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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED DEC 15 2017, Clerk US Court of Appeals

UNITED STATES, appellee

v. No. 17 – 35458

D. C. No. 2:17 – CV – 134 – LRS

D. C. No. 2:17 – CV – 121 – LRS

CHARLES LEE GILLENWATER, appellant

Before: BYBEE, and MURGUIA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not shown that "jurist of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a

constitutional right and that jurist of reason would find it debatable whether the District Court was correct in its procedural ruling." Slack v. McDaniel, 529 US 473, 484 (2000); see also 28 USC 2253 (c) (2); Gonzales v. Thaler, 565 US 134, 140 – 41 (2012); Miller-El v. Cockrell, 537 US 322, 327 (2003).

Any pending motions are denied as moot.

Denied

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED JAN 30 2018, Clerk US Court of Appeals

UNITED STATES, appellee

v. No. 17 – 35458

CHARLES LEE GILLENWATER, appellant

Before: NGUYEN and OWENS, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 11).

The motion for reconsideration is denied in the motion for reconsideration en banc 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 close case.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES, respondent

v. No. 1:11 – CR – 121 – LRS – 1

CHARLES LEE GILLENWATER, petitioner

ORDER DENYING MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE.

BEFORE THE COURT is Petitioner's pro se Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 USC 2255 (ECF No. 361).

I. BACKGROUND

This matter arises from the conviction by jury trial of Petitioner Charles Lee Gillenwater. In August 2011, the Grand Jury returned an

Indictment charging Gillenwater with two counts of Transmission of Threatening Interstate Communications to a government employee in violation of 18 USC 875 (c). The Government filed a Superseding Indictment adding a third count of Transmission of Threatening Communication by US Mail in violation of 18 USC 867 (c). After the federal public defender moved to withdraw, the court appointed attorney Frank Cikutovich to represent Gillenwater.

In September 2011, the Chief Judge Rosanna Peterson ordered a psychological evaluation and a competency hearing. On January 6, 2012, a competency hearing was held for a disruptive outburst from Gillenwater

prompted the court to remove him from the courtroom. On interlocutory appeal from the court's order declaring Gillenwater incompetent to stand trial, the Ninth Circuit Court of Appeals ruled that Gillenwater's constitutional right to testify at the competency hearing had been violated and remanded the matter for a new competency hearing. See US v. Gillenwater, 717 F.3d 1070 (9th Cir. 2013) ("Gillenwater I").

On remand, the case was reassigned to the undersigned judge. On September 24, 2013, the court determined that Gillenwater was not competent to stand trial and authorized involuntary medication with haloperidol decanoate pursuant to Sell v. US, 539 US 166

(2003). Gillenwater appealed the involuntary medication order and the Ninth Circuit affirmed the court's Order in US the Gillenwater, 749 F.3d 1094 (9th Cir. 2014) ("Gillenwater II"). On December 15, 2014, the US Supreme Court denied Gillenwater's pro se petition for rehearing.

On June 16, 2015, the court entered an Order declaring Gillenwater competent to stand trial. On June 30, 2015, Gillenwater was convicted of Counts 2 and 3 (a 875 (c) and 876 (c) violation). Gillenwater was sentenced to time served followed by a three-year term of supervised release. (ECF No. 331).

Gillenwater appealed his conviction claiming first that the 4-year pretrial delay violated his

constitutional right to speedy trial and prejudiced his defense at sentencing and second, challenged the denial of his rule 29 motion for acquittal. The Ninth Circuit Court of Appeals rejected his arguments noting that the delay was " largely attributable to Gillenwater's own appeals and the District Court's efforts to restore him to competency. " US v. Gillenwater, 669 Fed. Appx. 844 (9th Cir. Oct. 18, 2016) ("Gillenwater III"). Gillenwater petition the US Supreme Court for writ of certiorari, but the petition was denied on February 27, 2017 and became final on that day. Gonzales v. Thaler, 565 US 134 (2012).

