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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Terrill Smith,

10 Movant,

11 v.

12 United States of America,

13 Respondent.
14

No. CV-21-01928-PHX-SPL (JZB)
(No. CR-16-00734-SPL-1)

REPORT & RECOMMENDATION

15 TO THE HONORABLE STEVEN P. LOGAN, UNITED STATES DISTRICT
16 JUDGE:

17 Movant Terrill Smith has filed a Motion to Vacate Conviction and Sentence Under
18 28 U.S.C. § 2255. (Doc. 1.)¹

19 **I. Summary of Conclusion.**

20 Movant seeks a new trial on the ground that he was denied effective assistance of
21 counsel at trial. Because none of Movant's claims are meritorious under the standards set
22 forth in *Strickland v. Washington*, 466 U.S. 668 (1984), the Court recommends that
23 Movant's Motion be denied and dismissed with prejudice.

24 **II. Background.**

25 **A. Facts of the Case.**

26 As summarized in the Presentence Investigation Report:

27 ¹ "Doc." refers to the docket in the instant civil case. "CR Doc." refers to the docket in the
28 criminal case, No. CR-16-00734-SPL-1 (D. Ariz.). "COA Doc." refers to the docket in the
appellate case, No. 18-10289 (9th Cir.). The Court will cite to the ECF page numbers
except as noted in n.2, *infra*.

1 On May 7, 2015, the Phoenix Human Trafficking Taskforce of the Federal
2 Bureau of Investigation initiated an investigation regarding human
3 trafficking by making contact with individuals who were using Facebook to
4 locate and recruit women into a life of prostitution. Undercover employees
5 (UCE's) created undercover Facebook accounts which depicted them as
6 young women from Arizona who had no history of being involved in
7 prostitution. These undercover Facebook accounts were then used to
8 communicate with subjects suspected of being involved in pimping and
9 human trafficking.

10 On September 20, 2015, UCE's identified a Facebook account belonging to
11 Vegas Rell, later identified as [Movant], as being used in human trafficking.
12 UCE's created an undercover Facebook account bearing the name, Vanessa
13 Thompson, and sent a friend request to [Movant], which he accepted, and the
14 UCE began communicating with [Movant] via Facebook messenger. Several
15 messages were exchanged on this application; however, the communication
16 between [Movant] and "Vanessa" subsequently transitioned to cellular
17 telephone text messages. [Movant] indicated he lived in Las Vegas.
18 "Vanessa" described herself to the defendant as a dancer who lived in
19 Chandler, Arizona, and indicated she lost her job. In response, [Movant]
20 invited "Vanessa" to travel to Las Vegas and stated, "Down to travel too?"
21 "I could definitely teach you a lot of profitable things." [Movant] then asked
22 for "Vanessa's" cellular telephone number, and by text message, [Movant]
23 introduced himself as Terrill. "Vanessa" asked for clarification for what she
24 would do in Las Vegas. [Movant] stated, "I'm gonna set something up for
25 this week. Get you to bigger and better things." [Movant] then stated to
26 "Vanessa," "You don't have to do anything you don't want to. I will show
27 you how to hustle." In a subsequent text message conversation [Movant]
28 stated, "I don't even like the word pimp. I'll help you, and you can do what
you want if it doesn't work." In subsequent text message conversations
"Vanessa" questioned how she and [Movant] would be paid. [Movant]
stated, "I'm gonna help you get everything started, then go from there. I don't
take all your money, if that's what you're thinking."

18 Between September 21, and October 11, 2015, [Movant] and "Vanessa" had
19 numerous communications regarding how [Movant] would drive to Chandler
20 to pick up "Vanessa," and how they would travel to Las Vegas. On October
21 12, 2015, [Movant] sent a cellular telephone text message to "Vanessa," and
22 they arranged for [him] to pick her up October 15, 2015, in Chandler, and he
23 would drive her back to Las Vegas in his vehicle. On October 15, 2015,
24 Chandler Police Department officers observed [Movant's] vehicle arrive at
25 the predetermined location. [Movant] was arrested on a warrant for the
26 instant offense June 28, 2017.

23 During an interview with case agents, [Movant] indicated he used his
24 Facebook account under the name Vegas Rell, to communicate with
25 "Vanessa," who was going through a hard time financially. [Movant] told
26 "Vanessa" he lived in Las Vegas, and he knew places where she could make
27 money by dancing. [Movant] indicated he drove from Las Vegas to Chandler
28 to meet "Vanessa," but she was not going to be a prostitute or escort.
[Movant] indicated he knew individuals involved in escorting; however,
"Vanessa" could make her own decision. Agents observed [Movant]
matched the appearance of the individual depicted in several photographs
uploaded to the Facebook account bearing the name Vegas Rell. A further
review of [Movant's] Facebook account revealed images posted by [Movant]
referencing the life of prostitution.

1 The case agent, FBI Special Agent Blake Childress, was interviewed
 2 telephonically. He indicated [Movant] discussed securing a Greyhound bus
 3 ticket for Vanessa to travel from Phoenix to Las Vegas, and he asked
 4 “Vanessa” for identification. UCE’s provided [Movant] with a copy of an
 undercover ID bearing the name Vanessa Thompson, which was found
 during a search of his cellular telephone.

5 (CR Doc. 71 at 4–6.)

