

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRENT DOUGLAS COLE — PETITIONER

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX -- VOLUME - 1 (ONE)

In propria persona Petitioner:

Brent Douglas Cole

Reg. no. 71911097-H4-16

P. O. BOX 1002 (FCI Thomson)

Thomson, IL 61285

No phone.

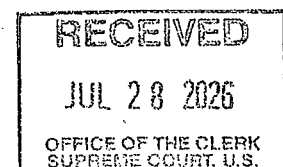
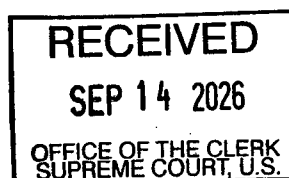
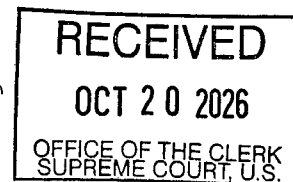


TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2-3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4-5
STATEMENT OF THE CASE	6-38
REASONS FOR GRANTING THE WRIT	39
CONCLUSION.....	40

INDEX TO APPENDICES

2026 U.S. App. LEXIS 3663

- APPENDIX A - Decision of the ninth Cir. Appeals Court 2/25/26 2-3-
ORDER, Case# 25-4263, Dkt#13.1. The panel construed all filings
as "a timely request for a certificate of appealability." DENIED.
- APPENDIX B - Court of Appeals DENIED rehearing and rehearing en
banc. Filed April 24, 2026, citing "See 9th Cir. R.27-10; 9th Cir.
Gen.Ord.6.11." Issue of Hohn v. U.S., 534 US at 253 is raised.
- APPENDIX C - Appeal# 25-1634 for Mandamus DENIED rehearing and 4
en banc rehearing. ORDER, Oct. 31, 2025, Dkt#15.1. The issue
of RECUSED Judge assigning this cause to all subsequent judges, etc.
- APPENDIX D - Appeal# 25-1634, DKT#4.1, ORDER, 3/27/2025 (2pgs), 5-6
"Real party in interest must file an answer to this petition ..."
Thomson USP was locked-down-all-mail suspended. I could not answer.
- APPENDIX E - Appeal 25-1634, 11/10/25, Dkt# 16.1, MANDATE ON 4/24/
2025 Order. The reason that the 2255 motion has taken more than 7-8
SIX YEARS when there was purportedly nothing "in it with merit"??
- APPENDIX F - Appeal 25-1634, 04/24/2025, Dkt# 12.1 (2pgs), ORDER,
"district court issued Findings and Recommendations addressing 9-10
petitioner's 28 USC § 2255 motion. This petition is denied as moot
with respect to claims regarding the district court's delay."
- APPENDIX G - Appeal# 25-382, 2/26/2025, Dkt# 7.1 (2pgs) MANDAMUS. 11-12
DENIED asserting "has not demonstrated a clear and indisputable"
right to the remedy under Bouman.
- APPENDIX H - ORDER No. 2:14-cr-0269-WBS-SCR, ECF 375, 5/14/2025, 13-16
MOTION FOR RECUSAL. Respondent argues that it is acceptable for
a patently disqualified judge to step back in assigning judges
- APPENDIX I - No. 2:14-cr-0269, ECF 377, 5/20/25, Time Ext. "GRANTED".
- APPENDIX J - Time Ext. 17-18

INDEX TO APPENDICES AND EXHIBITS Appx. (i)(i)

Opinions, orders, Findings of fact, and conclusions of law (cont.)

