, first paragraph, page one. The court then directed "Based upon Petitioner's Motion to Vacate, set Aside or correct Sentence filed herein and good cause appearing" the Government to file a Return (Opposition) by November 3, 3021. *Id.*, at Docket 5. The Government then filed its Opposition devoid of any supporting declaration(s). *Id.*, Docket 7. It bears repeating [13] that the court approved a violation of its own Local Rule 7-6 when it permitted the Government to file its Opposition without declaration(s). Petitioner filed his Reply on November 23, 2021. *Id.*, Docket 8.

In George's Petition, the district court was faced with the following issues, most of them admitting IAC by trial counsel:

a. Petitioner was denied effective assistance of counsel and fair trial by the Government's bad-faith cross-examination of Petitioner, without defense objection or motion for mistrial, misrepresenting a forged document as authentic.

b. Petitioner was denied effective assistance of counsel and fair trial by the Government's willful introduction of misleading, material testimony through Agent Carol Mace. *Napue/Alcorta* issues.[5]

c. Defense counsel failed to identify or investigate antagonistic defenses or pursue severance of defendants, exposing Petitioner to prejudicial evidence introduced at trial against his co-defendants.

d. Defense Counsel Failed to Explicitly Move Pretrial for Suppression of George's Proffer Statements, depriving him of effective assistance and confrontation rights.

e. The Government's misrepresentation *to this very Court* when it inaccurately represented that, at the district court level, George moved *only* for dismissal based on the introduction of his proffer statements at trial, and not suppression.

[14] f. Trial Counsel admittedly had neither identified, investigated, nor pursued obvious multiple conspiracies/duplicity motions pretrial; predictably, the issues prejudicially surfaced midtrial.

For each of his issues, George provided specific facts in declarations, transcripts, and documents. As noted, the

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[5] *Napue v. Illinois*, 360 U.S. 264 (1959) and *Alcorta v. Texas*, 355 U.S. 28 (1957).

court failed to order the Government to file any opposing sworn declaration.

Of George's first issue – trial counsel's lack of vigilance for the Government's injecting false testimony - the district court speculated - "***According to George*****,** trial counsel also was unprepared for trial." *Id.*, page 5, emphasis added. This supported allegation *by George* was not some *post-hoc* conclusory claim "according to George." Attorney Cephas' lack of preparation was in *his own multiple admissions*, and in the supporting transcripts George provided in his *habeas*.

The lower court also erroneously concluded:

> George's arguments lack merit. The jury acquitted George of the counts related to the conduct of Hamid Shalviri and thus he was not prejudiced by any questioning referencing the Shalviri lease. (Cr. Doc. No. 811.) Moreover, as detailed in this Court's Order denying the motion for a new trial, the government's cross-examination of George about the Shalviri lease was harmless "***because this evidence tended to show 'the existence of a close relationship' between [George] and Shalviri.***"

[15] *Id.*, emphasis added. But the record shows that there was no "evidence" showing any "close relationship between Petitioner and Shalviri. In fact, the Government engaged in the misleading cross-examination using the *forged* Shalviri lease precisely to falsely show that there was that "close [conspiratorial] relationship" the Government needed for all the conspiracy

counts. This false relationship allegation prejudiced George because it related to the evidence introduced by the Government at the joint trial of fraudulent actions regarding Andrea Ramirez and the codefendants, unfairly implicating George.

The trial transcript established that even the district court contemporaneously corrected Government counsel about the supposed "relationship" with Shalviri - "The Court: How can you argue that you weren't using the documents to show that Shalviri signed them? That is what you were using them for." Trial Transcript, May 22, 2015, page 28, lines 20-22 and in George's *habeas*, page 8.

Regarding George's second issue – the improper introduction of Agent Mace's false testimony to argue recent fabrication by George – the district court again visibly distorted the actual record:

> As to Agent Mace's testimony, the Court noted that references to RC Mortgage ***were brief***, Agent Mace ***did not testify falsely***, and that any "argument that the jury from [Agent Mace's] testimony drew an inference that [16] George fabricated evidence regarding the existence of RC Mortgage Quest is, at best, entirely speculative."