6 **B. Procedural History.**

7 On June 14, 2016, Movant was charged with attempting to transport an individual
 8 with the intent that the individual engage in prostitution or other criminal sexual activity in
 9 violation of 18 U.S.C. § 2421 (Count 1) and attempting to induce an individual to travel to
 10 engage in prostitution or other criminal sexual activity in violation of 18 U.S.C. § 2422(a)
 11 (Count 2). (CR Doc. 1.) During a four-day trial in April 2018, the government presented
 12 testimony from law enforcement officials involved in Movant’s investigation, including
 13 Agent Childress and Chandler Police Detective Michael Russo, the undercover agent who
 14 had posed as “Vanessa,” and various exhibits, including the phone and text conversations
 15 between Movant and “Vanessa” and Movant’s social media records; Movant did not
 16 present any evidence or witnesses. (See CR Docs. 88–91 (trial transcripts); CR Doc. 58
 17 (witness list); CR Doc. 59 (exhibit list); Doc. 1-3 at 544–759 (copies of select trial
 18 exhibits).)² The jury convicted Movant on Count 1 but was unable to reach a verdict on
 19 Count 2. (CR Doc. 62.) On August 1, 2018, the Court sentenced Movant to 20 months in
 20 prison followed by 60 months of supervised release.³ (CR Doc. 73.) On August 17, 2020,
 21 the Ninth Circuit affirmed the conviction and sentence. *United States v. Smith*, 817
 22 F. App’x 450 (9th Cir. 2020).⁴

23 _____
 24 ² In referring to the trial exhibits in Exhibit 6 of Movant’s Motion (doc. 1-3 at 544–759),
 25 the Court will cite to the internal page numbers on the bottom right. In referring to the trial
 transcript, the Court will cite to the internal page numbers on the top right.

26 ³ As noted in the November 18, 2021 Service Order: “At some point Movant was released
 27 from prison and sought modification of his supervised release conditions. On October 1,
 2019, the Court denied the motion. Effective March 8, 2021, Movant’s release supervision
 was transferred to the District of Nevada.” (Doc. 3 at 1; see CR Doc. 107 (motion to stay
 conditions of supervised release), CR Doc. 109 (minute entry denying motion), CR Doc.
 118 (order transferring jurisdiction).)

28 ⁴ A copy of the Ninth Circuit’s decision is attached as Exhibit 4 of Movant’s Motion.
 (Doc. 1-3 at 537–39.)

On November 12, 2021, Movant filed the present Motion pursuant to 28 U.S.C. § 2255. (Doc. 1; CR Doc. 120.) The Motion is timely.⁵

III. Post-Conviction Relief Under 28 U.S.C. § 2255.

“A federal prisoner may collaterally attack the legality of his conviction or sentence through a motion to vacate, set aside, or correct his sentence under § 2255.” *United States v. Jackson*, 21 F.4th 1205, 1212 (9th Cir. 2022). A federal prisoner may seek relief on 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.” 28 U.S.C. § 2255(a). If the court finds the prisoner is entitled to relief, it must vacate and set aside the judgment and “discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” 28 U.S.C. § 2255(b).

Generally, “claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice.” *Massaro v. United States*, 538 U.S. 500, 504 (2003); *see also United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) (“A § 2255 movant procedurally defaults his claims by not raising them on direct appeal and not showing cause and prejudice or actual innocence in response to the default.”). However, “an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.” *Massaro*, 538 U.S. at 504.

Issues resolved on direct appeal may not be relitigated in a collateral proceeding under 28 U.S.C. § 2255. *Egger v. United States*, 509 F.2d 745, 748 (9th Cir. 1975) (“Issues raised at trial and considered on direct appeal are not subject to collateral attack under 28 U.S.C. § 2255.”); *United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985) (“Redd raised

⁵ A one-year statute of limitations applies to § 2255 petitions. 28 U.S.C. § 2255(f). The one-year period runs from the date on which the judgment of conviction becomes final. § 2255(f)(1). A judgment becomes final when the Supreme Court “affirms [the] conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.” *Clay v. United States*, 537 U.S. 522, 527 (2003). Supreme Court Rule 13 provides that a petition for writ of certiorari must be filed within 90 days after entry of the judgment or order sought to be reviewed. Movant’s conviction therefore became final 90 days after the Ninth Circuit affirmed it.

1 this precise claim in his direct appeal, and this court expressly rejected it. Therefore, this
 2 claim cannot be the basis of a § 2255 motion.” (citing *Egger*, 509 F.2d at 748)).

3 **IV. Movant’s Claims to Relief.**

4 Movant seeks a new trial on the ground that he was denied effective assistance of
 5 counsel at trial. (Doc. 1; *see also* Doc. 3 at 1–2.) Movant asserts counsel was ineffective
 6 for failing to: (1) call an expert witness to counter testimony that escorting and prostitution
 7 are interchangeable, (2) challenge the reliability of said testimony, (3) object to hearsay,
 8 and (4) request complete jury instructions on “attempt.” (Doc. 1 at 2–3, 33–50.) Movant
 9 also asserts “cumulative error” resulted. (*Id.* at 51.) In support of his claims that counsel’s
 10 performance was deficient, Movant provides a declaration from Laura Udall, a criminal
 11 defense attorney in Tucson. (Doc. 1-3, Ex. 9, at 777–82.) The government responded. (Doc.
 12 6.) Movant replied. (Doc. 11.)

13 **V. Discussion.**

14 The Sixth Amendment guarantees a defendant the right to counsel, which the
 15 Supreme Court has interpreted as “the right to the effective assistance of counsel.”
 16 *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14
 17 (1970)); *see* U.S. Const. amend. VI. To establish a violation of this right, a defendant must
 18 show: (1) counsel’s performance “fell below an objective standard of reasonableness,”
 19 measured by “prevailing professional norms,” and (2) prejudice attributable to the deficient
 20 performance, *i.e.*, “a reasonable probability that, but for counsel’s unprofessional errors,
 21 the result of the proceeding would have been different.” *Id.* at 688, 694.

22 “[C]ounsel is strongly presumed to have rendered adequate assistance and made all
 23 significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690. To
 24 show deficient performance, the defendant “must rebut this presumption by proving that
 25 [the] representation was unreasonable under prevailing professional norms and that the
 26 challenged action was not sound strategy.” *Kimmelman v. Morrison*, 477 U.S. 365, 384
 27 (1986). To show sufficient prejudice, the defendant must show “a substantial, not just
 28 conceivable, likelihood of a different result.” *Kayer v. Shinn*, 141 S. Ct. 517, 523 (2020)

(internal quotation marks and citations omitted). “This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687.