NO.	DESC.	Dkt#	DATE	INFO	RESULT	PAGES
11.	ORDER, 2:14-cr-0269, ECF# 68, 2/20/15, §2255 Motion DENIED					21
12.	ORDER, 2:14-cr-0269-WBS-DB, ECF# 10, 10/6/2014 RECUSAL of Judge Kimberly J. Mueller					22
13.	DOCKET ENTRY for ECF# 10 "ORDER REASSIGNING CASE signed by District Judge Kimberly J. Mueller on 10/6/2014. Judge Mueller Judge Mueller is RECUSED from this action and District Judge Garland E. Burrell, Jr. is assigned for all further proceedings. All dates set before Judge Mueller are hereby vacated. ..."					23
14.	DOCKET ENTRY for ECF# 220, 01/14/2020, ORDER signed by Chief District Judge Mueller on 1/14/2020: Pursuant to inactive status of Senior Judge Garland E. Burrell Jr. this case is REASSIGNED to Senior Judge William B. Shubb for all further proceedings. District judge Garland E. Burrell Jr. no longer assigned to case. The case number on all future filed documents shall be: 2:14-cr-0269-WBS. (TEXT ONLY ENTRY)(Donati, J)" NO ORDER FILED IN VIOLATION OF F.R.Crim.P. Rule 55.					24
15.	ORDER OF REASSIGNMENT, ECF 338, 08/06/2024, by Judge Kimberly J. Mueller: "IT IS THEREFORE ORDERED that the above captioned case shall be and hereby is reassigned from Magistrate Judge Deborah Barnes to Magistrate judge Sean C. Riordan for all further proceedings. Entered in C.A.9, No 25-1634, 4/21/2025, Dkt# 11.1					25-26
	NOTICE OF ELECTRONIC FILING, ECF# 338, 8/6/2024					26
16.	NOTICE OF ELECTRONIC FILING, ECF# 339, 8/15/2014, . . . "(NO Document ATTACHED)(TEXT ONLY) as to Brent Douglas Cole: Due to the previous referrals of motions [215]&[317] to the Magistrate Judge and the Reassignment of this case to Magistrate Judge Riordan, the COURT HEREBY ORDERS the NOTICE to correct Er- ror [336] filed 7/15/2024 also REFERRED to Magistrate Judge Sean C. Riordan. (Fancel M.)"					27
17.	"ORDER, (Text Only Entry) as to Brent Douglas Cole issued by Courtroom Deputy for Magistrate Judge Sean C. Riordan on 1/22/ 2025: A review of the docket indicates that movant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255 has been briefed by the parties. [216],[250]. Movant's additional motions related to his §2255 motion have also been fully briefed. ECF Nos.[227],[266],[267],[270],[275], [285],[299],[317],[336],[343]. All of these matters are deemed submitted on the papers pursuant to Local Rule 230(1). Unless Unless specifically authorized by the court, any additional motions or oppositions to any new motion related to the pending §2255 motion will be stricken from the docket and not considered." NOTE: F.R.Crim.Proc. Rule 55 requires the written ORDER be filed.					28
18.	ORDER, No. 25-1634, 4/4/2025, Dkt# 5.1, (FILED BY RESPONDENT) No. 2:14-cr-0269-WBS-SCR, ECF 365. 3/31/2025					29-30

INDEX TO APPENDICES AND EXHIBITS Appx. (i)(i) Opinions,
Orders, Findings of fact, and Conclusions of law (cont.)

No.	DESC.	DKT#	DATE	INFO	RESULT	PAGES
18.	(cont.) Judge Shubb claims that I have not taken the appeals in good faith. That is calumny. It is my duty as a citizen to protect the integrity of the judiciary from the abuses of discretion and subversion of legal principles that is now being routinely practiced.					29-30
19.	No. 25-1083, 2/25/2025, Dkt# 4.1, ORDER, "Briefing is stayed" "The order is not appealable as a final judgment or as a collateral order, so the court appears to lack jurisdiction over this appeal. [Cites omitted]. ("denial of a motion to disqualify is not a final order nor one that should be treated as such.") I did not receive my mail timely and was locked down for months.					31-2
20.	ORDER, No. 25-1083, DKT#9.1,, 5/28/2025, "not a final order nor one that should be treated as such."				DISMISSED.	33
21.	MANDATE, 25-1083, 6/27/2025, Dkt# 11,1, Judgment in EFFECT.					34 -
22.	ORDER, 2:14-cr-269-wbs-scr-1, and 2:19-cv-2274-WBS-SCR, "de novo review of this case. having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis. ..." DENIED CATEGORICALLY No disputed fact; claim, issue, ground, or evidence decided.					35-37
23.	JUDGMENT ON MOTION UNDER 28 USC §2255, No 2:14-cr-0269, ECF 382, 6/3/2025, dismissing everything in both the criminal case, which was reopened by "MOTION TO CORRECT PLAIN ERROR UNDER F.R.Crim.P.RULE 52(b)", and No. 2:19-cv-02274 "Companion Civil Case". The practice of issuing one order for both a civil case and a criminal case was used here to conceal the facts and to deprive me of due process of law by falsely claiming that the RULE 52(b) motion was connected to the 2255 proceeding, and concealing the assignment of the 52(b) motion by violating Rule 55 of F.R.Crim.P. using ECF# 339 (supra "16." NOTICE OF ELECTRONIC FILING). — Also, infra EXHIBITS (Ex.) 1-3 reveal that the trial court violated F.R.Civ.Proc. 79 by filing the final order and judgment, ECF 381 & 382 out of sequence and not docketed chronologically. ECF 383 being filed the day before. June 2, 2025. ECFs 381 & 382 were filed June 3, 2025.					38-39