Id., at page 6, emphasis added. These opinions by the court are directly contradicted by the record. Agent Mace most definitely did in fact testify *falsely.*

George demonstrated the falsity of Mace's testimony when he provided the very transcript of the

direct and cross-examination of Agent Mace testifying to the jury that she had ***never*** heard George say anything about RC Mortgage (Petitioner's new office) ***in his first interview***. Therefore, that George lied in his testimony to the jury.

Contrary to the district court's speculation, the record showed this exact testimony by Agent Mace:

> Q: Now, during this interview, the second interview, did Christopher George mention RC Mortgage?
> A: Yes.
> Q: And was that ***the first time you had heard Mr. George discuss RC Mortgage***?
> A. ***Yes.***

Exhibit N in George's *habeas*, Docket 1, page 13, lines 15-28, emphasis added. This transcript explicitly dispels the court's clearly erroneous, incorrect opinion that Agent Mace did not "testify falsely." To no avail, George noted this in his Petition:

> Government counsel did not ask whether Agent Mace recalled or whether George in fact mentioned RC Mortgage at the first interview. The Government explicitly [17] provided the jury this misleading colloquy on direct, ***leaving a false impression from an official Government witness – Agent Mace – that George had fabricated his resignation and move to RC Mortgage***.

George's Petition, page 15, 5:21-cv-01705-VAP, Docket 1, emphasis added.

Following its distortion theme, the district court failed to consider, or in some instances, even failed to note, the rest of George's facts and constitutional issues. By then refusing to issue a COA, the district court presumably intended its biased resolution of George's well-developed issues to remain unreviewed.

Two additional examples from the court's Order bear exposing: 1) the "critical corroborating witness" Esther Garibay; and 2) the failure by trial counsel to identify antagonistic defenses and seek severance.

Of Esther Garibay's declaration, the court superficially concluded:

> George cannot prevail by showing that calling Garibay to testify would have been a reasonable decision, or that counsel failed to pursue it. Instead, ***he must allege facts supporting an inference that his trial counsel's strategy or the execution of it was unreasonable***. Strickland, 466 U.S. at 689.

Order, page 7, emphasis added. But George did in fact "***allege facts supporting an inference that his trial counsel's strategy or the execution of it was unreasonable.***" He did so in trial counsel's own sworn declaration. The court ignored, even in the [18] absence of a contrary opposing declaration from the Government, that Attorney Cephas' declaration noted of the value of Garibay's available testimony:

> But I . . . [was] able to interview one of those witnesses – Esther Garibay. ***Ms. Garibay was a critical witness corroborating*** Mr.

> George's defense ***and one of my prospective trial witnesses. Because I was overwhelmed during trial by the Shalviri surprise, I decided not to call her as a witness***.

Cephas second declaration September 29, 2021, emphasis added. Expressly, Cephas' failure to call Garibay to testify was *not at all reasonable strategy.*

As to George's antagonistic defenses/failure to move for severance of defendants, at footnote 5, page 9 of its Order, the court casually writes this facile conclusion:

> To the extent George argues that trial counsel failed to move for severance based on antagonistic defenses with Ramirez, this argument fails. (Motion at 16.) ***Ramirez did not proceed to trial and George fails to identify any of Ramirez's testimony that would have affected the outcome of the trial***. . . .

Id., emphasis added. What the district court also did with this issue was to fail to meaningfully consider the statements of Ramirez's *co-conspirators and employees* – Buck and DiRoberto – *jointly tried with George* and the *uncontradicted* admission by Cephas in his second declaration.

[19] The district court's obvious failure to directly address the contested facts provided by George in his Petition, raises questions among jurists of reason that the court's resolution of the constitutional

issues presented by George support issuance of a COA. *See*, *Buck and Miller-El*, below.

IV.
A Certificate of Appealability was compelled by George's "substantial showing that the lower court deprived him of his "constitutional right" under *Miller-El.*

Title 28 U.S.C. Section 2253(c)(2) provides - "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." Christopher Paul George submits that the facts in his *habeas*, in his trial counsel's declarations, in his exhibits, and in the uncontradicted facts in Esther Garibay's declaration, he met and exceeded the relatively liberal standard for issuance of a COA, as established by the U.S. Supreme Court in *Buck* at 773.