“Failure to make the required showing of *either* deficient performance or sufficient prejudice defeats the ineffectiveness claim.” *Id.* at 700 (emphasis added); *see also Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) (“Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other.”). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

A. Counsel was not ineffective for not calling an expert witness to testify on lawful escort services.

1. Background.

At trial, the government presented the testimony of Det. Russo, the undercover agent who posed as “Vanessa,” and Det. Christina Decoufle of the Phoenix Police, who testified as a blind expert on the prostitution and escorting industries. (See CR Doc. 88 at 167–76, 181–90 (Russo, direct); CR Doc. 89 at 211–43 (Russo, direct cont’d), 244–75 (Russo, cross), 285–309 (Decoufle, direct), 309–19 (Decoufle, cross); CR Doc. 33 (notice of expert testimony).)⁶

Det. Russo testified, *inter alia*, that prostitution and escorting “are essentially the same” and that “essentially an escort is a prostitute,” testifying that both involve “some sort of sex acts that’s [sic] performed for money” and that “escorting” is simply “the more politically correct term or the term that will get you in less amount of trouble.” (CR Doc. 89 at 272–74.) Nonetheless, Det. Russo conceded it was “not impossible” for a person to be an escort without being a prostitute and that “[i]t could happen,” though he could recall only “a handful of times” in his 18 years of working on prostitution cases when that had been the case. (*Id.* at 273–74.)

Det. Decoufle similarly testified, *inter alia*, that the terms “prostitution” and

⁶ There was no redirect of either witness.

1 “escorting” are “interchangeable” and that “escorting” is “just a word to slap on top of
2 prostitution to not make it look so bad, or to try to make it seem legal.” (*Id.* at 307.) She
3 testified that every instance of so-called “escorting” she encountered in her 13 years of
4 working on prostitution cases was found to be prostitution. (*Id.*) However, Det. Decoufle,
5 like Det. Russo, conceded it was “possible” for a person to be an escort without being a
6 prostitute. (*Id.* at 310.)

7 In its closing argument, the government urged the jurors to discredit Movant’s
8 allegations that he did not intend to prostitute “Vanessa” and to rely, instead, on Det.
9 Decoufle’s testimony in finding that he did:

10 [Movant] didn’t come out and say: Vanessa, I am a pimp, directly, and what
11 I would like you to do is to sell your body in exchange for money. He didn’t
12 use legal terminology. He didn’t say: I would like you to engage in a
13 commercial sex act. He used the terms that are common in the industry, and
you heard Detective Decoufle explain each one of those terms to you. You
heard her talk about what escorting really is.

14 (CR Doc. 90 at 388–89.)

15 In response, the defense argued, *inter alia*, there was insufficient evidence that
16 Movant intended to prostitute “Vanessa,” that there was no “pimp/prostitute” relationship
17 between her and Movant, and that the government had been “running a one-size-fits-all-
18 theory about pimps.” (*Id.* at 410, 414, 416–17, 419.) It further argued that not everything
19 termed “escorting” involved sex, appealing to notions of common sense:

20 Sure, it’s common knowledge to everybody in this room – let’s not be cute –
21 a lot of escorts do sleep with their clients. I mean, we just know that by being
22 Americans and being human, right? A lot of strippers probably do too. But
23 here’s the other thing, do you honestly believe that every stripper sleeps with
24 the guys, or do you think really just a small percentage do? Don’t a lot of
25 college girls do this to make money? Don’t a lot of professionals, before they
26 become professionals, do this and make money? Do you think they go over
the line and start having sex with people? Of course not. Is it such a new
concept for some guy who has money to want to be seen with a woman for
whatever reason? No. We know that happens too, we’re adults. We know
that happens, and we know that *that doesn’t always mean sex*. Sometimes it
just means you would be paid to hang out with this guy, go see a show with
him, keep him company, because we know people will pay for company.

27 (*Id.* at 410–11 (emphasis added).)

28 In rebuttal, the government again urged the jury to reject the defense’s contentions

1 and rely instead on the testimony of Det. Russo and Det. Decoufle—the “experts” on
2 prostitution:

3 [The defense is] asking you just to rely upon your notion of what a pimp is,
4 instead of the experts. . . . [Y]ou heard both Russo and Detective Decoufle
5 talk to you about how many pimps and prostitutes they have talked to. It’s in
6 the thousands. They are experts in this field.

6 (*Id.* at 440.)

7 2. Movant’s Argument.

8 Movant asserts that Det. Russo and Det. Decoufle’s testimony “that virtually all
9 escorting is actually prostitution was not accurate” and “seriously undermined the
10 credibility of [his] defense,” namely, “that he never intended that [‘Vanessa’] engage in
11 prostitution or other criminal sexual offenses when she got to Las Vegas.” (Doc. 1. at 35–
12 36.) Movant asserts their testimony was “based exclusively on interactions with pimps and
13 prostitutes in the context of criminal investigations” and that counsel was ineffective for
14 failing to counter it with expert testimony on the prevalence of “escort services or other
15 forms of adult entertainment that do *not* involve sexual acts.” (*Id.* at 36, 39.)⁷

16 Movant provides a declaration from Barbara Brents, a sociology professor at the
17 University of Nevada–Las Vegas, who has done extensive research on the sex industry in
18 Nevada. (Doc. 1-3, Ex. 8, at 770–75.) According to Professor Brents, there is a “wide range
19 of formal and informal, adult, entertainment, leisure, and intimate services that individuals
20 who may be considered attractive may provide in tourist towns like Las Vegas that do not
21 include sex.” (*Id.* at 772.) Professor Brents provides a number of examples of services that
22 “do not include penetration, touching of genitals or other illegal acts” in her declaration,
23 including: modeling, product promotion, dinner dates, dancing, house shows, “tickles
24 parties,” sensual massages, “sugaring” (receiving financial compensation in exchange for
25 “emotional labor, dating, or conversation”), professional domination services, and
26 financial domination (receiving “money or expensive gifts” in exchange for “almost

27
28 ⁷ Movant provides a declaration from trial counsel in which counsel confirms he “did not
consider retaining an expert for the case on any issue, including the nature of escorting and
related services in Las Vegas.” (Doc. 11 at 26 ¶ 2.)