APPENDIX 1(i)(ii): OTHER RELEVANT OPINIONS, ORDERS, AND CONCLUSIONS OF LAW ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

Ex.#	Desc.	Dkt#	Date	INFO	Pages
1. (Doc. 13)	RECUSAL, ECF 10, 10/6/14(1pg.) & p.3 of ECF 383,				40-42
(Ex. 1)	"MOTION TO RECONSIDER MAGISTRATE ORDER OF MAY 14, 2025" (Doc. 24)				
2.	ECF 381, ORDER, 6/3/25 (2pgs.) Final Order No. 2:14-cr-0269				43-44
(25)	Supra order 22 (Doc. 25 of PETITIONER'S APPENDIX.) (Doc. 25)				
	EXHIBIT 2 (Ex. 2) (2pgs.), pp. 43-44				

INDEX TO APPENDICES AND EXHIBITS APPX. 1(i)(ii) (cont.)
 Opinions, Orders, Findings of fact, and Conclusions of law

Doc#	Desc.	Dkt#	INFO/RESULT	PAGES
26.	Ex.3, Judgment on # 2:14-cr-0269-WBS-SCR, ECF 383, 6/3/25			45
	Final Judgment on both criminal and civil cases 2:19-cv-02274-WBS-SCR in the same Order and judgment.			
27.	Ex.4, "NOTICE OF SUBSTANTIVE CHANGE IN THE LAW INVOLVED"			46-47
	ECF# 332, 9/12/2022, N.Y. Ragle & Pistol Ass'n., Inc. v. Bruen, U.S. LEXIS 3055, No. 20-843. The trial court ignored it.			
28.	Ex.5, ECF 7 filed 10/01/2014, No. 2:14-Mj-0212-EFB, <u>ORDER APPOINTING COUNSEL</u> , Structural Error. This was issued in breach of the court's consent decree on 9/25/14 in open court.			48
29.	Ex.6, California Misdemeanor Complaint, Case M14-0388			49-50
	Prosecution was instituted Jan. 27, 2014, but could not state what the corpus delicti was. Prosecution kept stating that the "crime" was that the California penal code was violated.			
30.	Ex.7, Email from FBI Agent FORRISTEL to attendees of the July 7, 2014 meeting at NCSO (Nevada County Sheriffs Office) containing the federal Criminal Complaint, supporting affidavit, and arrest warrant attachments. FORRISTEL irregularly proffered the Complaint to the court, and the court illegally accepted the proffer from a person without a bar license that is not an authorized representative of the United States in court.			51
31.	Ex.8, is p.2 of ECF 340, <u>"OBJECTION TO FAILURE TO PROVIDE SERVICE OF PROCESS"</u> , for the Government's OPPOSITION (#337) to #336 Motion To Correct Plain Errors pursuant to Rule 52(b) F.R.Crim.P. This page details the violation of Art.I, §9 cl.2 U.S. Const., and U.S. v. Cox, to establish vindictive prosecution.			52
32.	Ex.9, 2025 U.S. Dist.LEXIS 73610, excerpt of findings, ECF 369, Filed 4/17/2025, paraphrased trial testimony of the the shooting-involved-officers. Yet another different story.			53-56
33.	Ex.10, ECF 23, 1/13/2015, <u>"MOTION IN LIMINE TO BAR A DEFENSE OF SELF-DEFENSE"</u> , AUSA McCoy paraphrases the testimony of FBI Agent FORRISTEL before the grand jury Oct. 2, 2014. See p.2 L.18-26 and n.1. See also PETITION p.27 for relevance.			57-60
34.	Ex.11, ECF 35, 1/23/2015, <u>"REPLY TO DEFENDANT'S OPPOSITION TO MOTION IN LIMINE"</u> . Here, on p.1 & n1 L.21-23, AUSA McCoy retracts the testimony of FORRISTEL before the Grand Jury. This constitutes a constructive amendment to the indictment. The Grand Jury was never informed of the retraction and this occurred eleven days before the trial began. This left NO evidence of the alleged crimes before the grand jury.			61-63
35.	ECF 155, excerpt 09/08/15, pp120-139, No.2:14-cr-0269, Forristel's Grand Jury Testimony Oct. 2, 2014. McCoy exam,			64-67