And George has also met the standard under *Barefoot v. Estelle*, 453 U.S. 880, 893 fn. 4 (1983), where the Supreme Court held that to make a "substantial showing", a petitioner seeking a COA must show that: (1) the issues are debatable among jurists of reason, (2) a court could resolve the issues in a different manner, *or* (3) the questions are "adequate to deserve encouragement to proceed further."

[20] The "debatable among jurists of reason" is a *very low barrier.* A petitioner need not show that some jurists would grant his petition. *Miller-El*, at 338. A claim can be considered "debatable" even if every

reasonable jurist would agree that the petitioner will not prevail. *Id.* The petitioner must prove "something more than the absence of frivolity or the existence of mere good faith on his or her part." *Id.* (internal quotations omitted). Plainly, George's Petition, and its supporting declarations and evidence, undeniably established that he far surpassed the threshold notion that he merely and simply made a showing of "absence of frivolity."

IV.
Statement of Counsel in Support of Rehearing *En Banc.*

Pursuant to Federal Rules of Appellate Procedure, Rule 35(b)(1)(A), Mr. George seeks rehearing en Banc because it is the respectful, good faith belief of counsel that this case involves an Order from the district court (and from the Petit Panel) which "conflict(s) with a decision of the United States Supreme Court."

[21] CONCLUSION

For the reasons stated herein, Mr. George respectfully asks this Court to grant rehearing *en banc.*

Respectfully submitted,

Date: October 9, 2023 /s/ Ezekiel E. Cortez

EZEKIEL E. CORTEZ
Attorney for
Christopher Paul George

[22] **C.A. No. 22-55326**
D.C. Nos. 5:21-cv-01705-VAP and
5:12-cr-00065-VAP-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER PAUL GEORGE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 40-1 (a), I certify that the Petition for En Banc Rehearing Appellant George is:

- Proportionately spaced, with a typeface of 14 points or more; and
- Contains 4,197 words, including footnotes and quotations.

Respectfully submitted,

Date: October 9, 2023. s/ Ezekiel E. Cortez
Ezekiel E. Cortez
Attorney for Petitioner-Appellant,

[23] **UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

CHRISTOPHER PAUL GEORGE Petitioner-Appellant, vs. UNITED STATES OF AMERICA, Respondent-Appellee.	U.S.C.A. No. 22-55326 5:12-cr-00065-VAP 5:21-cv-01705-VAP **CERTIFICATE OF SERVICE**

I, the undersigned, say:

1. That I am over eighteen (18) years of age, a resident of the county of San Diego, State of California, not a party in the within action, and that my business address is 550 West C Street, Suite 620, San Diego, California 92101.

2. That I electronically filed the Petition for Rehearing *En Banc* for Appellant Christopher Paul George with the U.S. Court Appeals for the Ninth Circuit in San Francisco, California.

3. That I served the within Petition for Rehearing/ Rehearing *En Banc* on counsel for Appellee by electronic service. And,

4. That I mailed an additional copy to Petitioner-Appellant Christopher Paul George and the same were delivered and deposited in the United States mail at San Diego County, California, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 9, 2023, at San Diego, California.

/s/ Ezekiel E. Cortez
EZEKIEL E. CORTEZ

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. CHRISTOPHER PAUL GEORGE, Defendant.	Case Nos. 21CV ED CR 12-65 (B) VAP **DECLARATION OF TRIAL COUNSEL DANA CEPHAS ISO PETITION FOR A *WRIT OF HABEAS CORPUS* TO VACATE CONVICTION AND SENTENCE BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL AND BECAUSE VERDICT RESTS ON FALSE TESTIMONY AND "EVIDENCE"** (Filed Oct. 7, 2021)

I, Dana Cephas, trial counsel for Petitioner Christopher Paul George, hereby declare the following in support of George's Petition for a *writ* of *habeas corpus*:

1. In April of 2014, I was appointed under the CJA to take over representation of Petitioner from his then CJA counsel Kenly Kiya Kato. The case had been classified as complex from

the outset and contained at that time vast quantities of discovery, "1.5 million pages of documents", and thousands of witnesses. *See*, Docket 167. The

2. On February 2, 2015, at a status hearing when the defense was requesting a continuance of the March 2015 trial date, I informed the Court that I was not ready for trial. I specifically stated, among other things, "If we have to go to trial, I'm going to go to trial, but I really could use more time . . . there just is a lot of discovery, and unfortunately, I did have some other cases I had to get rid of. I stopped taking cases when I got assigned to this case. . . ." *See*, Transcript page 41, lines 11-15.

