APPENDIX

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JONATHAN MOTA, Defendant.	Case No. 13-cr-00093-JST-1 **ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT UNDER 28 U.S.C. § 2255** Re: ECF No. 538

Before the Court is Defendant Jonathan Mota's motion to vacate his judgment under 28 U.S.C. § 2255. ECF No. 538. The Court will deny the motion.

I. BACKGROUND

On February 21, 2013, Mota was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). ECF No. 1. On June 27, 2013, Mota was charged in a superseding indictment of one count of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count One); one count of use or possession of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (Count Two); one count of causing the death of a person through use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(j) (Count Three); and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) (Count Four). ECF No. 19 at 3–6.

Count Four was severed pending trial on Counts One, Two, and Three. ECF No. 163 at 3–4. At trial, the jury convicted Mota of Counts One, Two, and Three. ECF No. 423 at 1–2. The jury made a special finding on Count Three that the government had not proven beyond a reasonable doubt that Mota committed first-degree murder, but that the government had proven beyond a reasonable doubt that Mota committed second-degree murder. *Id.* at 3. Subsequently, the government voluntarily dismissed Count Four. ECF No. 462 at 1. This Court sentenced Mota

to life on Count Three and 240 months on Count One to run concurrently, as well as ten years on Count Two to run consecutively to all other counts, for a total term of life plus ten years. *Id.* at 2.

Mota appealed his conviction to the Ninth Circuit, ECF No. 460, arguing that: (1) the Court erred by denying him the use of a pen during pretrial hearings and refusing to order the government to provide him additional notice to prepare while in custody; (2) the Court constructively amended the superseding indictment by instructing the jury it could convict on Count Three upon proof of second-degree murder and on Count One upon proof of elements taken from the statutory definition of Hobbs Act Extortion; (3) his convictions on Counts Two and Three were multiplicitous, exposing him to double jeopardy; (4) Hobbs Act robbery, as applied to the robbery of a single convenience store, violates the Commerce Clause; and (5) the Court erred in instructing that a "probable or potential" effect would satisfy the interstate commerce element of Count One. *United States v. Mota*, No. 16-10468 (9th Cir.), Dkt. 29. Mota also moved for leave to file a supplemental brief arguing that Hobbs Act robbery is not categorically a crime of violence under Section 924(c)(3), *id.* Dkt. 45–46, but his motion was denied, *id.* Dkt. 62. The Ninth Circuit vacated Mota's conviction and sentence under Count Two as multiplicitous, but affirmed the judgment in all other respects. *United States v. Mota*, 753 F. App'x 470 (9th Cir. 2019). The Supreme Court denied Mota's petition for writ of certiorari. *Mota v. United States*, 140 S. Ct. 962 (2020). This Court issued its amended judgment on September 21, 2020. ECF No. 507.

On April 30, 2021, Mota timely filed a motion to vacate his sentence under Section 2255. ECF No. 508. Mota then amended his motion to vacate on October 4, 2021. ECF No. 514. After the government's opposition brief was filed, the Court granted Mota's former counsel's motion to withdraw and appointed counsel to file a reply brief. ECF No. 520. Mota, through his new counsel, filed a reply to the government's opposition on August 5, 2022. ECF No. 526. In that reply, Mota raised, for the first time, claims related to ineffective assistance of appellate counsel and requested leave to file a second amended motion to raise an ineffective assistance of appellate counsel claim. After ordering the government to file an opposition or statement of non-opposition to Mota's request for leave to amend, the Court granted Mota's request to file a second amended

motion to vacate. ECF No. 533. This motion now follows.

II. LEGAL STANDARD

Defendant brings this motion to vacate his sentence under 28 U.S.C. § 2255, which provides that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

"Under 28 U.S.C. § 2255, a federal court may vacate, set aside, or correct a federal prisoner's sentence if the sentence was imposed in violation of the Constitution or laws of the United States." *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011).

III. DISCUSSION

Mota moves under Section 2255 to vacate his sentence on the following grounds: (1) the predicate offense underlying his Section 924(j) conviction is not a "crime of violence"; (2) he was acquitted of first-degree murder and is actually innocent of second-degree murder, or alternatively, there was insufficient evidence to support his Section 924(j) conviction; (3) the government withheld material impeachment evidence in violation of Mota's right to due process; (4) the jury received improperly redacted trial exhibits, in violation of the Fifth and Sixth Amendments; (5) there was juror bias and misconduct, in violation of the Sixth Amendment; and (6) Mota received ineffective assistance of appellate counsel. *See generally* ECF No. 538. The government opposes Mota's motion, arguing that each of the grounds on which Mota's motion rests is both precluded and fails on the merits. ECF No. 548. On reply, Mota counters that any procedural default on his claims is excused by cause and prejudice or actual innocence and reasserts his arguments on the merits. ECF No. 555.