Gillenwater timely filed his 2255 motion on April 10, 2017. 28 USC 2255(f)(1). He asserts

at least 14 grounds under which he claims relief: (1) defendant's right to speedy trial under the Sixth Amendment was abridged; (2) the court was without jurisdiction act upon "the first of many deprivations of fundamental... rights" (ECF No. 361 – 1 at 8; (3) 28 USC 3161(h)(1)(a) is unconstitutional because authority has been" usurped from the impartial Jury"; (4) local rule 83.2 (d) abridged the defendant's right to access to the court; (5) the court order directing the involuntary ministration of antipsychotic medication violated the Conventions Against Torture, and 18 USC 2340 18 USC 2340A, which are" unconstitutionally narrow"; (6) 18 USC 875 (c) and 876 (c) are unconstitutional and violated

due process because the law imposes" strict liability" and" usurp[s] the domain of the impartial Jury"(ECF No. 361 – 1 at 10); (7) petitioner's right to speedy trial was violated when his pretrial incarceration exceeded 70 days without jury authorization; (8 the Judge tampered with a witness by violating defendant's right to speedy trial and ordering forced medication; (9) deprivation of due process "in the absence of unanimous determination by an impartial Jury" (ECF No. 361 – 1 at 11); (10) the trial judges evidentiary ruling violated Federal Rules of Evidence 702 thereby violating defendant's constitutional rights; (11) improper delegation of discretionary power to the court usurping the

right to an impartial trial by jury; (12) adverse evidentiary ruling violated the defendant's right to have a jury determine "relevancy and admissibility issues." (13) ineffective assistance of counsel (asserting numerous grounds against pretrial, trial, and appellate counsel); and (14) defendant is entitled to a retrial due to the deprivation of constitutional rights.

II. JURISDICTION AND LEGAL STANDARDS

This court has jurisdiction by virtue of 28 USC 2255.

A. Custody requirement

A petition for writ of habeas corpus under 28 USC 255 may only be filed by" [a]

prisoner in custody." The" in custody" requirement is jurisdictional in nature and applies at the time the petition is filed. United States v. Reves, 774 F.3d 562, 564 – 65 (9th Cir. 2014). Although Gillenwater is no longer incarcerated, Gillenwater is serving a term of Supervised Release which is set to expire on September 22, 2018. The Ninth Circuit has held that a federal defendant who is "subject to supervised release... is in" custody" ...[and] may seek relief pursuant to 28 USC 2255." Matus-Leva v. United States, 287 F.3d 758, 761 (9th Cir. 2002) (citing Jones v. Cunningham, 371 US 236, 242 – 43, (1963)).

B. Cognizable Claims and Preliminary Review

section 2255 allows a prisoner in federal custody to move the sentencing court to vacate, set aside or correct the sentence if he claims the right to be released upon any of the following four narrow grounds: 1) the sentence was imposed in violation of the Constitution or laws of the United States; 2) that the court was without jurisdiction to oppose such sentence; 3) that the sentence was in excess of the maximum authorized by law; or 4) is otherwise subject to collateral attack. 28 USC 2255 (a). If there is no alleged lack of jurisdiction or constitutional error, there is no basis for collateral relief under 2255 unless the error constituted a "fundamental defect which

> inherently results in a complete miscarriage of justice." Davis v. US, 417 US 333, 346 (1974) (quoting Hill v. US, 368 US 424, 428 (1962)). The burden is on the petitioner to show his entitlement to relief under 2255 including his entitlement to an evidentiary hearing.

The court notes that petitioner has made an assertion of lack of jurisdiction in the underlying case. Such assertions do not deprive this court of jurisdiction to adjudicate the 2255 Motion as the statute enumerates jurisdiction for the very purpose of determining whether the trial court lacked jurisdiction.

The 2255 Motion is subject to preliminary

review to determine whether an Answer or other response is required. Rule 4 (b), Rules Governing 2255 Proceedings. A District Court may deny a 2255 motion without an evidentiary hearing if the movant's allegations, viewed against the record, either do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal. United States v. Burrows, 872 F.2d 917 (9th Cir. 1989). It is also well-settled that the law of the case doctrine precludes the re-examination of issues decided, either expressly or by necessary implication, in a previous appeal. See United States v. Jingles, 702 F.3d 494, 498 (9th Cir. 2012) (citing In re Rainbow Magazine, Inc., 77 F.3d 278, 281 (9th Cir. 1996)

("[T]he decision of an appellate court on a legal issue must be followed in all subsequent hearings in the same case"); Odom v. United States, 455 F. 2d 159, 160 (9th C. 1972) (" the law in this circuit is clear that when a matter has been decided adversely on appeal from a conviction, it cannot be litigated again on a 2255 motion ") (some citations omitted)).