3. At a status hearing on April 20, 2015, I requested CJA authorization for funds for a trial paralegal to assist me during trial. I requested such authorization because I felt I was overwhelmed with the massive amount of discovery and had been unable to review a vast amount of it.

4. Therefore, at the April 20, 2015 status hearing, I informed the Court " . . . when I'm done here [for the day during trial], I'm going to sit in my office and continue to work and then on the weekends. And I know the Government will have two or three paralegals working all weekend along." *See*, Transcript pages 55-56. I was worried because by April 2015, only one month before trial, I had been able to review only "a fraction" of the massive discovery. And that was the main reason why I knew I

needed the help of a paralegal during trial. *See*, Docket 751, my Declaration of 7-06-2015.

5. Predictably, during trial, I was caught by surprise at a critical point on May 21, 2015, when the Government suddenly pulled a surprise move by cross-examining Mr. George about the existence of office leases, purportedly for Mr. George's office, signed by a cooperating co-defendant and lawyer Hamid Shalviri, who had been given a sweetheart deal by the government. Neither I, nor Mr. George, had prior knowledge of the specific leases the government was referring to because of my inability, as I tried to warn the Court many times, to review the discovery. The lease that the government contended was signed by Shalviri was not in the Government's Exhibit list and Shalviri was not in the Government's witness list.

6. The Government's use at trial, of what it knew to be forged leases, was ostensibly to show that Mr. George was lying when he testified. The Government essentially argued that because Shalviri signed a lease for Mr. George, he and Shalviri were in fact working together and maybe even "friends." This left a prejudicial mischaracterization for the jury because it falsely represented that George was not credible in his denial about the leases the Government claimed Shalviri had "signed" for Mr. George. Because of my surprise at these "new" documents and the fact that the Government's misrepresentation initially caused me to believe that the forged

leases were genuine, I did not immediately object nor move for mistrial.

7. Because I was caught off guard by the Government's use of a forged document, that same evening - May 21, 2015 - I carefully reviewed the discovery, found the Shalviri leases, and noticed that they appeared to be signed in handwriting that was obviously facially different from Shalviri's known signature (which was on his plea agreement). I then found and reviewed the related reports of the pretrial proffer sessions the Government had with Mr. Shalviri wherein he disavowed knowledge of the purported lease. Shalviri told the Government that Andrea Ramirez, the main defendant in this case, used to forge documents and that he had neither seen the suspect leases, nor signed them at all. Yet, despite the fact that Mr. Shalviri had told the Government agents and prosecutor that it was not his signature on the lease, the Government went ahead and cross-examined George and intentionally misled the jury and the court by letting them believe that the forged leases were genuine.

8. On May 22, 2015, in the midst of trial, I filed a Motion to Dismiss for Outrageous Government Conduct. [Docket 665]

9. At the close of the evidence, during the jury instruction conference and for hearing on my motion to dismiss because of prosecutorial misconduct, I specifically noted of the forged Shalviri leases: "And so they [the

Government] have misled the jury to believe that Mr. George and Shalviri were friends because Shalviri signed those. In his proffer session, he said no, he didn't sign them [the forged leases]. . . ." *See*, May 22, 2015, Transcript pages 13-18. The Court denied my Motion to Dismiss.

10. After trial, on July 6, 2015, I filed a Rule 29 Motion for Judgment of Acquittal and for New Trial. I supported those motions by my sworn declaration and that of Mr. George. I have reviewed my declaration and hereby adopt it. I again affirm that, because of my lack of effective preparation, "the Government was able to present false arguments that I was not aware of and/or was unable to challenge at the time." *See*, *Declaration of Dana Cephas*, July 6, 2015, docket 751, paragraph 2.