A. Bar to Relitigation

Before reaching the merits of Mota's claims, the Court must determine whether, as the government argues, he is procedurally barred from raising them. The government argues that Mota is barred from relitigating the issues raised in Grounds One, Two, and Three of his amended

Section 2255 motion because he raised them on direct appeal. ECF No. 548 at 19, 24, 28.

"Issues disposed of on a previous direct appeal are not reviewable in a subsequent [Section] 2255 proceeding." *United States v. Currie*, 589 F.2d 993, 995 (9th Cir. 1979). "When a defendant has raised a claim and has been given a full and fair opportunity to litigate it on direct appeal, that claim may not be used as basis for a subsequent § 2255 petition." *United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000). "The fact that the issue may be stated in different terms is of no significance." *Currie*, 589 F.2d at 995.

1. Ground 1

In Ground 1 of his second amended petition, Mota argues that while the predicate "crime of violence" underlying Count Three was Hobbs Act robbery, the jury was only instructed on the elements of Hobbs Act extortion, which is not categorically a crime of violence. ECF No. 538 at 11. Thus, he argues that his "conviction of Count Three cannot stand." *Id*. The government argues that Mota raised his claim that the jury conviction him of Hobbs Act extortion (as opposed to robbery) before the Ninth Circuit and therefore cannot relitigate this claim on collateral review. ECF No. 548 at 19–20.

On direct appeal, Mota argued that the Court's jury instructions on Count One constructively amended the superseding indictment, resulting in his conviction for extortion, not robbery. *See Mota*, No. 16-10468, Dkt. 29. Specifically, he averred that "on Count One [the Court] instructed the jury on the elements of Hobbs Act extortion, despite the indictment charging only Hobbs Act robbery. [This] impermissibly permitted conviction on charges other than those found by the grand jury." *Id.* at 22. Rejecting Mota's argument, the Ninth Circuit ruled that Mota's constructive amendment argument failed on plain error review, as "[t]he jury could not have found that Forrest Seagrave consented to Mota taking property, when Seagrave was attempting to stop the crime up until the moment he was fatally shot." *Mota*, 753 F. App'x at 471.

In his Section 2255 motion, Mota argues his claim differs from his constructive amendment claim on direct appeal because "he is raising a different claim involving a different legal right"—namely, that "his conviction under the Hobbs Act is not a predicate 'crime of violence'" that can support a Section 924(j) conviction. ECF No. 555 at 8. Although Mota

concedes that the Section 2255 claim "rests, in part, on the argument that the jury was instructed on Hobbs Act extortion rather than robbery," he claims that this "does not transform this categorical analysis claim into a constructive amendment claim." *Id*. However, the Ninth Circuit found that the jury could not have convicted Mota of extortion, as the jury "*could not* have found" the required element of consent on the evidence presented to them. *Mota*, 753 F. App'x at 471 (emphasis added). As such, his argument that the jury did, in fact, convict him of Hobbs Act extortion is barred; this issue was raised, and disposed of, on direct appeal.

Mota further argues that "Hobbs Act robbery is not a 'crime of violence' under the elements clause of 18 U.S.C. § 924(c)(3)(A)." ECF No. 538 at 15. The government contends that "Mr. Mota already raised this issue on direct appeal and therefore is barred from relitigating it now." ECF No. 548 at 21. The government is correct that, on direct appeal, Mota filed a motion for leave to file a supplemental brief arguing that Hobbs Act robbery is not categorically a crime of violence. *Mota*, No. 16-10468, Dkt. 45–46. However, as the government recognizes in a footnote, Mota's motion for leave was denied. ECF No. 548 at 22 n.8; *see Mota*, No. 16-10468, Dkt. 62. As such, Mota cannot be said to have *actually raised* the argument on appeal: he was not permitted to raise the argument, and the argument certainly was not "disposed of" by the panel. *Currie*, 589 F.2d at 995. Thus, Mota is not barred from litigating this claim on collateral review.