A petitioner "who is able to state facts showing a real possibility of constitutional error should survive Rule for review." Calderon v. United States Dist. Court, 98 F. 3d 1102, 1109 (9th Cir. 1996) (Schroeder, C. J., Concurring) (referring to Rules Governing 2254 Cases). " [I]t is the duty of the court to screen out frivolous applications and eliminate the burden to be

placed on the respondent by ordering an unnecessary answer." Advisory Committee Note (1976), Rule 4, Rules Governing 2255P proceedings (citing Advisory Note governing Rule 4 in 2254 cases). The court has completed this review.

C. No Right to Jury on 2255 Motion

rule 4 governing 2255 motion's dictates that, absent unique circumstances, 2255 motions are properly assigned to the original sentencing judge. See Farrow v. United States, 580 F.2d 1339, 1348 – 51 (9th Cir. 1978) (en banc) (describing why there is no impropriety in this and its advantages); King v. United States, 576 F. 2d 432, 436 – 38 (2d Cir.), cert. denied, 439 US 850 (1978).

Petitioner's Motion alleges that both the undersigned and the initially assigned Judge deprived him of his fundamental rights and proceeded without jurisdiction. It further alleges that the court abused its discretion in failing to recognize the supremacy of constitutional rights over statutory law (ECF No. 361 – 1 at 22), and that a jury should "make a judgment of the appropriateness of the judge's conduct." (ECF No. 361 – 1 at 24).

There is no right to a jury trial in habeas corpus proceedings. 28 USC 2243 provides that" the court shall summarily hear and determine the facts, and dispose of the matter as law and justice requires." See also, 6A FED. PROC., L. ED. 41.105 (Mar. 2017) ("no

constitutional right to trial by jury exists because the seventh amendment preserves trial by jury only in so far as that right was recognized the common law or by statute prior to the adoption of the Constitution, and habeas corpus issues had historically been tried to the court alone."). Having presided over the trial and sentencing, this court has knowledge of the circumstances of the case. The court has an obligation to carefully review all habeas corpus proceedings and has "every reason to welcome the opportunity to correct any inadvertent aggravation of injustices" that provide grounds for relief to the habeas corpus petitioner. Farrow v. US, 580 F. 2d 1339, 1350 (9th Cir. 1978).

III. DISCUSSION

A. Claim One – Speedy Trial

Petitioner first asserts that he was unconstitutionally denied his right to speedy trial under the Sixth Amendment. He contends the Speedy Trial Act, 18 USC 3161(h)(1)(A) (excluding delay resulting from proceeding concerning mental competency), is unconstitutional as applied because it delegates discretionary authority to the court to toll speedy trial. In the absence of a "willful and knowing waiver or unanimous determination by an impartial jury." (ECF No. 361 at 4).

Petitioner already sought ruling on his constitutional right to speedy trial on direct

appeal and the Ninth Circuit rejected the claim in Gillenwater III. Since the review under 2255 is not available to claims that been previously rejected on their merits on direct appeal, this claim is not reviewable. Although Gillenwater's appeal did not raise the constitutionality of 3361 (h) (1) (A), this analysis likewise would revert to the application of the constitutional speedy trial principles enunciated in Barker v. Wingo, 407 US 514 (1972), which the Ninth Circuit has already concluded he failed to demonstrate. Accordingly, it would be superfluous for this court to address the contention that the Speedy Trial Act unconstitutionally accords discretion to the court. See e.g. US v. Bounos,

730 F.2d 468, 471 – 472 (7th Cir. 1984); see also, US v. Brainer, 691 F.2d 691, 699 (4th Cir. 1982) (holding the Speedy Trial Act constitutional both on its face and as applied and stating the possibility the Act would prevent the Judiciary act accomplishing its constitutionally assigned functions "would appear remote.").

B. Claim Two – Jurisdiction

petitioner argues his conviction is void because the court lost jurisdiction when it deprived him of specific constitutional rights citing "the moment that judge Peterson denied the defendant an opportunity to testify" at the initial competency hearing, the violation of his right to speedy trial, and the violation of due

process and liberty interest by ordering the involuntary ministration of medication. Petitioner relies upon Johnson v. Zerbst, 304 US 458 (1938), a decision elaborating on the right to counsel to indigent defendants and the broadening of habeas corpus review to constitutional (non-jurisdictional) deficiencies. In the 19th century hey be a's corpus jurisprudence, the scope of Hades review was typically confined to determining whether or not the court had jurisdiction. US ex rel New v. Rumsfeld, 448 F.3d 403 (D. C. Cir. 2006) (explaining evolution of Hades review over time). The Johnson court held that jurisdiction, the present at the beginning of the trial, was "lost" in the course of the trial by the failure to

provide counsel for the accused. The court said that a violation of the Sixth Amendment "stands as a jurisdictional bar to a valid conviction and sentence." Although the court attached jurisdictional significance to the right to failure to appoint counsel, when the court later expanded the availability of hate is relief to other constitutional violations, it did so without claiming the denial of these rights by the court would have denied it jurisdiction. See Curtis v. US, 511 US 485, 494 – 495 (1994) explaining evolution of the habeas corpus prudence).