11. My inability to review a large part of the discovery caused me to also be unable to interview most of the witnesses. But I, and Attorney Kato before me, were able to interview one of those witnesses - Esther Garibay. Ms. Garibay was a critical witness corroborating Mr. George's defense and one of my prospective trial witnesses. Because I was overwhelmed during trial by the Shalviri surprise, I decided not to call her as a witness. [See, Esther Garibay Declaration, Petitioner's Exhibits]

12. The detailed pre-indictment proffer statements extracted by the Government from Mr. George and Andrea Ramirez, even as they

> were jointly represented by obviously conflicted counsel Kathleen Moreno, contained a clear basis for an antagonistic defense for George. They also raised possible separate conspiracies and the likely duplicity in the Superseding Indictment. But I did not think about antagonistic defenses nor about duplicity.

I declare the foregoing under oath and to the best of my abilities.

Dated: September 29, 2021

Declarant,

/S/ Dana Cephas
Dana Cephas

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHRISTOPHER PAUL GEORGE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case Nos. **EDCV 21-01705-VAP** EDCR 12-00065-VAP-2 **ORDER REQUIRING RETURN OF §2255 MOTION** (Filed Oct. 13, 2021)

Based upon Petitioner's Motion to Vacate, Set Aside or Correct Sentence filed herein and good cause appearing:

IT IS HEREBY ORDERED that the United States Attorney file a Return to the motion on or before November 3, 2021, accompanied by all records, and that Respondent serve a copy of the Return upon the Petitioner prior to the filing thereof.

NO EXTENSIONS OF TIME WILL BE GRANTED EXCEPT FOR GOOD CAUSE SHOWN UNDER EXTRAORDINARY CIRCUMSTANCES.

IT IS FURTHER ORDERED that if the Petitioner desires to file a Reply to the Return, he shall do so twenty-one days from the Return filing date, setting forth separately: (a) his admission or denial of any new factual allegations of the Return, and (b) any additional legal arguments.

IT IS FURTHER ORDERED that if any pleading or other paper submitted to be filed and considered by the Court does not include a certificate of service upon the Respondent, or counsel for Respondent, it will be stricken from this case and disregarded by the Court.

Dated: 10/31/2021 /s/ Virginia A. Phillips
Virginia A. Phillips
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

United States of America, Plaintiff/Respondent, v. Christopher Paul George, Defendant/Petitioner.	Case No. **5:21-cv-01705-VAP**✓ 5:12-cr-00065-VAP-2 **Memorandum and Order DENYING Motion under 28 U.S.C. Section 2255 and Dismissing Action (Doc. No. 1)** (Filed Feb. 16, 2022)

Christopher Paul George ("George") filed a Motion to Vacate, Set Aside, or Correct Sentence ("Motion") on October 7, 2021. (Doc. No. 1.)[1] Respondent United States of America ("Respondent") filed its Opposition ("Opp'n") to the Motion on November 3, 2021. (Doc. No. 7.) George filed a Reply on November 23, 2021. (Doc. No. 8.)

I. BACKGROUND

After a one-month trial, a jury convicted George of mail and wire fraud, and conspiracy to commit mail and wire fraud, as charged in Counts 6 through 12 of the indictment. (Cr. Doc. No. 733.) The Court sentenced

[1] Docket entries in this Order refer to the docket in Case No. 5:21-cv-01705-VAP. Docket entries in George's underlying criminal case, Case No. 5:12-cr-00065-VAP-2, are referred to as "Cr. Doc."

George to 240 months in custody and 5 years supervised release. (Cr. Doc. No. 911.)

George appealed his conviction and sentence to the Ninth Circuit Court of Appeals. Although the Ninth Circuit affirmed George's conviction, it found that the district court erred in imposing a two-level enhancement under U.S.S.G. § 2B1.1(b)(9)(A) and remanded the case for resentencing. (Cr. Doc. No. 1142); *United States v. George*, 713 F. App'x 704, 704-06 (9th Cir. 2018). On remand, the district court re-sentenced George to 235 months of custody and 5 years supervised release. (Cr. Doc. No. 1156.)

George again appealed to the Ninth Circuit. (Cr. Doc. No. 1157.) The Ninth Circuit rejected George's appeal and issued its Mandate on April 20, 2020. (Cr. Doc. No. 1214.) George then timely filed a Petition for Writ of Certiorari ("Petition") to the U.S. Supreme Court on September 8, 2020.[2] (Ex. R, Doc. No. 8-3.) The Supreme Court denied George's Petition on October 13, 2020. (Ex. Q, Doc. No. 8-2.) George timely filed this Motion on October 7, 2021.[3] (Doc. No. 1.)