2. Ground 2

In Ground 2 of his second amended petition, Mota argues that the jury's verdict—finding him guilty of both Hobbs Act robbery and second-degree murder—is inconsistent, and therefore, he is actually innocent of second-degree murder. ECF No. 538 at 20–21. The government responds that Mota is barred from relitigating this claim. ECF No. 548 at 24.

On direct appeal, Mota argued that the district court's instructions that the jury could convict him on Count Three by finding proof of second-degree murder constructively amended the indictment, which charged only first-degree felony murder. *Mota*, No. 16-10468, Dkt. 29 at 32–33. He also argued that every murder involving an enumerated felony under federal law is always first-degree murder. *Id.* at 35. The Ninth Circuit rejected the argument, stating that "[t]he jury instructions for Count Three did not constructively amend the indictment, because the indictment

did not specify that the murder being charged was felony murder." *Mota*, 753 F. App'x at 471.

Here, the issue is put differently: Mota again argues that federal law defines every murder committed in the perpetration of a robbery (an enumerated felony) as first-degree murder, but, rather than claiming that the jury instructions constructively amended the indictment, Mota's amended motion alleges that "this inconsistency makes him 'actually innocent" of second-degree murder or, alternatively, that there was insufficient evidence [] to support a § 924(j) conviction." ECF No. 555 at 14. This issue was not actually raised and disposed of on direct appeal, and accordingly, Mota is not barred from litigating it here.

3. Ground 3

In Ground 3 of his second amended petition, Mota avers that the government's failure to disclose certain evidence amounted to a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). One of the witnesses against Mota at trial was his cellmate, Paul Cardwell. ECF No. 375 at 67. Cardwell testified that Mota had confessed a robbery and murder to him. *Id.* at 110, 146. Cardwell also claimed that the only way he could have received this information was from Mota himself. *Id.* at 122. After trial and before sentencing, the government filed a sentencing memorandum, which included a letter from Cardwell to his attorney. ECF No. 453.[1] In that letter, Cardwell asserted that "inmates have cell phones at all levels of the federal system." *Id.* At his sentencing hearing, Mota claimed that he never received a copy of the letter in discovery before trial. ECF No. 472 at 27–28. He now argues that this withheld evidence was favorable to him and material, as "it would have permitted [him] to effectively cross-examine Cardwell and cast considerable doubt upon his claim that his knowledge of the offense could only have come from Mr. Mota's supposed confession." ECF No. 538 at 25.

The government claims that Mota is precluded from relitigating his *Brady* claim because he already raised this issue "at his sentencing." ECF No. 548 at 28. Pushing back on this argument, Mota argues that "a claim raised at sentencing does not trigger the relitigation bar, which prohibits reconsideration of claims 'presented and resolved on *direct appeal*." ECF No.

[1] The letter is not attached to ECF No. 453. Neither party, however, appears the dispute the letter's contents.

555 at 15 (quoting *Clayton v. United States*, 447 F.2d 476, 477 (9th Cir. 1971) (emphasis added). The Government fails to point to any caselaw that holds that an issue raised only at sentencing is deemed actually raised and disposed of on direct appeal. Thus, Mota is not barred from litigating it here.

B. Procedural Default

The government further argues that Mota procedurally defaulted on the claims raised in Grounds Three, Four, and Five by not raising them on direct review.

Claims may not be raised in Section 2255 motions where they have been procedurally defaulted, including where they could have been raised on direct review. *See United States v. Frady*, 456 U.S. 152, 167–68 (1982) (holding that procedural default rules developed in the habeas corpus context apply in Section 2255 cases). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice' or that he is 'actually innocent.'" *United States v. Braswell*, 501 F.3d 1147, 1149 (9th Cir. 2007) (quoting *Bousley v. United States*, 523 U.S. 614, 622 (1998)).

1. Cause and Prejudice

A procedurally defaulted claim may be raised on collateral review upon a showing of cause and actual prejudice. "To allege cause for a procedural default, a petitioner must assert that the procedural default is due to an 'objective factor' that is 'external' to the petitioner and 'cannot fairly be attributed to him.'" *Manning v. Foster*, 224 F.3d 1129, 1133 (9th Cir. 2000) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). To allege actual prejudice, a petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170. While "[a]ttorney ignorance or inadvertence is not cause," *Bradford v. Davis*, 923 F.3d 599, 612 (9th Cir. 2019), "[c]onstitutionally ineffective assistance of counsel constitutes cause sufficient to excuse a procedural default." *United States v. Ratigan*, 351 F.3d 957, 964–65 (9th Cir. 2003). To prove counsel was constitutionally ineffective, an individual must establish (1) that counsel's

performance "fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Courts must employ a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "The test is not whether another lawyer, with the benefit of hindsight, would have acted differently . . . 'the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable.'" *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998) (quoting *Siripongs v. Calderon*, 113 F.3d 732, 736 (9th Cir. 1998)).