Johnson's jurisdictional requirements were not violated in this case is the petitioner was represented by counsel at trial. Moreover, the

court unequivocally had jurisdiction when the Ninth Circuit remanded the matter with directions that the petitioner's right to testify at the compensate hearing be respected. A narrow examination of jurisdiction is unnecessary to consider whether the alleged constitutional claims have a basis in law and fact. Because the Ninth Circuit has already found that petitioner's right to speedy trial was not violated and the courts involuntary medication order was constitutionally permissible under Sell v. United States 2255 relief on these claims is precluded under the law of the case doctrine.

C. Claims Three and Seven – Speedy Trial Act

petitioner's third claim argues that 28 USC

3161 (h) (1) (A) is unconstitutional "because it usurps the authority of the impartial Jury to deprive a Citizen's fundamental right to speedy trial..." (ECF No. 361 at 7). His seventh claim contends the application of 3161 (h) (1) (A) "resulted in the criminal defendant's detention exceeding 70 days," thereby denying his constitutional speedy trial rights "without Jury authorization." (ECF No. 361 at 11). For the reasons Claim One must be dismissed, so must Claims Three and Seven.

D. Claim Four- Local Rule 83.2 (d)

Petitioner contends Local Rule 83.2 (d) is unconstitutional and its application resulted in the denial of his due process rights and the denial of his right to access

the courts "for the purpose of accusing defense counsel of demanding $10,000 in order to call witnesses which the criminal Defendant desired." On January 18, 2012, judge Peterson entered an order striking the pro se motions filed by the Defendant and reminding Defendant that the Local Rules prohibit a party from proceeding pro se once an attorney has appeared on that party's behalf. (ECF No. 97).

The cited Local Rule follows well-established law that a criminal defendant has the constitutional right to either appear pro se or by counsel, but has no corresponding constitutional right to act as co-counsel on his own behalf. US v.

Maxwell, 778 F.3d 719 (8th Cir. 2015), cert. denied, 135 S. Ct. 2390 (2015) and cert. denied, 135 S. Ct. 2827 (2015) and cert. denied, 136 S. Ct. 176 (2015) and cert. denied, 136 S. Ct. 319 (2015); US v. Graham, 682 F. Supp. 2d 286 (W.D. N. Y 2010), aff'd, 504 Fed. Appx. 63 (2d Cir. 2012), cert. denied, 134 S. Ct. 207(2013). This protects the Sixth Amendment rights to counsel and to self-representation. This claim does not set forth an arguable error of constitutional magnitude which had an injury is effect on the proceedings.

E. Claim Five- Involuntary Medication

The petitioner contends the forced

administration of medication constitutes

torture under and violates the United Nations Conventions Against Torture (CAT) and the court in ordering the medication violates the Constitution by "committing a federal offense" under 18 USC 2340 and 2340A.

Section 2340A provides," whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both...." 18 USC 2340A." Torture" is defined as "an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other

than pain or suffering incidental to lawful constitutional provision and his claim involves the conditions of his pretrial detention, and therefore fails to state a cognizable claim. See e.g. Badea v. Cox, 931 F. 2d 573, 574 (9th Cir. 1991) (habeas corpus is the mechanism to challenge the legality or duration of confinement and civil rights action is proper method of challenging conditions of confinement). The CAT does not create private rights enforceable in 2255 proceedings. The US Supreme Court has already made clear and Sell v. United States, 439 US 166 (2003) the forced medication of an accused is constitutionally permissible in" limited circumstances." Sell, 539 US at 169. The Sell

factors have already been reviewed by this court and the Ninth Circuit and were resolved against the petitioner.