1 nothing”), among other things. (*Id.* at 772–74.)

2 Movant argues “there was no strategic reason” for counsel to not present testimony
3 from Professor Brents (or an individual with similar knowledge) regarding these services
4 and that there is “at least a reasonable probability” the jury would not have convicted him
5 had such testimony been presented because it “would have alerted the jury to the fact that
6 escorting and related services that do *not* entail sex acts are indeed common and quite
7 lucrative in tourist destinations such as Las Vegas.” (Doc. 1 at 39–40.) Movant asserts that
8 whether he “could have been referring to legal escort services” in his discussions with
9 “Vanessa” was a “key issue” in both parties’ closing arguments and that, in its closing
10 argument, the government had “leaned heavily” on the detectives’ testimony and “the
11 defense’s failure to present any testimony in support of its theory.” (*Id.* at 40–41.) Movant
12 further asserts the jurors “appear[ed] to have been struggling with their decision [to
13 convict],” noting their failure to reach a verdict on Count 2 and their question during
14 deliberations on whether a lawful escort encounter could transform into an illegal
15 prostitution if the escort performed a sex act during the encounter. (Doc. 1 at 40; *see* CR
16 Doc. 61 at 4.) Movant argues this “shows” the jurors were “grappling” with whether the
17 evidence was sufficient. (Doc. 1 at 40.) Therefore, Movant argues, “[i]f defense counsel
18 had presented testimony such as Professor Brents’s, jurors may well have harbored a
19 reasonable doubt about [his] guilt.” (*Id.* at 41.)

20 3. Analysis & Conclusion.

21 a. Counsel’s Performance.

22 The Court finds counsel’s performance was objectively reasonable. Movant argues
23 there was no strategic reason for counsel to fail to call an expert in his case. But there are
24 at least two reasons why the failure to call an expert was not ineffective assistance of
25 counsel. First, the government’s witnesses agreed that it was possible for a person to be a
26 legal escort without engaging in prostitution. While the government’s witness testified that
27 it was rare for a person to be an escort without engaging in sexual acts, the fact was
28 admitted by the expert. (*See, e.g.*, doc. 1-3, Ex. at 197. ER 214. “Q: So at the end of the

1 day, you can be an escort without having to be a prostitute? A: It could – it could happen.”)

2 Second, and more importantly, a defense expert may have been forced to agree that
3 many of Movant’s statements were consistent with an attempt to transport Vanessa with
4 the intent that she engage in illegal prostitution. The Ninth Circuit found that a reasonable
5 jury “could find that Smith intended for Vanessa to engage in unlawful sexual conduct,
6 based on Smith’s assurances to Vanessa that she could choose which sexual acts she would
7 perform and Smith’s explanation of the legal consequences if she were ‘caught.’” *United*
8 *States v. Smith*, 817 Fed. App’x. 450, 451 (9th Cir. 2020). Several conversations between
9 the undercover agent and Movant reflect a strong suggestion that illegal conduct would be
10 occurring with the Vanessa.

11 THE CHS: Yeah. And, like, at that point, like, you know how you said, like,
12 you would have my back, it’s like you wouldn’t be -- it’s not like you’d be
13 getting in the car with me. You know, so that’s why I want to just make sure
14 that, you know, I could really trust you, like, if I ever got in trouble or
15 something like that, that you would -- you’d still have my back. You know?

16 MR. SMITH: Definitely that. And like I got connections out here to the point
17 where, like, if something like that was to ever happen, then, you know what
18 I’m saying, like, it would -- it would be taken care of. And it wouldn’t even
19 be like it happened, because there’s lawyers involved. And there’s people
20 that can erase it.

21 ...

22 if you have a bails bondsman or a -- a lawyer that you connected with, then
23 anything, if you was ever to get in trouble or -- you know. . . they would --
24 they would make the bail and they would, you know what I’m saying, appear
25 in court for you. So you wouldn’t even have to show up to court. And then,
26 basically, like you would pay a fine and take a class. And then it would erase
27 from your record.

28 (Doc. 1-3 at 562.)

THE CHS: . . . So is it -- is it a felony? Or is it just, you know, like a slap on
the wrist kind of thing?

MR. SMITH: It’s a -- out here, it’s like a slap on the wrist, because out here,
you know what I’m saying, like, there’s like a 48-hour hold, if -- you know
what I’m saying, if you don’t get bailed out. . . . But even if you don’t -- even
if you weren’t to be bailed out, two days is all the time that they really keep
you.

THE CHS: Sweet.

MR. SMITH: And it’s -- it’s a misdemeanor. It’s not a felony.

1 (Id. at 564.)

2 THE CHS: I mean, like, with -- with, like, protection and stuff, if -- because
3 I'm -- I mean, I'm clean. I want to stay clean. I don't want to get like an STD
4 or anything like that. If they're not wanting to use, like, condoms or anything,
5 I can tell them no; right?

6 MR. SMITH: Fuck yeah. And not only that, but I mean like everything is
7 fucking covered no matter if it's a fucking hand job.

8 (Id. at 570.)

9 Considering the risk that Movant's own expert may have agreed that these
10 conversations were consistent with prostitution, counsel did not provide ineffective
11 assistance by failing to present expert testimony at trial.

12 **b. Lack of Prejudice.**

13 Movant also fails to demonstrate a "substantial" likelihood that the jury would not
14 have convicted him had it been presented with testimony from Professor Brents or an
15 individual with similar knowledge on lawful (non-sexual) escorting services. Movant's
16 claim therefore fails on the prejudice prong of the *Strickland* test. "[W]hile the Constitution
17 requires that a criminal defendant receive effective assistance of counsel, the presentation
18 of expert testimony is not necessarily an essential ingredient of a reasonably competent
19 defense." *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995). "[A] court hearing an
20 ineffectiveness claim must consider the totality of the evidence before the judge or jury."
21 *Strickland*, 466 U.S. at 695.