a. Ground 3

The government argues Mota has procedurally defaulted on his claim that the government withheld material impeachment evidence in violation of *Brady*. ECF No. 548 at 28. In response, Mota contends that his appellate counsel was constitutionally ineffective for failing to raise the claim on direct appeal, which provides cause to excuse his procedural default, and that this failure prejudiced him. ECF No. 555 at 16.

Mota fails to show that appellate counsel's performance was objectively unreasonable under *Strickland*. He notes that counsel "did not pursue the claim on direct appeal despite the fact Mr. Mota raised the issue of the letter being suppressed at the sentencing hearing." *Id*. However, Mota does not adequately demonstrate that appellate counsel's choice to not raise this claim on appeal was objectively unreasonable. Instead, he argues only that counsel's choice to "not pursue the claim" renders their performance constitutionally deficient. Stating that counsel could have made an argument, but did not, is insufficient to show that counsel's performance was objectively unreasonable under *Strickland*. Because Mota cannot meet even the first prong of the *Strickland* test, Mota fails to show cause to excuse the procedural default of his *Brady* claim.

b. Ground 4

In Ground 4 of his second amended petition, Mota argues that his rights to due process and a fair trial were violated when the jury received two improperly redacted exhibits, Government Exhibit 400A and Government Exhibit 252B. ECF No. 538 at 27–28. In particular, Mota avers

that these exhibits allowed the jury to learn that Mota had "been involved in at least one stabbing and spent 18 years in prison." *Id.* at 29. The government argues Mota has procedurally defaulted on this claim. ECF No. 548 at 32–33. In his reply, Mota argues that ineffective assistance of appellate counsel provides cause to excuse his procedural default. ECF No. 555 at 19.

Mota again fails to meet his *Strickland* burden. Mota states that appellate counsel was aware of the possible redaction issue prior to filing Mota's opening brief on appeal and "thus could have raised the improperly redacted transcript issue on direct appeal." *Id*. But Mota does not suggest that it was objectively unreasonable for appellate counsel not to have raised the issue. Under *Strickland*, courts employ a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Mota offers no argument or evidence to overcome this presumption. He thus fails to show cause to excuse his procedural default of his claim in Ground Four.

c. Ground 5

In Ground 5 of his second amended petition, Mota argues that juror misconduct and bias occurred because jurors improperly learned of Mota's criminal history, conducted outside research on at least one occasion, and began discussing evidence prior to deliberations. ECF No. 538 at 30–31. The government argues that Mota's juror misconduct and bias claim is subject to procedural default. ECF No. 548 at 41.[2] Mota argues that cause and prejudice cure any procedural default; while Mota does not suggest his appellate counsel was unaware of this claim at

[2] The government also argues that Mota's juror bias and misconduct claim is time-barred because it was first raised in Mota's amended Section 2255 motion. ECF No. 548 at 39–40. Section 2255 motions are subject to a one-year statute of limitations that runs from, in this case, "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). The government argues Mota's convictions became final in January 2021, "one year after the Supreme Court denied Mota's certiorari petition." ECF No. 548 at 39. The government waived any statute of limitations defense until May 1, 2021, and Mota's amended Section 2255 motion was filed on October 4, 2021. ECF No. 514-2; ECF No. 514. Because Mota's claim in Ground Five was first raised in October 2021, the government argues it is barred by the statute of limitations. Mota argues the claim is timely because, under *United States v. Colvin*, 204 F.3d 1221, 1226 (9th Cir. 2000), a judgment of conviction becomes final once the time has passed for appealing the district court's entry of amended judgment. ECF No. 555 at 22. The Court agrees that the "bright-line rule" announced in *Colvin* plainly applies here. *Colvin*, 204 F.3d at 1226. The one-year statute of limitations of Section 2255(f) began to run on October 5, 2020, fourteen days after this Court issued its amended judgment, once Mota's time to appeal the amended judgment had passed. Mota's claim is therefore timely.

the time of his direct appeal, he contends "she could not have presented the claim to the Ninth Circuit on direct appeal" due to controlling law. ECF No. 555 at 24.