F. Claim Six-18 USC 875 (c) and 876

the petitioner contends the statutes of conviction, 18 USC 875 (c) and 876 (c) are unconstitutional because they "are structured in such a way as to impose...[s]trict [l]iability" which "usurp[s] the domain of the impartial [j]ury." (ECF No. 361 – 1 at 10). Although 875 (c) contains no explicit men rea element, the statute is not presumed to establish a strict liability offense, because the "mere omission from [the statute] of any mention of intent will not be construed as a laminating that element from the crimes denounced." Morrissette v.

United States, 342 US 246, 263 (1952);

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sanctions) upon another person within his custody or physical control." 18 USC 2340 (emphasis added).

See also, Elonis v. US, 135 S. Ct. 2001, 2009 (2015). The Ninth Circuit held in United States v. Twine, 835 F.2d 676 (9th Cir. 1988) that" we made it clear that 875 (c) (and therefore 876) did not define a strict liability offense." 835 F.2d at 680. Petitioner's motion does not state a basis in law for Claim Six.

G. Claim Eight-Witness Tampering

In Claim Eight, petitioner repeats earlier asserted speedy trial and forced medication

claims, and contends that by ordering the defendant's detention and medication, chief Judge Peterson engaged in misconduct by witness tampering (of the defendant) and committed an abuse of discretion. (ECF No. 361 at 12). The allegation of witness tampering, based upon the Courts rulings, is patently frivolous and cannot be the basis for hey be relief.

H. Claims Nine, Eleven, and Twelve – "Usurpation of the Jury's Domain"

Petitioner contends in Claims Nine, Eleven, and Twelve that his right to due process was deprived by "usurpation of the Jury's domain." These claims incorporate the allegations of his older claims and adds the contention this court

refused to allow the defendant to call his desired witnesses and enter exculpatory evidence into the record. (ECF No. 361 at 12). It is petitioner's primary contention in this 2255 Motion that Marbury v. Madison is being ignored and that the Constitution mandates that juries, not judges, make pretrial and evidentiary rulings that touch upon or impact fundamental rights. (ECF No. 361 – 1 at 22 – 24).

The phrase " usurping the province of the jury," has been characterized as "empty rhetoric." Note of Advisory Committee on Federal Rules of Evidence, Rule 704 (1972 proposed rules). See McElhaney, Expert Witnesses and the Federal Rules of Evidence,

28 Mercer L Rev 463, 472, n. 45 (1977) ("'usurping the province of the jury' is an unfortunate hyperbole, rightly derided."). The judge and the jury each have very important and vital functions to perform. The heavy primary responsibility of safeguarding the fundamental rights and assigning questions of law to rest on the trial court. The reliability and admissibility of evidence in a criminal case is at the forefront of a trial court's gatekeeping role. In granting circumstances and deciding competency issues, the judge is not usurping the function of the jury. These essential functions of a judge do not involve addressing the merits of the case in deciding what is truth, credibility, or guilt or innocence.

Petitioner's Motion fails to state any colorable basis for his claim that he was denied the right to jury trial.

I. Claim Ten – Federal Rules of Evidence 702 and Fifth Amendment

Claim Ten pertains to the court's consideration of the testimony and report of defense witness Dr. C. Robert Cloninger at a pretrial evidentiary hearing on competency, when Cloninger had never examined Gillenwater. Petitioner contends that court's consideration of the evidence violated Federal rule of evidence 702 and although the prosecutor objected, neither "the Judge nor Defense counsel rose to challenge the admissibility of Dr. Cloninger's testimony." Claimed errors in

the adequacy of evidentiary rulings are ordinarily not cognizable under 2255. Such a claim, if cognizable under 2255, is still only if the allegation, if proved, would constitute a denial or infringement of a constitutional right or if it would result in a defect seriously affecting the fundamental fairness of the trial. Petitioner claims it infringed upon the Fifth Amendment privilege against self-incrimination. (ECF No. 361 – 1 at 12). Petitioner failed to allege a colorable basis for a Fifth Amendment claim where the examination was occasioned by and used for the "neutral purpose of determining his competency to stand trial." Estelle v. Smith, 451 US 454, 465 (1981).

J. Claim Thirteen – Ineffective Assistance of Counsel

the Sixth Amendment guarantees "the right to effective assistance of counsel." McMann v. Richardson, 397 US 759, 771 n. 14 (1970). A petitioner claiming ineffective assistance of counsel must allege specific facts which, if proved, would demonstrate that 1) counsel's actions were "outside the wide range of professionally competent assistance," and 2)" there is a reasonable probability that, but for counsel's unprofessional errors, the result of proceeding would have been different." Strickland v. Washington, 466 US 668, 687 – 690 (1984). Mere conclusory allegations do not prove that counsel was ineffective. See Shah v.