22 Among what the Ninth Circuit referred to as the "extensive evidence of guilt,"
23 *Smith*, 817 Fed. App'x at 451, was the audio recording of an October 13, 2015 phone call
24 between Movant and Devynn Mitchell (posing as "Vanessa"). (CR Doc. 89 at 275–79; see
25 Doc. 1-3 at 550–90 (transcript of phone call).) During the call, Movant and "Vanessa"
26 discussed the work "Vanessa" would do in Las Vegas. Movant identified "dancing" as
27 "one way" she could make money. (Doc. 1-3 at 556.) However, "Vanessa," stated she
28 wanted "to try to expand a little bit." (*Id.*) Movant then brought up "escort services." (*Id.*)
"Vanessa" asked if Movant was referring to "streetwalking," which he denied, stating,
"Never that. Never jumping in and out of cars," explaining that the safety risks associated

1 with streetwalking were “not worth it.” (*Id.* at 560–61.)

2 As noted above, “Vanessa” asked Movant what would happen if she “got in
3 trouble.” (*Id.* at 562.) Movant stated that he had “connections” who could “erase it,”
4 specifically, that a lawyer would “make the bail” and “appear in court for [her]” and that
5 “it would erase from [her] record” once she “pa[id] a fine and t[ook] a class.” (*Id.* at 562–
6 63.) “Vanessa” responded that she “always thought it was legal out there or something”
7 and asked if “it” was “a felony” or “like a slap on the wrist kind of thing.” (*Id.* 564.) Movant
8 stated it was the latter and that it was “a misdemeanor,” “not a felony.” (*Id.*) He stated she
9 could be held in custody for 48 hours if she failed to make bail. (*Id.*)

10 Movant and “Vanessa” then discussed specific services “Vanessa” might provide.
11 Movant told her people would give her money “to go out to eat” or “to go take you shopping
12 and give you money on top of shopping just to kind of be seen with you.” (*Id.* at 566.) He
13 also said someone might pay “to go to a show with you or whatever.” (*Id.* at 567.) He stated
14 “it’s not necessarily that you’re just, like, fucking for money,” but that “anything that
15 happens within the room is obviously . . . between you and whoever you’re in the room
16 with” and “everything’s your choice.” (*Id.* at 568–69.) “Vanessa” expressed that she
17 “want[ed] to stay clean” and not “get like an STD or anything like that. . . .” (*Id.* at 570.)
18 Movant responded, “Fuck yeah. And not only that, but I mean like everything is fucking
19 covered no matter if it’s a fucking hand job.” (*Id.*) Emphasizing once again that
20 “everything’s covered,” Movant further explained that “[t]here is no kissing . . . [and] no
21 . . . letting people like eat your pussy . . . [o]r play with your pussy” and that “everything
22 is so . . . strict as far as that goes.” (*Id.* at 571.) Later, he told “Vanessa” they would discuss
23 “how to charge” and “how much to charge” on their way back to Las Vegas. (*Id.* at 573.)

24 In light of Movant’s statements during this phone call, expert testimony on the
25 existence and prevalence of lawful escort services in Las Vegas would have had little to no
26 effect on the jurors and their decision to convict Movant. Such testimony was largely
27 inapposite because, as evidenced by Movant’s statements during the call, Movant did not
28 intend for “Vanessa” to engage exclusively in lawful activity when she came to Las Vegas.

1 Although Movant and “Vanessa” discussed her earning money through various non-
2 sexual encounters—*e.g.*, dinner and shopping dates—they discussed her engaging in
3 sexual encounters as well. In response to “Vanessa’s concern that she might contract a
4 sexually transmitted infection (“STI”) during an encounter with a client, Movant stated that
5 “everything,” even a “hand job,” would be “covered” (*i.e.*, with a condom). (*Id.* at 570.)
6 He further stated that clients would not be allowed to kiss or perform oral sex on her. (*Id.*
7 at 571.) But, in the jurors’ minds, if Movant had truly intended for “Vanessa” to only
8 engage in lawful (non-sexual) activity, his response to her concern regarding STI’s likely
9 would have been dramatically different. For instance, he likely would have assured her that
10 there would not even *be* a risk of her contracting an STI because she would not be engaging
11 in any activity posing such a risk—*i.e.*, any *sexual* activity. But instead, Movant told
12 “Vanessa” that any sexual activity she engaged in during the course of her work would be
13 protected (“covered”) sexual activity.

14 Moreover, if Movant had only intended for “Vanessa” to engage in *lawful* activity,
15 he would have no reason to discuss potential legal consequences she could face if she was
16 caught engaging in such activity. Movant stated that what “Vanessa” would be doing was
17 “a misdemeanor” and that she could be arrested and spend up to 48 hours in jail for it. (*Id.*
18 at 564; *see also* CR Doc. 89 at 309 (Det. Decoufle confirms prostitution is a misdemeanor
19 in Las Vegas).)

20 Movant therefore fails to show a reasonable probability that the jury would not have
21 convicted him had it been presented with expert testimony on the prevalence of lawful
22 escort services in Las Vegas. Movant’s claim that counsel was ineffective for not
23 presenting countervailing expert testimony therefore fails for lack of prejudice. *See Kayer*,
24 141 S. Ct. at 523; *Strickland*, 466 U.S. at 694, 700; *see also Bean v. Calderon*, 163 F.3d
25 1073, 1082–83 (9th Cir. 1998) (rejecting that counsel was ineffective for failing to
26 investigate and present a theory that lacked support from the record and conflicted with
27 other evidence).

28 **B. Counsel was not ineffective in challenging the reliability of the**

detectives’ testimony regarding escort services.