INDEX TO APPENDICES AND EXHIBITS APPX. 1(i)(ii) (cont.)
Opinions, Orders, Findings of fact, and Conclusions of law

Doc#	Desc.	Dkt#	INFO/RESULT	PAGES
36.	FD-302 "discussing the June 14, 2014 shooting incident"		Agent Forristel, AUSA Coppola, and CHP HARDIN "review".	68
37.	Initial interview of CHP HARDIN AT NCSO (Nevada County Sheriffs Office)	BATES COLE_00614-645	excrpt.	69-74
38.	ECF 176, 3/2/16, Trial Transcript (TT) excerpt, CHP HARDIN, who change his testimony from his initial interview. TO: I initially thought he had because he had-- I guess..."			75-78
39.	ECF 292, Filed 9/17/2021, Affidavit of Defense Counsel Jake Toney. Mr. TONEY claiming to have been a defense counsel for 39 years before this cause, asserts the "important question" in this cause was "who shot first." So the court and prosecution also seem to push on the jury. I believe who first drew a gun and targeted the other party is the correct statement of the law of assault and self-defense.			79
40.	ORDER, ECF 276, 5/27/2021, REFERRED ECF 275 "Motion to Set Aside Void Judgment" to Magistrate Judge Deborah Barnes for findings and recommendation pursuant to 28 USC § 636(b)(1) (B). I asserted on page 2 of ECF 275 it is exempt:DISPOSITIVE.			80-81
41.	ORDER, 5/14/2025, "Motion for Recusal", DENIED (ECF# 294) "Ninth Circuit has held... judge himself should rule on the legal sufficiency" (of ECF 370). 2025 U.S. Dist. LEXIS 92137.			82-83
42.	Ex.14, 2025 U.S. Dist. LEXIS 19069, 1/29/25, DENIED "Motion for Disqualification of Magistrate Judge and Judge." (Docket No. 294). Court notes "the case has since been reassigned to Magistrate Judge Sean C. Riordan for..." by the same recused Judge Kimberly J. Mueller that assigned all.			84
43.	ORDER, ECF 352, Filed in CA9 No. 25-1634, Dkt# 1.1 Judge shubb ignores the fact that appointments were made by recused judge Mueller and were invalid ab initio. It is required to recuse if a reasonable person might percieve bias. A recused judge would think it likely the bias exists. The appearance of bias is certain.			85-87
44.	ECF 280, 6/29/21, Government's RESPONSE TO DEFENDANT'S MOTION FOR DEFAULT JUDGMENT (ECF 289) AND REQUEST FOR A BRIEFING SCHEDULE. "the United States was awaiting the Magistrate Judge's review and determination of an appropriate schedule."			88-89
45.	ECF 5, Filed 09/25/2024, No 2:14-mj-0212-EFB-1 <u>DETENTION ORDER</u> — I was held to answer for an INFAMOUS CRIME WITHOUT AN INDICTMENT or a judicial determination of the corpus delicti of any crime. There was only the hearsay affidavit of the FBI Lead Investigator, who was a judge/adjudicator and the "prosecutor" who proffered the complaint without STANDING, and the court should not have accepted it.			90-91

INDEX TO APPENDICES AND EXHIBITS — APPX. 1(i)(v)

MATERIAL REQUIRED BY SUBPARAGRAPH 1(f)