United States, 878 F. 2d 1156, 1161 (9th Cir. 1989). Petitioner fails to state a claim for ineffective assistance of counsel by failing to allege facts sufficient to meet the "performance" or "prejudice" standard, and the District Court may summarily dismiss his claim. Stated differently, "[t]o be entitled to hate is relief due to the ineffectiveness of defense counsel, the petitioner must establish both that counsel's performance was deficient and that the deficiencies prejudiced the defense." Medina v. Barnes, 71 F. 3d 636, 368 (9th Cir. 1995) (quoting Strickland, 466 US at 687, 689). The court evaluates "counsel's performance from [their] perspective at the time of that performance, considered in the

light of all the circumstances, and we indulge a strong presumption that counsel's conduct fell within the 'wide range of a reasonable professional assistance.' Medina, 71 F.3d at 368 (emphasis added).

Petitioner's Motion makes numerous vague and conclusory allegations against all of his court-appointed attorneys, claiming they violated his right to effective distance of counsel. Specifically, he alleges:

- Robert Fisher "try to steal exculpatory evidence which was hidden with the North Idaho Attorney." (ECF No. 361 – 1 at 14).
- Bruce Johnson (appellate counsel) refuse to "present the defense of his client's choice,"" inventing accusations of his own." (ECF No.

361 at 14).

- Terrance Ryan failed to advise the defendant to remain silent during his interview because "if he misspoke, the information to be used against them in court." (ECF No. 361 – 1 at 15).
- Frank Cikutovich 1) failed to object or block the evidence of Dr. Cloninger; 2) failed to advise the defendant to remain silent (ECF No. 361 – 1 at 15); 3) refuse to comply with a directive from the defendant to "read the complaint of the interlaboratory appeal of 20 December 2011, which accused multiple court officers of inappropriate conduct." 4) failed to raise an objection to evidence being introduced in the record (ECF No. 361 at

19); 5) failed to raise an objection to the deprivation of fundamental rights (ECF No. 361 at 19 – 21); called a witness during the competency hearing who failed to meet the standards of Federal Rules of Evidence 702; 7) failed to object to the involuntary administration of medication and pretrial detention in excess of 70 days (ECF No. 361 at 20); and 8) failed to raise an objection to an unconstitutional statute.

- Jeffrey Finer (appellate counsel) 1)" hijacked the appeal, refusing to present the defense the defendant desired, authored and directed to be presented to the court." (ECF No. 361 – 1 at 18); and 2) involuntarily waived defendant's right to

speedy trial by telling the Ninth Circuit at oral argument that" the defendant had waived his right to speedy trial."

Viewed against the record as a whole, petitioner's conclusory allegations of ineffective assistance of counsel want summary dismissal. Petitioner's claims are meritless as they are premised upon his misguided belief that he had a right to dictate trial strategy. The motion and the lengthy files and records of the case conclusively show that cannot satisfy either the "performance" or" prejudice" prong and surmount Strickland's high bar.

K. Claim Fourteen – Remedy

petitioner's last asserted ground for relief does not

state a claim but suggest a remedy (retrial) if he were successful on his 2255 Motion. As the court's initial screening process summarily dismisses all claims asserted in the 2255 Motion, the claim regarding available remedies is moot.

IV. CONCLUSION AND ORDER

based on the foregoing, IT IS HEREBY ORDERED that Petitioners Motion to Vacate, Set Aside or Correct Sentence (ECF No. 361) pursuant to 2255 is DENIED. The court also DECLINES to issue a certificate of appealability because the court finds that reasonable jurists would not find the court's determination of the Motion debatable or wrong, or that the issues presented are deserving of encouragement to proceed further.

Slack v. McDaniel, 529 US 473, 484 (2000); Allen v. Ornoski, 435 F. 3d 946, 951 (9th Cir. 2006). Petitioner is advised that he may still request a certificate of appealability from the Ninth Circuit Court of Appeals pursuant to Federal Rules of Appellate Procedure 22 (b) and Local Ninth Circuit Rule 22-1. To do so, he must file a timely notice of appeal. It petitioner filed a timely notice of appeal, and not until such time, the Clerk of Court shall forward a, together with this Order, to the Ninth Circuit Court of Appeals.