Movant claims counsel was ineffective for failing to challenge the reliability of Det. Russo and Det. Decoufle’s testimony (discussed above) “that legal escorting is exceedingly rare, such that ‘escorting’ really refers to prostitution.” (Doc. 1 at 41–42.) Movant argues that the detectives’ opinions were premised on a “gross underestimation [of] the prevalence of legal escort services,” as purportedly demonstrated by Professor Brents’s declaration. (*Id.* at 41–42.) Further, Ms. Udall, in her declaration, opines that counsel performed deficiently by “failing to object to the reliability of the expert testimony” on the grounds that “the Phoenix-area Police Department employees were in no way qualified to testify about the escort business in Las Vegas[,] Nevada.” (Doc. 1-3, Ex. 9, at 779–80 ¶ 6.b.) Movant asserts there is “at least a reasonable probability that the Court would have precluded those opinions and that the jury would not have convicted [him]” had counsel challenged their reliability “with contrary evidence.” (Doc. 1 at 42.)

The Court finds that counsel did not perform deficiently simply because he did not proceed as Ms. Udall, another lawyer, would have proceeded. “There are countless ways to provide effective assistance in any given case.” *Strickland*, 466 U.S. at 689. “The test is not whether another lawyer, with the benefit of hindsight, would have acted differently, but whether ‘counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment.’” *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998) (quoting *Strickland*, 466 U.S. at 687, 689). Rather, the relevant inquiry is “whether the choices made by defense counsel were reasonable.” *Id.* (citation omitted).

What is more, the very objection Ms. Udall states should have been presented was, in fact, presented—and rejected—on direct appeal. (Doc. 1-3, Ex. 3, at 526–27.) The Ninth Circuit found Movant’s “assertion that that Detective Decoufle’s expertise was limited to prostitution in Arizona” to be “unpersuasive” in light of Det. Decoufle’s “background and experience” and further found the district court did not err in admitting “expert testimony regarding the common behaviors and terminology of pimps.” *Smith*, 817 Fed. App’x at

1 451–52 (citing *United States v. Taylor*, 239 F.3d 994, 998 (9th Cir. 2001) (“By and large,
2 the relationship between prostitutes and pimps is not the subject of common knowledge.”)).

3 Thus, counsel was not ineffective for failing to challenge the testimony on such
4 grounds because such a challenge would likely have been futile. *See Rupe v. Wood*, 93 F.3d
5 1434, 1445 (9th Cir. 1996) (“[T]he failure to take a futile action can never be deficient
6 performance.”); *Ramirez*, 327 Fed. App’x at 752 (“[E]ven assuming the failure of
7 Ramirez’s attorney to object to the admission of this testimony is deficient performance,
8 Ramirez cannot show prejudice because the . . . testimony was admissible.”).

9 But even if, *arguendo*, there existed some meritorious challenge to the testimony
10 that would guarantee its exclusion, counsel did not perform deficiently by failing to raise
11 it because counsel had competently challenged the reliability of the testimony during cross-
12 examination, eliciting favorable admissions from both detectives that not every “escort” is
13 necessarily a prostitute:

14 Detective Russo

15 Q: Have you talked to every escort who works in the Valley?

16 A: I have not.

17 Q: What percentage do you think you have talked to?

18 A: Over a thousand.

19 Q: All right. Over a thousand percent?

20 A: Over a thousand escorts or prostitutes.

21 Q: And what percentage might that be in Maricopa County?

22 A: I couldn’t tell you.

23 Q: So at the end of the day, you can be an escort without having to be a
24 prostitute?

25 A: It could – *it could happen*.

26 (CR Doc. 89 at 274 (emphasis added).)

27 Detective Decoufle

28 Q: While I would agree with you that the term “escorting” probably has
got its reputation sullied over the last few years, but is it possible for

1 somebody to be an escort and not a prostitute?

2 A: *It's possible, yes.*

3 Q: Can somebody be a stripper and not a prostitute?

4 A: Correct, yes.

5 Q: And you can make money at both of those professions as well, right,
6 without having sex with anybody?

7 A: Yes, people can.

8 (*Id.* at 310 (emphasis added).)

9 By eliciting these admissions, counsel had established the critical point he had been
10 trying to make in Movant's defense: that someone is not a prostitute simply because they
11 are an escort. The total exclusion of the detectives' testimony was therefore not necessary
12 for presentation of a competent defense. Counsel's challenge to the reliability of the
13 detectives' testimony through competent cross-examination was a reasonable action under
14 the circumstances. *See Babbitt*, 151 F.3d at 1173. Movant fails to rebut this presumption.

15 Moreover, Movant fails to show that the result of trial would have been any different
16 had counsel taken a different course of action—*i.e.*, moved for the exclusion of the
17 testimony or objected to it. As discussed, such a course of action would likely have been
18 unsuccessful and therefore futile. But even so, substantial evidence of guilt existed in
19 Movant's own statements—*independent of the detectives' testimony*—namely, his own
20 statements that “Vanessa” would engage only in protected sexual activity and that she
21 could be arrested and put in jail for the work she would be doing for him because it was “a
22 misdemeanor.” Thus, even if, *arguendo*, Movant could establish deficient performance
23 here, his claim would still fail for failure to show sufficient prejudice. *See Kayer*, 141 S. Ct.
24 at 523; *Strickland*, 466 U.S. at 694, 700.