The Constitutional Provisions, Treaties, Statutes, and Ordinances	
Doc.#	PAGES
46. 18 U.S.C. §111 as codified in 2014 when the shooting occurred	92
47. 18 U.S.C. §111 as codified in 2022 after P.L. 117-59 added(c)	93-95
48. 18 U.S.C. §1623 False declarations before grand jury or court AUSA McCoy expounded FBI Agent FORRISTEL's Testimony before the grand Jury 2014A, USDC Eastern District of California (Doc.33, p.58 (ECF 23) this APPX.), p.2 L.18-26, 1/13/2015. He retracted the testimony of FORRISTEL (Doc. 34 (ECF 35), p.1 L. 21-23 & n.1, 1/23/15, as being "incorrect"(n.1), 11 days before trial. He failed to notify the grand jury that he re- tracted all evidence of the corpus delicti. This is construc- tive amendment of the indictment. The Retraction of the only "evidence" of the Corpus Delicti was concealed from the juries.	96
49. 28 U.S.C. §547, Duties. "Except as otherwise provided by law, 97 each United States Attorney, within his district, SHALL — (1) prosecute for all offenses against the United States;..."	
50. 28 U.S.C. §132. Creation and composition of the district courts Statutorily legislated courts are Article I courts (Black's 98 Law Dictionary 11th Ed (Black's 11th)), p.448 'legislative court' "created by statute"; not Article I, §8, cl.9, U.S. Const.	
51. Excerpt of <u>Morrison v. Olson</u> , 487 US 654, 709-711 (1988)	99
52. Excerpt of <u>Ex Parte Yarbrough</u> , 110 US 651, 653 (1884)	100
53. <u>Swain v. Pressley</u> , 430 US 372, 384-86 (1977) and <u>Williams v. Florida</u> , 399 US 78, No 927, Note 44, 6/20/70	101-102
54. <u>McGuin v. Texas Power and Light</u> , 714 F.2d 1255, 1261(5th Cir. 103 1983). <u>U.S. v. Marcus</u> , 560 US 258, 263, 176 LEd2d 1012 (2010)	
55. <u>Sivak v. Hardison</u> , 658 F.3d 898, 2011 US App.(9th Cir.) at 908-909; and <u>Napue v. Illinois</u> , 360 US 264, 269-70(1959)	104
56. The Northwest Ordinance (NW Ord.) 'Articles of Compact'... and certificate of authenticity from the National Archives.	105-06
57. ECF 294, 9/21/2021, Case 25-1634, Dkt 1.1, pp.33-53,	107-128
58. Case# 25-1083, 4/8/2025. Dkt# 7.1, IMPORTANT PUBLIC INTEREST, Ex.12 pp. 129-139	
59. 28 USC §137. Division of business among district judges 140 "(a) In General. ... [§] (b) Random assignment of rate Court..."	

INDEX TO APPENDICES AND EXHIBITS — APPX. 1(i)(v) (cont.)

MATERIAL REQUIRED BY SUBPARAGRAPH 1(f)

The Constitutional Provisions, Treaties, Statutes, and Ordinances

Doc.#	DESCRIPTION	PAGES
59.	28 U.S.C. §137. Division of business among district judges.. 140 (b) Random assignment of rate court proceedings. The local rules of the USDC Eastern District of California require random assignment of cases among the judges be done by the Clerk of the Court.	
60.	18 USCS §924(c)(1)(A) is a sentence "enhancement" mandating..141 THAT ADDITIONAL SENTENCE BE ADDED CONSECUTIVELY, and be stacked with other sentencing enhancements for the same act: in this instance §111(b). The act of carrying a firearm was innocently done in order to have the ability to defend against problem bears.	
61.	Case# 2:14-cr-0269, ECF 6., 02/15/2014, Jury instruction . .142-143 16 amended and delivered to jury after closing arguments. This fraudulently declared that listed precedents determined by binding precedent that criminal intent was presumed, without notice or opportunity to object. It was a directed verdict: GUILTY.	
62.	Felony Complaint, Superior Ct. of Cal., Nevada County . .144-48 No. F14-0267, Attempted murder and assault with a firearm filed in motion to set aside void judgment, ECF 275, #2:14-cr-269.	
63.	CA public Records Act request and response, 07/09/2014 . . 149-50 "Index of Invitees". AUSA and numerous others not listed attended the meeting. State and Federal executive colluded against me.	
64.	Gov. Exhibit 6F, BATES COLE 01562, picture of Hardin's . . 151 only injury, minor wound on the lower leg. Offer of Proof.	
65.	Gov. Exhib. 6C, BATES COLE 01163, picture of PULTORAK's .. 152 only injury, a through and through wound above the clavicle bone on his upper left shoulder -- a non-debilitating wound.	
66.	" District Attorney Findings", CHP investigation, . . 153 It is claimed that the State DA exonerated both officers. There is no specifics given and it requires a judicial determination.	
67.	Affidavit of FBI Agent FORRISTEL with his proffer of a . 154-159 criminal complaint that instituted the prosecution w/o cognizance.	
68.	Indictment, #2:14-cr-269, ECF 8, 10/2/14 160-165	
69.	Transcript of Motion for change of Counsel hearing . . 166-185	
70.	" <u>MOTION TO SET ASIDE VOID JUDGMENT</u> ", No.2:14-cr-0269 ...186-202 ECF 275, Filed 05/24/2021, under FRCP Rule 60(b) and 12(b)(1).	