DATED this 1st day of June, 2017.

s/Lonny R. Suko, LONNY R. SUKO

SENIOR US DISTRICT JUDGE

UNITED STATES DISTRICT COURT

Eastern District of Washington

Filed in the US District Court for the Eastern District of Washington, September 23, 2015, Sean F. McAvoy, clerk.

UNITED STATES OF AMERICA

v.

CHARLES LEE GILLENWATER, II

JUDGMENT IN A CRIMINAL CASE

Case number: 2:11 CR 00121 – LRS – 1

USM Number: 13889 – 085

Frank Cikutovich, Defendant's Attorney

THE DEFENDANT: was found guilty on counts 2 and 3 of the superseding indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses: title 18 USC section 875 (c), Transmission of Threatening Interstate Communication, offense ended 07/20/11, count 2s; title 18 USC section 876 (c), Transmission of Threatening Communication by US Mail, offense ended 07/20/11, Count 3s.

The defendant is sentenced as provided in this judgment. The sentence is imposed pursuant to Sentencing Reform Act of 1984. The defendant has been found not guilty on count 1 of the superseding indictment, all remaining counts are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United Atty. for this district within 30 days of a change of name, residence, or mailing address

until all fines, restitution cost, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United Atty. of material changes in economic circumstances.

9/22/2015: date of imposition of judgment.

s//Lonny R. Suko

The Honorable Lonny R. Suko, Senior Judge, US District Court

9/23/2015

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of prisons to be in prison for a term of: time served, credit for 50 months and two days served as 9/22/15.

SUPERVISED RELEASE

Upon release from imprisonment, defendant shall be on supervised release for a term of: 3 years on each count, to run concurrent.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of Bureau of prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test

within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the schedule of payments sheet of this judgment.

The defendant must comply with the

standard conditions that been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reason;

6) defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without

the permission of the court, and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

14) You shall take medications for the treatment of delusional disorder as prescribed by a licensed mental health treatment provider.

15) You shall complete a mental health

evaluation and follow any treatment recommendations of the evaluate professional which do not require forced or psychotropic medication and or inpatient confinement, absent further order of the court. You shall allow reciprocal release of information between the supervising officer and treatment provider. You shall contribute to the cost of treatment according to your ability to pay.

16) You shall have no contact with the victim in person, by letter or other communication devices, audio or visual devices, or through a third party, unless authorized by the supervising officer. You shall not enter the premise or loiter within 1000 feet of the victim's residence or place of employment.

17) You shall reside in a residential reentry Center (RRC) for a period up to 180 days if necessary to provide for transitional housing. You shall abide by the rules and requirements of the facility and shall participate in programs offered by the facility at the direction of the supervising officer. You shall submit your person, residence, office, or vehicle to a search, conducted by a probation officer, at a sensible time and manner, based upon reasonable suspicion of contraband or evidence of violations of a condition of supervision. Failure to submit to search may be grounds for revocation. You shall

warn persons with whom you share a residence that the premises may be subject to search.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

Assessment total $200; fine $0.00; restitution$0.00.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows: a lump sum payment of $200 due immediately, balance due in accordance

with special instructions regarding the payment of criminal monetary penalties: while on supervised release, monetary penalties are payable on a monthly basis of not less than 10% of the defendant's net household income, commencing 30 days after the defendant is released from imprisonment.

STATEMENT OF REASONS

COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT. The court adopts the presentence investigation report without change.

COURT FINDING MANDATORY MINIMUM SENTENCE. No count of conviction carries a mandatory minimum sentence.

COURT DETERMINATION OF

ADVISORY GUIDELINE RANGE

Total Offense Level: 15

Criminal History Category: I

Imprisonment Range: 18 to 24 months

Supervised Release Range: 1 to 3 years

Fine Range: 4002 40,000, fine waived or below the guideline range because of inability to pay.

COURT DETERMINATION FOR ENDS

OUTSIDE OF THE ADVISORY

GUIDELINE SYSTEM

The sentence imposed is above the advisory guideline range.

Sentence imposed pursuant to motion not addressed in a plea agreement, defense

motion for a sentence outside of the advisory guideline system to which the government did not object.

COURT DETERMINATION OF RESTITUTION

Restitution not applicable.

9/22/2015: date of imposing of judgment.

s//Lonny R. Suko

the Hon. Lonny R. Suko, Senior Judge US District Court. 9/23/2015: date signed.