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[2] George's Petition was timely because the Supreme Court extended filing deadlines 150 days. *See* Order List: 589 U.S.

[3] Although Respondent argues George's claims are procedurally barred, (Opp'n at 13-14), George's Motion is timely because he filed it within one year of the Supreme Court denying his Petition. *See United States v. Aguirre-Ganceda*, 592 F.3d 1043, 1045 (9th Cir. 2010) ("[F]inality occurs when the Supreme Court 'affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari

II. DISCUSSION

George raises five claims for relief in his Motion, all asserting he was denied his Sixth Amendment right to effective assistance of counsel.

A. Legal Standard

Section 2255 authorizes the Court to "vacate, set aside or correct" a sentence of a federal prisoner that "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). Claims for relief under section 2255 must be based on some constitutional error, jurisdictional defect, or an error resulting in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 783-84 (1979). The Sixth Amendment recognizes that "'the right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

To prevail on an ineffective assistance of counsel claim, a petitioner must show (1) that his counsel's performance was deficient and (2) that such deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687. The standard for deficient performance is deferential. "There is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional

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petition expires.'") (quoting *Clay v. United States*, 537 U.S. 522, 527 (2003)).

assistance.'" *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998) (quoting *Strickland*, 466 U.S. at 689). If the petitioner fails to establish either prong of the *Strickland* test, relief cannot be granted. *Strickland*, 466 U.S. at 700.

Post-hoc complaints about the strategy or tactics employed by defense counsel are typically found insufficient to satisfy the first prong of *Strickland. See* 466 U.S. at 690; *see also People of Territory of Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir. 1984) ("A tactical decision by counsel with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel."); *United States v. Simmons*, 923 F.2d 934, 956 (2d Cir. 1991) (appellant's displeasure with strategy employed by trial counsel insufficient to establish ineffectiveness).

To show prejudice, "[t]he [petitioner] 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." *Strickland*, 466 U.S. at 694.

B. First Claim: Cross-Examination of George Regarding the Shalviri Lease

George first claims that his trial counsel's failure to object, or file a motion for mistrial, to the government's questioning of George about the forged Shalviri

lease constitutes ineffective assistance of counsel.[4] (Motion at 5-10.) According to George, trial counsel also was unprepared for trial. (*Id.* at 9.)

George's arguments lack merit. The jury acquitted George of the counts related to the conduct of Hamid Shalviri and thus he was not prejudiced by any questioning referencing the Shalviri lease. (Cr. Doc. No. 811.) Moreover, as detailed in this Court's Order denying the motion for a new trial, the government's cross-examination of George about the Shalviri lease was harmless "because this evidence tended to show 'the existence of a close relationship' between [George] and Shalviri." (Cr. Doc. No. 811.) Accordingly, even assuming any error in the failure to object to the cross-examination, the result of George's conviction on the remaining counts would not have been different. (Cr. Doc. No. 811.); *see also Strickland*, 466 U.S. at 694

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[4] Respondent's arguments that George's First, Second, and Fifth claims are procedurally barred because he did not raise them on direct appeal lack merit. The U.S. Supreme Court has ruled unequivocally that ineffective assistance of counsel claims may be raised for the first time in a section 2255 motion. "[F]ailure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massaro v. United States*, 538 U.S. 500, 509 (2003); *see also United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000) (holding that generally ineffective assistance of counsel claims should be raised in a 28 U.S.C. § 2255 motion rather than on direct appeal). The Ninth Circuit's February 27, 2019, mandate also noted that "[t]he record is not sufficiently well-developed to review George's ineffective assistance of counsel claim on direct review and we therefore defer any review of this claim to a motion under 28 U.S.C. § 2255." (Cr. Doc. No. 1142.)

("[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

George's contention that trial counsel was unprepared for trial also fails. (Motion at 9.) The Court previously approved five stipulated requests by pre-trial counsel to continue the trial date. (Cr. Doc. Nos. 118, 126, 196, 198, 204, 269, 280, 333, 336, 409, 410.) Trial counsel requested, and the Court granted, only one continuance of the trial date so he "could use more time" to prepare for trial. (Ex. B, Doc. No. 1-1; Cr. Doc. Nos. 498, 502.) Trial counsel, however, requested no further continuances nor informed the Court he was unprepared to proceed to trial on May 5, 2015. Proceeding to trial thus was a tactical choice considering the Court's disposition to granting continuances, and any post-hoc complaints about this strategy are insufficient to satisfy the first prong of *Strickland*. *See* 466 U.S. at 690; *see also Santos*, 741 F.2d at 1169.