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 25 2026

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRENT DOUGLAS COLE,

Defendant - Appellant.

No. 25-4263

D.C. Nos. 2:14-cr-00269-WBS-SCR-1
2:19-cv-02274-WBS-SCR

Eastern District of California,
Sacramento

ORDER

Before: CANBY and HURWITZ, Circuit Judges.

The court has considered all of appellant's filings and construes them as a timely request for a certificate of appealability. So construed, the request 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.

APPENDIX A
Page 1 of 2

Doc, 2 pg. 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 24 2026

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRENT DOUGLAS COLE,

Defendant - Appellant.

No. 25-4263

D.C. Nos. 2:14-cr-00269-WBS-SCR-1
2:19-cv-02274-WBS-SCR

Eastern District of California,
Sacramento

ORDER

Before: TALLMAN and M. SMITH, Circuit Judges.

The motion (Docket Entry No. 15) for reconsideration and reconsideration en banc is denied. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX B

Note number! Note Date!

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

v.

BRENT DOUGLAS COLE,

Movant.

Nos. 2:14-cr-0269-WBS-SCR-1
2:19-cv-2274-WBS-SCR

ORDER

Movant, a federal prisoner proceeding pro se, filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On April 17, 2025, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty-one days. Movant filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

////

APPX. Doc. 25 p. 43 SCOTUS

APPX. p. 43 ¹
23

Note number! Note Date!

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations (ECF No. 369) are adopted in full.

2. Movant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF Nos. 216 & 250) is denied.

3. All pending motions related to the § 2255 motion (ECF Nos. 227, 266, 270, 275, 279, 285, 299, 317, 326, 343) are denied as moot.

4. The Clerk of Court is directed to close the companion civil case No. 2:19-cv-2274-WBS-SCR.

Dated: June 3, 2025



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

cole0269.805.vac

APPX. Doc 25 p. 44 SCOTUS

Doc. 25

UNITED STATES OF AMERICA, Respondent, v. BRENT DOUGLAS COLE, Movant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
2025 U.S. Dist. LEXIS 92137; 2025 LX 16672
No. 2:14-cr-0269-WBS-SCR-1
May 14, 2025, Decided
May 14, 2025, Filed

Editorial Information: Prior History

United States v. Cole, 2015 U.S. Dist. LEXIS 70690 (E.D. Cal., May 29, 2015)

Counsel {2025 U.S. Dist. LEXIS 1} Brent Douglas Cole, Defendant, Pro se,
SANDSTONE, MN.

For Brent Douglas Cole, Defendant: Karyn Hilde Bucur, LEAD
ATTORNEY, Law Office of Karyn H. Bucur, Laguna Hills, CA.

For USA, Plaintiff: Heiko Philipp Coppola, GOVT, LEAD
ATTORNEY, United States Attorney's Office, Sacramento, CA.

Judges: SEAN C. RIORDAN, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: SEAN C. RIORDAN

Opinion

EXHIBIT 13
Page 1 of 2

ORDER

Movant is a federal prisoner proceeding without counsel with a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Currently pending before the court is movant's motion for recusal of the undersigned. ECF No. 370. Respondent has filed an opposition to the motion. ECF No. 373. For the reasons indicated below, the court denies the motion.

I. Motion for Recusal

In his motion, movant describes himself as a "Constitutionalist" and submits that a "judicial cabal" is operating within the Eastern District of California to only appoint biased judges to his case in violation of the Local Rules. ECF No. 370. Movant also argues that former Chief District Judge Kimberly Mueller improperly reassigned this case on January 14, 2020 as well as on August 6, 2024 since she had previously recused herself from the criminal proceedings. See ECF Nos. {2025 U.S. Dist. LEXIS 2} 10, 220, 338.