25 **C. Counsel was not ineffective for failing to object to testimony regarding**
26 **another individual's conviction for sex-trafficking.**

27 **1. Background.**

28 FBI Special Agent Childress testified that the “Vanessa Thompson” profile was

1 created in response to a post written by a Facebook user by the name of “Mitchell Moola”
 2 (hereinafter, the “Moola post”) that was essentially an advertisement for women to become
 3 prostitutes. (CR Doc. 89 at 322, 324; *see* Doc. 1-3, Ex. 6, at 758 (Moola post, Trial Ex.
 4 22).) The Moola post tagged 65 other Facebook users, including Movant, and stated that
 5 “anyone of these fine gentlemen can show a worthy lady of leisure who is really ready to
 6 change her life a righteous way to a righteous life.” (Doc. 1-3 at 758; *see* CR Doc. 89 at
 7 322, 324–28.) Agent Childress testified that another one of the individuals tagged in the
 8 Moola post was an individual who had been previously convicted of sex trafficking in the
 9 District of Arizona.⁸ (CR Doc. 89 at 322.) At this point, the Court called a sidebar inquiring
 10 into the relevance of this testimony. (*Id.* at 322–23.) According to the government, the only
 11 connection between this individual and Movant was that they were both tagged in the
 12 Moola post. (*Id.* at 323.) The Court then asked if defense counsel had any objection to the
 13 testimony as unduly prejudicial under Fed. R. Evid. 403. (*Id.* at 323–24.) Counsel declined,
 14 stating it was “just a tag” and that he planned to “deal” with it in closing argument. (*Id.* at
 15 324.) The sidebar concluded. (*Id.*)

16 In closing, with respect to the “tag” issue, defense counsel essentially argued that
 17 just because Movant had been tagged in the Moola post did not mean he had any knowledge
 18 of it or that he was involved or associated with it:

19 I don’t know if anybody has Facebook, but when you’re tagged in something,
 20 you’re tagged in it. If I want to create an account right now that said FBI
 21 agents were on the take and I tagged Agent Childress, could he do anything
 22 about it? No. Does that mean he’s on the take? No. Does that even mean he
 23 knows about it? No. But let’s say he’s investigated in the future for
 24 impropriety, are they seriously going to bring up this post that he may not
 know about and say, look, Mr. Childress, somebody said you’re on the take?
 I mean, how does a person even defend themselves against something like
 that, something that they have no control over that somebody else wrote,
 somebody posted on their timeline?

25 (CR Doc. 90 at 408–09.)

26 ⁸ The individual was Kenneth Becketts, who was indicted for sex trafficking of a
 27 minor in November 2013 and convicted pursuant to a plea agreement in March 2015 in
 28 Case No. CR-13-01637-001-PHX-SRB (D. Ariz.). (Doc. 1-3, Ex. 10, at 785, Ex. 11, at
 787–81.) He was not mentioned by name at the trial but was mentioned by name in the
 search warrant used to obtain Movant’s Facebook records. (*Id.*, Ex. 10, at 785–86; *see also*
 Doc. 6 at 10–11.)

1 **2. Argument.**

2 Movant claims counsel was ineffective for failing to object to or move to exclude
3 or strike Agent Childress’s “highly prejudicial” testimony regarding the other individual’s
4 conviction as unduly prejudicial under Fed. R. Evid. 403 or as inadmissible hearsay under
5 Fed. R. Evid. 803(22). (Doc. 1 at 43–45.) Movant also asserts counsel should have sought
6 a cautionary instruction and moved for a mistrial based on this testimony. (*Id.* at 46.)
7 Movant argues there is a “reasonable probability” that he would not have been convicted
8 had counsel objected to this testimony. (*Id.*)

9 **3. Analysis & Conclusion.**

10 The Court finds that Movant fails to demonstrate a reasonable probability that the
11 jury would not have convicted him had counsel successfully objected to or moved for the
12 exclusion of Agent Childress’s testimony regarding the conviction of one of the other
13 individuals tagged in the Moola post. Agent Childress testified that the post invited women
14 to reach out to the tagged individuals if they wanted to become a prostitute. The post was
15 generated by “Moola” not Movant. The fact that one person out of 65 had a prior sex
16 trafficking conviction would have very little relevance regarding Movant’s conduct and
17 statements. The introduction of this evidence would not have reasonably affected the
18 outcome of Movant’s case in light of Movant’s own statements to “Vanessa.” *See Smith*,
19 817 Fed. App’x at 451. Movant’s claim therefore fails for failure to show prejudice
20 attributable to counsel’s performance with respect to Agent Childress’s testimony on this
21 issue. *See Kayer*, 141 S. Ct. at 523; *Strickland*, 466 U.S. at 694, 700.

22 **D. Counsel was not ineffective for failing to object to hearsay.**

23 Movant argues that counsel provided ineffective assistance by failing to object to “a
24 portion of” a Facebook message that addressed Movant as “P” (for “pimp”). Among the
25 evidence presented at trial was a screenshot of a Facebook message sent to Movant from a
26 user named “Cee Chizzle,” which stated:

27 Hey hey Happy holidays P hey this funny ass bitch on FB that try to add me
28 and I didn’t accept it because she seem like them PEOPLE so be safe and hit
 me back about it . . . Luv Ya Bro

1 (Doc. 1-3, Ex. 6, at 752 (Trial Ex. 20).) Explaining this message, Agent Childress testified
2 that “P” meant “pimp” and “PEOPLE” meant “law enforcement.” (CR Doc. 89 at 337.)

3 Movant claims there is a “reasonable probability” the outcome of trial would have
4 been different had counsel challenged the admissibility of the portion of the message
5 referring to Movant as “P” as inadmissible hearsay offered to prove the truth of the matter
6 asserted—*i.e.*, that Movant was a pimp. (Doc. 1 at 47–48.)

7 Movant’s claim lacks merit. On direct appeal, the Ninth Circuit affirmed the
8 admission of the contents of the Facebook message. *See Smith*, 817 Fed. App’x at 451
9 (“The district court did not plainly err by failing to exclude as impermissible hearsay
10 Smith’s conversations with Bunny Jordan and a Facebook message from a friend warning
11 that Vanessa might be an undercover officer. The district court could conclude that the
12 evidence was offered not for the truth of the matter asserted, but to show Smith’s
13 knowledge and intent.”). Here, the letter “P” was a part of Facebook message that was not
14 improperly admitted at trial. Counsel did not provide ineffective assistance by failing to
15 object to the letter “P.” *See Rupe*, 93 F.3d at 1445 (9th Cir. 1996) (“[T]he failure to take a
16 futile action can never be deficient performance.”); *Ramirez*, 327 Fed. App’x 751 at
17 (“[E]ven assuming the failure of Ramirez’s attorney to object to the admission of this
18 testimony is deficient performance, Ramirez cannot show prejudice because the . . .
19 testimony was admissible.”).