A defendant may show cause for failure to raise a claim on direct review "where the claim rests upon a new legal or factual basis that was unavailable at the time of direct appeal, or where 'interference by officials' may have prevented the claim from being brought earlier." *Braswell*, 501 F.3d at 1150 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "[F]utility cannot constitute cause when it means 'simply that a claim was "unacceptable to a particular court at a particular time,"' but futility can constitute cause if it means that a claim has been unacceptable to a near-unanimous body of lower courts a sustained period." *United States v. Werle*, 35 F.4th 1195, 1201 (9th Cir. 2022) (quoting *Bousley*, 523 U.S. at 623). Here, Mota argues that, because "the Ninth Circuit will not consider issues raised for the first time on appeal," *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1189 (9th Cir. 1992), the claim was "unavailable" at the time of direct appeal. ECF No. 555 at 24. But *Reyes-Alvarado* itself states that there are "three exceptions" to this "general[]" rule, including "where review is necessary to prevent a miscarriage of justice." 963 F.2d at 1189. Had Mota's appellate counsel raised the claim and successfully argued for an exception, the Ninth Circuit may well have considered it; thus, at the time of direct appeal, the claim would not have been "futile" in the sense that can constitute cause. Accordingly, the Court finds that Mota has not demonstrated cause and prejudice to overcome procedural default of this claim.

2. Actual Innocence

In the alternative, Mota argues that any procedural default on Grounds Three, Four, and Five is excused by actual innocence. *See* ECF No. 555 at 15–16, 19, 25. In his view, because "a guilty verdict for violating [] Hobbs Act [robbery] and for second degree murder are 'mutually exclusive,'" "there is insufficient evidence to support the § 924(j) conviction." ECF No. 538 at 22; *see* ECF No. 555 at 16 ("Because Mr. Mota could not be convicted of both Hobbs Act [robbery] and second-degree murder when the jury was instructed as to felony first[-]degree murder, Mr. Mota is actually innocent of second-degree murder and necessarily § 924(j).").

A procedurally defaulted claim may also be raised on collateral review upon a showing

"that the constitutional error . . . has probably resulted in the conviction of one who is actually innocent." *Bousley*, 523 U.S. at 623 (quoting *Murray*, 477 U.S. at 496). Actual innocence acts as a "gateway" to reconsideration of defaulted claims that "should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial.'" *McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).

To pass through the *Schlup* actual innocence gateway, a petitioner must demonstrate that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Schlup*, 513 U.S. at 327. Further, a petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. "The habeas court then 'considers all the evidence, old and new, incriminating and exculpatory,' admissible at trial or not. On this complete record, the court makes a 'probabilistic determination about what reasonable, properly instructed jurors would do.'" *Lee v. Lampert*, 653 F.3d 929, 938 (9th Cir. 2011).

Mota offers no new evidence to support his innocence; rather, he argues that he is innocent of the crime of conviction on Count Three because he believes the jury's verdict is "clearly inconsistent." ECF No. 538 at 21; *see* ECF No. 555 at 13 (the jury's finding is, "in the Ninth Circuit's own words, irrational."). This is a legal argument. In the Ninth Circuit, "habeas petitioners may pass *Schlup*'s test by offering 'newly presented' evidence of actual innocence." *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003). "The required evidence must create a colorable claim of actual innocence . . . as opposed to legal innocence as a result of legal error." *Gandarela v. Johnson*, 286 F.3d 1080, 1085 (9th Cir. 2002). Mota has not offered any evidence that raises a colorable claim of actual innocence.

C. Whether Hobbs Act Robbery is Categorically a Crime of Violence

Having concluded that Mota is barred from relitigating the nature of his Hobbs Act conviction, the Court briefly addresses Mota's argument that Hobbs Act robbery is not categorically a "crime of violence" within the meaning of Section 924(c)(3)(A). ECF No. 538 at

15. To qualify as a crime of violence, the predicate offense must "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).[3] If Mota's conviction on Count One is not a crime of violence within the meaning of the statute, his conviction on Count Three, for causing the death of a person through use of a firearm during a crime of violence, cannot stand.

The Court need not, and does not, resolve this question anew because, as Mota acknowledges, this claim is "currently foreclosed by Ninth Circuit precedent" in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020). ECF No. 555 at 13. The law in this Circuit, as well as others, makes clear that Hobbs Act robbery—whether completed or attempted—is a crime of violence. *See Dominguez*, 954 F.3d at 1260–61; *United States v. Ingram*, 947 F.3d 1021, 1025–26 (7th Cir. 2020) (finding that attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)). Accordingly, Ground One of Mota's petition is denied.