Accordingly, George is not entitled to habeas relief on his First Claim.

C. Second Claim: Agent Carol Mace's Testimony Regarding RC Mortgage; and Calling Esther Garibay as a Witness

George also claims ineffective assistance of counsel based on trial counsel's failure to object to Agent Carol Mace's ("Agent Mace") testimony regarding RC Mortgage; he claims the testimony implied George

fabricated his resignation and move to RC Mortgage. (Motion at 10-16.) According to George, trial counsel also was ineffective because he failed to call Esther Garibay ("Garibay") to testify as she would have corroborated George's testimony. (*Id.* at 15.)

George's arguments again are unpersuasive. As to Agent Mace's testimony, the Court noted that references to RC Mortgage were brief, Agent Mace did not testify falsely, and that any "argument that the jury from [Agent Mace's] testimony drew an inference that George fabricated evidence regarding the existence of RC Mortgage Quest is, at best, entirely speculative." (Cr. Doc. No. 811.) In other words, even assuming trial counsel's failure to object to Agent Mace's testimony was unreasonable, George was not prejudiced by the brief references to RC Mortgage. *See Strickland*, 466 U.S. at 694.

Trial counsel's failure to call Garibay as a witness also was not unreasonable or prejudicial. George cannot prevail by showing that calling Garibay to testify would have been a reasonable decision, or that counsel failed to pursue it. Instead, he must allege facts supporting an inference that his trial counsel's strategy or the execution of it was unreasonable. *Strickland*, 466 U.S. at 689. He has failed to do so and thus George's post-hoc complaints about this strategy is insufficient to satisfy the first prong of *Strickland. See* 466 U.S. at 690; *see also Santos*, 741 F.2d at 1169.

George suffered no prejudice because of trial counsel's decision not to call Garibay to testify. Although

Garibay declares George frustrated Andrea Ramirez's ("Ramirez") efforts to deceive homeowners, (Ex. D, Doc. No. 1-1), other sufficient evidence presented to the jury linked George to the conspiracy, including:

- "codefendants George and Ramirez formed 21st Century in 2008, with each of them owning 50% of the company;
- George was listed as the CEO or President on various corporate documents;
- he helped manage the company's day-to-day operations;
- he opened numerous bank accounts in the company's name;
- he set up and directed the use of the automatic calling system that generated the calls from potential customers;
- he was paid substantial sums by the company; and
- he personally directed employees to make false representations to customers."

(Cr. Doc. No. 811.) Accordingly, George has not shown that Garibay's omission as a witness affected the outcome of the trial. *Strickland*, 466 U.S. at 694.

For the reasons stated above, George fails to show he is entitled to relief on the basis of his Second Claim.

D. Third Claim: Antagonistic Defenses and Severance from Co-Defendants

George next argues that trial counsel provided ineffective representation when he failed to investigate antagonistic defenses or pursue severance from co-defendants Albert DiRoberto ("DiRoberto") and Crystal Buck ("Buck"). (Motion at 16-19.)

Even assuming, without deciding, that trial counsel's failure to investigate or pursue severance was objectively unreasonable, George fails to establish the second prong of the *Strickland* test, and thus is not entitled to relief on this basis. As Buck never testified at trial, no testimony exists for George to base an antagonistic defense and pursue severance from Buck. As to DiRoberto's testimony, George fails to point to specific statements that he had to defend against or that would have affected the outcome of the trial.[5] Moreover, the Ninth Circuit found Buck's and DiRoberto's out-of-court statements "did not affect George's substantial rights," i.e., the error did not affect the outcome of the trial. *See United States v. Olano*, 507 U.S. 725, 734 (1993) ("For an error to affect 'substantial rights,' it 'must have been prejudicial: It must have affected the outcome of the district court proceedings."). Finally, sufficient evidence, other than Buck's or DiRoberto's