By way of opposition, respondent contends that the recusal motion is untimely because the undersigned was assigned to this case over eight months ago. ECF No. 373. Additionally, respondent submits that movant's declaration does not establish any bias or prejudice that would warrant granting the motion. ECF No. 373. Regarding Chief District Judge Mueller's minute orders

reassigning this case, respondent points out that these were merely ministerial orders.

II. Legal Standard

The Ninth Circuit has "held repeatedly that the challenged judge himself should rule on the legal sufficiency of a recusal motion in the first instance." United States v. Studley, 783 F.2d 934, 940 (9th Cir. 1986) (citation omitted). If the affidavit supporting the motion is legally insufficient or conclusory in nature, then recusal can be denied. United States v. \$292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995). The substantive standard in both federal statutes governing recusal is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Studley, 783 F.2d at 939 (internal quotations omitted); see also 28 U.S.C. § 144; 28 U.S.C. § 455. Recusal is justified "only if the bias or prejudice stems from an extrajudicial source and not from conduct or rulings made during the course of the proceeding." {2025 U.S. Dist. LEXIS 3} Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1388 (9th Cir. 1988).

III. Analysis

Based on these standards and a review of the motion, a reasonable person with knowledge of the facts of this case would not have a basis to question the impartiality of the undersigned magistrate judge nor the procedure utilized to reassign this matter. The undersigned magistrate judge was reassigned this matter, as well as all the other cases that were previously assigned to Magistrate Judge Deborah Barnes upon her retirement. See ECF No. 338. Movant's conclusory allegations are based on nothing more than rank speculation of a conspiracy against him and are legally insufficient to establish a reasonable question as to the undersigned's impartiality. Therefore, the motion for recusal is denied.

Accordingly, IT IS HEREBY ORDERED that movant's motion for recusal (ECF No. 370) is denied for the reasons stated herein.

DATED: May 14, 2025

/s/ Sean C. Riordan

SEAN C. RIORDAN

UNITED STATES MAGISTRATE JUDGE

EXHIBIT 13
Page 2 of 2

Appx. Doc. 41, pg. 83

UNITED STATES OF AMERICA, Plaintiff, v. BRENT DOUGLAS COLE, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
2025 U.S. Dist. LEXIS 19069; 2025 LX 113819
No. 2:14-cr-00269 WBS DB
January 28, 2025, Decided
January 29, 2025, Filed

Editorial Information: Prior History

United States v. Cole, 2015 U.S. Dist. LEXIS 70690 (E.D. Cal., May 29, 2015)

Counsel {2025 U.S. Dist. LEXIS 1} Brent Douglas Cole, Defendant, Pro se,
Thomson, IL USA.

For Brent Douglas Cole, Defendant: Karyn Hilde Bucur, LEAD ATTORNEY, Law Office of Karyn H. Bucur, Laguna Hills, CA USA; Benjamin David Galloway, Office Of The Federal Public Defender, Sacramento, CA USA; J Toney-DECEASED, J Toney, Attorney At Law, Woodland, CA USA; Quin Anthony Denvir, Law Offices Of Quin Denvir, Davis, CA USA.

For U.S. Attorneys: Heiko Philipp Coppola, GOVT, LEAD ATTORNEY, Michael Damien McCoy, GOVT, United States Attorney's Office, Sacramento, CA USA.

Judges: WILLIAM B. SHUBB, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: WILLIAM B. SHUBB

Opinion

EXHIBIT 14
Page 1 of 1
ECF 352

ORDER

Defendant Brent Douglas Cole has filed a pro se "Motion for Disqualification of Magistrate Judge and Judge." (Docket No. 294.) Defendant seeks to disqualify the then-assigned Magistrate Judge and the undersigned. As an initial matter, the court notes that the case has since been reassigned to Magistrate Judge Sean C. Riordan for findings and recommendations on multiple pending motions, and thus the motion appears moot to the extent it seeks disqualification of former Magistrate Judge Deborah Barnes. More importantly, however, the motion, even assuming it was timely, does not demonstrate that the undersigned {2025 U.S. Dist. LEXIS 2} "has a personal bias or prejudice against [the defendant] or in favor of any adverse party," as required by 28 U.S.C. § 144, or that (1) the undersigned's "impartiality might reasonably be questioned" or (2) the undersigned "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," as required by 28 U.S.C. § 455. Among other things, a judge's prior adverse ruling is not a sufficient cause for recusal. United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986.)