D. Actual Innocence or Insufficient Evidence to Support 924(j) Conviction

In this petition, Mota argues that his conviction on Count Three must be reversed because the fact that the jury convicted him of Hobbs Act robbery means he is actually innocent of second-degree murder. ECF No. 538 at 20–21. Mota contends that, under federal law, any murder committed during a robbery is first-degree murder. *Id.* The jury both convicted him of Hobbs Act robbery and issued a special finding that the government had proved second-degree murder. ECF No. 423. Mota argues that the jury could not rationally convict him of both Hobbs Act robbery and second-degree murder, so his conviction on Count Three cannot stand. ECF No. 538 at 20–21. As an alternative, Mota contends that there was insufficient evidence to support conviction on Count Three. *Id.* at 21.

Mota's argument that he cannot be rationally convicted of *both* Hobbs Act robbery and

[3] Though the statute lists two definitions for crime of violence, only the elements clause remains in effect. The residual clause of Section 924(c)(3)(B) offers a second definition of crime of violence: offenses that "by [their] nature, involve[e] a substantial risk that physical force . . . may be used." 18 U.S.C. § 924(c)(3)(B). In *United States v. Davis*, the Supreme Court invalidated the residual clause as unconstitutionally vague. 139 S. Ct. 2319 (2019). Thus, to be defined as a crime of violence, the predicate offense must now meet the definition of the elements clause of Section 924(c).

second-degree murder fails for at least two reasons. First, as the Government points out in its opposition brief, "to demonstrate actual innocence, Mr. Mota 'must show it is more likely than not that no reasonable juror would have convicted him in light of the *new evidence*." ECF No. 548 at 24 (quoting *Schlup*, 513 U.S. at 327) (emphasis added). Mota, however, fails to present any new evidence. Instead, he argues that "a claim of actual innocence does not require 'new' evidence as the government asserts; it merely requires a petitioner show 'that the evidence against him was weak.'" ECF No. 555 at 14 (quoting *Lorentsen v. Hood*, 223 F.3d 950, 954 (9th Cir. 2000)). Mota's selective reading of *Lorentsen* is misplaced. True, a "[p]etitioner bears the burden of proof on this issue by a preponderance of the evidence," and he "must show not just that the evidence against him was weak, but that it was so weak that 'no reasonable juror' would have convicted him." *Id*. However, *Schlup* makes equally clear that "a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the *new evidence*, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." 513 U.S. at 329 (emphasis added). Thus, Mota's actual innocence argument must be denied on this ground.

Second, even if the Court were to reach the merits of this argument, the jury was presented with sufficient evidence to conclude that Mota caused the murder of Seagrave under Section 1111. Count Three of the superseding indictment charged Mota with "using and carrying a firearm during . . . the robbery charged in Count One of this Superseding Indictment . . . cau[sing] the death of a person through the use of a firearm, which killing was murder as defined in Title 18, United States Code, Section 1111." ECF No. 19 at 5. The statute of conviction for Count Three, 18 U.S.C. § 924(j), reads, in relevant part:

> A person who, in the course of [using or carrying a firearm during a crime of violence], causes the death of a person through the use of a firearm, shall . . . if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life.

18 U.S.C. § 924(j). Section 1111, in turn, states that "[e]very murder . . . committed in the perpetration of . . . robbery . . . is murder in the first degree. Any other murder is murder in the second degree." 18 U.S.C. § 1111(a). As the Ninth Circuit noted, "the indictment did not specify that the murder being charged was felony murder." *Mota*, 753 F. App'x at 471. In short, to

convict Mota for a 924(j) violation, a rational trier of fact would need to find, beyond a reasonable doubt, that Mota had caused Seagrave's death by murder, using a firearm, in the course of a crime of violence.