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[5] To the extent George argues that trial counsel failed to move for severance based on antagonistic defenses with Ramirez, this argument fails. (Motion at 16.) Ramirez did not proceed to trial and George fails to identify any of Ramirez's testimony that would have affected the outcome of the trial. *See Strickland*, 466 U.S. at 694

statements, supported George's conviction on mail and wire fraud, and conspiracy. (*See e.g.*, Cr. Doc. No. 811) ("Cynthia Lopez testified that Defendant George told employees 'to tell customers that their money was going to be paid to their lenders.'"; "Melissa Pearson testified that Defendant George told her to misrepresent to customers"; "it was not necessary for the jury to find Defendant George conspired with either Buck or DiRoberto, only that he knowingly entered into an agreement to commit mail or wire fraud with at least one other person. There was sufficient evidence here to support a rational trier of fact's decision that he conspired with Andrea Ramirez").

Accordingly, George is not entitled to habeas relief on his Third Claim.

E. Fourth Claim: George's Pre-Indictment Proffer Statements

George contends that his counsel's failure to suppress his pre-trial indictment proffer statements constituted ineffective assistance.[6] (Motion at 19-21.)

This argument is unavailing. Trial counsel's decision not to pursue a futile motion to suppress George's proffer statements is not unreasonable. The Court denied pre-trial counsel's motion to dismiss the indictment, and alternatively, to suppress George's proffer

[6] As George provides no facts or authority for his conclusory statement that trial-counsel's failure to cross-examine Ramirez's proffer statement deprived him of his confrontation rights, he fails to show ineffective assistance. *Strickland*, 466 U.S. at 689.

statement. (Cr. Doc. Nos. 157, 210.) It was thus reasonable for trial counsel not to file a futile motion to suppress, or a motion *in limine* suppressing, George's proffer statements based on the same arguments the Court already rejected. *See Santos*, 741 F.2d at 1169 ("A tactical decision by counsel with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel."); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("[T]he failure to take a futile action can never be deficient performance . . . ").

Even assuming for the sake of this motion that trial counsel's actions were unreasonable, George does not show how his pre-indictment proffer statements prejudiced him.[7] George argues in a conclusory statement only that he was prejudiced because the jury considered "inadmissible proffer statements." (Motion at 21.) He fails, however, to identify the specific proffer statements that would have changed the outcome of the verdict. *Strickland*, 466 U.S. at 694.

For the reasons stated above, George fails to show he is entitled to relief on the basis of his Fourth Claim

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[7] George's contention that Respondent misrepresented the waiver of suppression issue to the Ninth Circuit is inapposite. (Motion at 19-20.) The Ninth Circuit's February 27, 2018, Memorandum made no reference to the waiver issue and thus any representation about it did not prejudice George.

F. Fifth Claim: Theories of Multiple Conspiracies or Duplicity

In his final claim, George argues his trial counsel provided ineffective assistance for failing to identify, anticipate, or pursue theories of multiple conspiracies or duplicity. (Motion at 21-24.)

Trial counsel's performance was not deficient and thus this argument lacks merit. Although George argues that trial counsel never pursued the theory of multiple conspiracies, it is insufficient to show that this strategy is reasonable or that counsel failed to pursue it. As George failed to show this strategy was unreasonable, he thus fails to show trial counsel's strategy was deficient. *Strickland*, 466 U.S. at 689; *see also Santos*, 741 F.2d at 1169.

Even if trial counsel had pursued a theory of multiple conspiracies or duplicity, George fails to identify the facts, evidence, or other conspiracies that would have affected the outcome of the trial. (Motion at 22.) Notably, the Court explained "that it found the evidence of multiple conspiracies 'slight.'" (Cr. Doc. No. 811.) Failure to pursue other theories thus did not prejudice George as there was sufficient evidence to establish the conspiracy as charged. (*Id.*)

Accordingly, George is not entitled to habeas relief on his Fifth Claim.

III. CONCLUSION

For the reasons state above, the Court **DENIES** the Motion to Vacate, Set Aside, or Correct Sentence and dismisses this action with prejudice. Moreover, to the extent George seeks a Certificate of Appealability, such request is **DENIED**. George failed to demonstrate a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A Certificate of Appealability shall not issue.

IT IS SO ORDERED.

Dated: 2/16/22

/s/ Virginia A. Phillips
Virginia A. Phillips
United States District Judge