20 Movant argues that “counsel should have requested the excision of the hearsay
21 within the message.” (Doc. 1 at 48.) Movant submits that “Agent Childress testified that,
22 based on his training and experience, “P” referred to pimp [].” Movant concludes that
23 because “this evidence was hearsay offered to prove the truth of the matter asserted, the
24 failure to object was unreasonable.” (*Id.* at 48-49.) But the word “pimp” was not included
25 in the Facebook message. Instead, it was the testimony of Agent Childress that interpreted
26 “P” to mean “pimp.” The testimony of Agent Childress was not hearsay. While the
27 testimony of Agent Childress may have been objectionable on other grounds, *e.g.*, Rule
28 403, it was not hearsay. Movant’s claim – that the failure to raise a hearsay objection was

1 deficient – lacks merit.

2 **E. Counsel was not ineffective for failing to request “complete” jury**
 3 **instructions on “attempt.”**

4 Movant claims counsel was ineffective for failing to request a “complete jury
 5 instruction on ‘attempt.’” (Doc. 1 at 48–50.) With respect to Count 1, the jury was
 6 instructed as follows:

7 [T]he Government must prove each of the following elements beyond a
 8 reasonable doubt: First, the defendant knowingly attempted to transport a
 9 person in interstate commerce; second, the defendant attempted to transport
 10 a person with the intent that such person engage in prostitution or any sexual
 11 act activity for which a person can be charged with a criminal offense; and
 12 third, the defendant did something that was a substantial step towards
 committing the crime. Mere preparation is not a substantial step towards
 committing the crime. To constitute a substantial step, a defendant’s act or
 actions must demonstrate that the crime will take place, unless interrupted by
 independent circumstances.

13 (CR Doc. 90 at 457–58.)

14 Movant’s claim of error here is identical to the one he raised on appeal. On appeal,
 15 Movant claimed these instructions were incomplete and that the jury should have been
 16 further instructed that “the third element . . . requires that the defendant did something that
 17 was a substantial step toward committing the crime and that ‘*strongly corroborated* the
 18 defendant’s criminal intent’ to commit the crime.” (Doc. 1-3, Ex. 3, at 509 (internal
 19 alterations and citation omitted).) Movant also claimed the jury should have been further
 20 instructed that “to constitute a substantial step, the defendant’s act must ‘unequivocally’
 21 demonstrate that the crime will take place unless interrupted by independent
 22 circumstances.” (*Id.*) The Ninth Circuit, however, found that the instructions as given
 23 “were not ‘misleading or inadequate to guide the jury’s deliberation’” and that, “given the
 24 extensive evidence of guilt, any error in the instruction did not prejudice [Movant].” *Smith*,
 25 817 Fed. App’x at 451 (citation omitted).

26 Consistent with the Ninth Circuit’s findings on appeal, Movant has not shown a
 27 reasonable probability that the jury would not have found him guilty had it been given these
 28 additional instructions. *Id.*; see *Redd*, 759 F.2d at 701 (“Redd raised this precise claim in

1 his direct appeal, and this court expressly rejected it. Therefore, this claim cannot be the
 2 basis of a § 2255 motion.” (citing *Egger*, 509 F.2d at 748)). Movant’s claim that counsel
 3 was ineffective for failing to ensure that these instructions were given therefore fails for
 4 lack of prejudice. See *Strickland*, 466 U.S. at 694, 700.

5 **F. Movant fails to show cumulative error or prejudice.**

6 Movant claims the “cumulative effect of [counsel’s alleged] errors requires a new
 7 trial.” (Doc. 1 at 51.) However, Movant has not shown *any* constitutional error in counsel’s
 8 performance, as discussed throughout this Report, and therefore fails to show cumulative
 9 error. See *Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) (“Because we conclude that
 10 no error of constitutional magnitude occurred, no cumulative prejudice is possible.”);
 11 *Franklin v. Small*, 161 F. Supp. 2d 1087, 1095 (N.D. Cal. 2001) (“[T]he cumulative error
 12 doctrine permits the court to consider the combined effect of several *errors*, but does not
 13 permit the court to consider the combined effect of several *non-errors*.” (emphasis added)).

14 **VI. Conclusion.**

15 Each claim in Movant’s motion fails for lack of merit for failure to satisfy both
 16 prongs of the *Strickland* test. Movant therefore fails to demonstrate that he is entitled to a
 17 new trial or any other post-conviction relief under 28 U.S.C. § 2255. Accordingly, the
 18 Court will recommend that Movant’s motion be denied and dismissed with prejudice.

19 **VII. Certificate of Appealability.**

20 “The district court must issue or deny a certificate of appealability when it enters a
 21 final order adverse to the applicant.” Rule 11(a), Rules Governing Section 2255
 22 Proceedings, 28 U.S.C. § 2255. To obtain a certificate of appealability, the movant must
 23 make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).
 24 This requires the movant to demonstrate “that jurists of reason could disagree with the
 25 district court’s resolution of his constitutional claims or that jurists could conclude the
 26 issues presented are adequate to deserve encouragement to proceed further.” *Miller–El v.*
 27 *Cockrell*, 537 U.S. 322, 327 (2003). Movant has not made either showing here.

28 Accordingly, the Court will recommend that a certificate of appealability be denied.

VIII. Recommendation.

Based on the foregoing analysis,

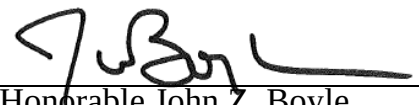
IT IS RECOMMENDED the Motion to Vacate Conviction and Sentence (doc. 1) be **denied** and **dismissed with prejudice**.

IT IS FURTHER RECOMMENDED a certificate of appealability be **denied**.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment. The parties shall have 14 days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Thereafter, the parties have 14 days within which to file a response to the objections.

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

Dated this 2nd day of December, 2022.



Honorable John Z. Boyle
United States Magistrate Judge