Mota argues that, on this evidence, no rational trier of fact could have found the essential elements of 924(j) satisfied beyond a reasonable doubt, because, "if the murder was committed during commission of a robbery, then a second-degree murder could not have taken place." ECF No. 538 at 21. In defense of his argument, Mota cites *United States v. Simoy*, in which the Ninth Circuit panel held that a criminal defendant charged with both felony murder under Section 1111 and territorial robbery under 18 U.S.C. § 2111 was not entitled to a jury instruction on the lesser included offense of second-degree murder. 998 F.2d 751, 752 (9th Cir. 1993). Because a defendant is only "entitled to instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater," *id.* (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)), the murder occurred during a robbery, and murder committed in the perpetration of robbery is defined as first-degree murder under Section 1111, the Court reasoned that, "[i]f the jury found that appellant participated in the robbery, it could not rationally acquit him of felony murder and convict him of second degree murder," *id.*

But here, Mota was not charged with felony murder. Rather, he was charged with violation of Section 924(j), which may be satisfied by any form of murder. And the jury had more than enough evidence to convict on second-degree murder under Section 1111. Many witnesses testified in the government's case, including Mr. Mota's former girlfriend, Yesnia Duran, who testified that she was in the pickup truck at the time of the robbery and murder, and that Mr. Mota confessed to her what happened inside the store. *See* ECF No. 345 at 85–93, 104–106, 150. The government's case also included dozens of exhibits, including videos from inside the store, crime scene photographs, and photographs of Mr. Mota's car, among others. *See* ECF No. 331. Thus, the Court is unpersuaded that there was insufficient evidence to support a § 924(j) conviction.

E. Ineffective Assistance of Appellate Counsel

Mota's sixth and final argument is that he received ineffective assistance of appellate counsel. Specifically, he contends that appellate counsel performed deficiently when she failed to

"(1) challenge the inconsistent jury verdict and raise a sufficiency of the evidence challenge on direct appeal; (2) raise the *Brady* issue concerning the disclosure of Cardwell's letter on direct appeal; and (3) raise the issue of the improperly redacted trial exhibits on direct appeal." ECF No. 538 at 33.

"[T]he Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right." *Evitts v. Lucey*, 469 U.S. 387, 388 (1985). Claims of ineffective assistance of appellate counsel are reviewed pursuant to the standard delineated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). Under *Strickland*, the petitioner must first show that counsel's performance was objectively unreasonable, which in the appellate context requires the petitioner to demonstrate that counsel acted unreasonably in failing to discover and brief a merit-worthy issue. *Strickland*, 466 U.S. at 688. Second, the petitioner must show prejudice, which in this context means that the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal. *Id*. at 694. Appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997).

1. Inconsistent Verdict

First, Mota contends that appellate counsel's performance was deficient because, "[d]espite being aware that the verdict was inconsistent, she [] did not raise a sufficiency of the evidence challenge to the inconsistent verdict." ECF No. 538 at 34. In its opposition, the Government argues that "Mr. Mota did not preserve this argument for appeal," and thus, he "set a barrier that appellate counsel could not overcome." ECF No. 548 at 49.

In his reply, Mota argues that the issue could still have been raised on appeal for plain error generally, "and given the Ninth Circuit's hesitation to apply plain error review to pro se litigants, likely reviewed de novo[.]" ECF No. 555 at 26. *Strickland*'s first prong asks if counsel's performance was "objectively unreasonable" in failing to "discover and brief a merit-worthy issue." 466 U.S. at 688. Here, appellate counsel's choice to argue that the jury instructions constructively amended the indictment (as opposed to arguing that the jury cannot rationally have

convicted him of both robbery and second-degree murder) may have been a strategic one. "A reasonable tactical choice based on an adequate inquiry is immune from attack under Strickland." *Gerlaugh*, 466 U.S. at 689–91. But even assuming the contrary, Mota suffered no prejudice on account of counsel's performance. As delineated above, *see supra* at 12–14, there is not a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal. Mota was charged with violation of Section 924(j), which may be satisfied by any form of murder, and additionally, the jury had more than enough evidence to convict on second-degree murder under Section 1111.

2. *Brady* Violation

Next, Mota argues that appellate counsel's performance was deficient because she failed to raise the *Brady* issue on appeal. ECF No. 538 at 34–35. Similar to its opposition to Mota's inconsistent verdict argument, the Government asserts that, by failing to raise this issue at trial, Mota "put his appellate counsel in the precarious position of raising the issue to the Ninth Circuit without lower court review on a much higher standard." ECF No. 548 at 51.

Although Mota again asserts that the Ninth Circuit may choose to apply a more lenient de novo standard to pro se litigants who fail to raise claims below, this is still not enough to overcome *Strickland*. The crux of Mota's *Brady* argument is that the withheld letter—stating, among other things, that inmates in prisons have cell phones—"would have permitted Mota to effectively cross-examine Cardwell and cast considerable doubt upon his claim that his knowledge of the offense could only have come from Mr. Mota's supposed confession." ECF No. 538 at 25. This argument is tenuous at best. As the government notes in its opposition brief, "Mr. Cardwell's general acknowledgement of cellphones in prison is useless to prove that Mr. Cardwell himself had a cellphone, never mind then proving that Mr. Cardwell purportedly used a cellphone in prison to learn the details of Mr. Mota's crimes." ECF No. 548 at 26. It is well-established that appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. *Jones*, 463 U.S. at 751-54. And further, "weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). The Ninth Circuit has made clear that appellate counsel will

frequently remain above an objective standard of competence and have caused his client no prejudice for the same reason[] because [s]he declined to raise a weak issue. *Id*.

Because Mota had only a slight chance of obtaining reversal based upon his *Brady* argument, he cannot satisfy either *Strickland* prong: appellate counsel was not ineffective for failing to raise the issue, and Mota suffered no prejudice on account of her performance. Accordingly, Mota was not denied his constitutional right to the effective assistance of appellate counsel on this ground.

3. Improper Exhibits

Finally, Mota avers that counsel erred in failing to raise the admission of improper exhibits on appeal. ECF No. 538 at 35. He contends that appellate counsel "was aware the exhibits were improperly redacted before filing the opening brief." *Id.* The government argues that appellate counsel did not err in failing to raise these issues, as doing so would have "cost[] petitioner credibility." ECF No. 548 at 50. As to Exhibit 252B, the government claims that Mota failed to "follow[] through on his motion to redact it," and as to Exhibit 400A, the government claims that it "was properly admitted as an audio recording, not an unredacted transcript." *Id.*

Regardless of whether (or why) these exhibits were improperly redacted, it was not objectively unreasonable for appellate counsel to not have raised the issue. *Strickland* cautions that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and Mota offers no argument or evidence to overcome this presumption. *Strickland*, 466 U.S. at 689.

F. Evidentiary Hearing

Mota argues that an evidentiary hearing is required in this case. ECF No. 538 at 35. The government argues the record is complete and the Court thus need not hold a hearing. ECF No. 548 at 50–51.

An individual filing a Section 2255 motion is entitled to an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. 2255(b). The Ninth Circuit has interpreted this standard as "requiring an evidentiary hearing where 'the movant has made specific factual allegations that, if true, state a

claim on which relief could be granted.'" *United States v. Leonti*, 236 F.3d 1111, 1116 (9th Cir. 2003) (quoting *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984)).

The claims Mota raises in Grounds One and Two involve only questions of law. Having found the Court barred from considering the claims Mota raises in Grounds Three, Four, and Five—the only claims that raise any factual allegations—the Court finds that it need not hold an evidentiary hearing on this motion. Further, in regard to Ground Six, Mota argues that "the Ninth Circuit favors evidentiary hearings so a petitioner can 'develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted.'" ECF No. 538 at 36 (quoting *Guerrero v. United States*, 84 Fed. Appx. 933, 935 (9th Cir. 2003)). However, on the current record, the Court does not believe that an evidentiary hearing is necessary.

G. Certificate of Appealability

Mota requests that, in the event the Court denies this motion and denies leave to amend, the Court issue a certificate of appealability ("COA"). "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). 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 v. McDaniel*, 529 U.S. 473, 484 (2000). Under this standard, the Court concludes that Mota is not entitled to a certificate of appealability on Grounds 3, 4, and 5, as no reasonable jurist would find debatable the reasons for the Court's ruling that these claims are procedurally barred. The Court further concludes that Mota is not entitled to a certificate of appealability on Grounds 1, 2, and 6 because no reasonable jurist would find debatable the reasons for the Court's ruling that these claims are without merit.

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CONCLUSION

For the foregoing reasons, Mota's motion to vacate his judgment under 28 U.S.C. § 2255 is denied.

IT IS SO ORDERED.

Dated: June 24, 2024

JON S. TIGAR
United States District Judge

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JONATHAN MOTA, Defendant - Appellant.	No. 24-4236 D.C. Nos. 4:21-cv-03275-JST 4:13-cr-00093-JST-1 Northern District of California, Oakland ORDER

Before: GRABER and JOHNSTONE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 6) is denied because appellant has not shown that "jurists of reason would find it debatable whether the [28 U.S.C. § 2255 motion] 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 v. McDaniel*, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.