Because there is no basis for the undersigned's disqualification in this case, the motion (Docket No. 294) is DENIED.

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APPX. Doc. 42, pg. 84

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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,

12 Respondent,

13 v.

14 BRENT DOUGLAS COLE,

15 Movant.
16

No. 2:14-cr-0269-WBS-SCR-1

FINDINGS AND RECOMMENDATIONS

17 Movant is a federal prisoner collaterally attacking his conviction and sentence pursuant to
18 28 U.S.C. § 2255. This matter was referred to a magistrate judge on November 12, 2019 and
19 reassigned to the undersigned on August 6, 2024. ECF Nos. 217, 339. Respondent filed an
20 opposition and movant has filed a reply. For the reasons set forth below, the undersigned
21 recommends denying movant's motion to vacate, set aside or correct his sentence.

22 **I. Factual and Procedural History**

23 Following a 2015 jury trial, movant was convicted in this court of assault on a federal
24 officer, assault on a person assisting a federal officer, and discharging a firearm during a crime of
25 violence.¹ The evidence adduced at trial is summarized as necessary herein to aid the court's
26 understanding of movant's current claims for relief.

27
28 ¹ All references to "defendant" have been modified to "movant" to reflect the current procedural posture of this case.

A. Jury Trial

1. Prosecution's Case in Chief

a. Testimony of Officer Hardin

On the afternoon of June 14, 2014, uniformed California Highway Patrol ("CHP") Officer Hardin responded to the area of Grizzly Hill and North Bloomfield Roads to assist a Bureau of Land Management ("BLM") ranger with two vehicle storage forms. ECF No. 176 at 86-89 (Reporter's Transcript ("RT") of Feb. 3, 2015). At that location he met BLM Ranger Pultorak who was also wearing a uniform. ECF No. 176 at 89-91. Officer Hardin radioed into CHP dispatch with the vehicle identification number ("VIN") for a motorcycle found in the area. Id. at 91-92. He was informed that the motorcycle was reported stolen. Id. at 92. Ranger Pultorak informed Officer Hardin that the stolen motorcycle was at an illegal campsite along with another motorcycle that had been broken down into parts. Id. Both officers went to the fairly remote area of the campsite to impound the motorcycles. Id. at 92-93, 95.

When they reached the campsite, Officer Hardin found an empty backpack and started putting the disassembled motorcycle parts into it so that he could take them to the area where a tow truck could come and pick them up. ECF No. 176 at 98. Ranger Pultorak went to the location of the other motorcycle at the campsite. Id. at 103.

At that point, Officer Hardin heard a noise that was "like a rustling in the leaves or the bushes." Id. Officer Hardin stopped what he was doing and headed down the hill in the direction of the noise. Id. at 104. He was approximately 15 to 20 feet from Ranger Pultorak who was in his line of sight and also walking towards the noise. Id. at 104-105. Ranger Pultorak yelled "Police, Identify yourself" or "Police, Who is there?" Id. at 105. Movant then came out from the tree lined area of the rustling noise. Id. at 106-107. He was wearing jeans, a t-shirt, and a hoodie sweatshirt. Id. At first, Officer Harden could not see anything on movant's waist due to the sweatshirt. Id. at 110.

Ranger Pultorak and movant initially engaged in a normal conversation. Id. at 110-111. Movant told him his name and said, "You know me." Id. at 111. Movant also told him that it was his campsite or his stuff at the campsite and he asked if he could have his stuff. Id. at 111,

1 144. Ranger Pultorak responded by taking out handcuffs from his duty belt. Id. Movant then
2 loudly responded, "You're not putting those on me" and took what Officer Hardin described as a
3 "bladed stance." Id. at 112. Movant's right hand went towards his waistband, prompting Officer
4 Hardin to fear for the officers' safety. Id. at 112-113. Ranger Pultorak asked movant if he was
5 armed and he said, "Yes, I am." Id. at 114. At that point, Officer Hardin saw that movant had a
6 gun in a holster on his hip. Id. at 114. Officer Hardin drew his .40 caliber service weapon and
7 pointed it at movant. Id. at 115. He yelled at movant, "Drop the gun, drop the gun" and kept
8 repeating that phrase. Id.

9 Ranger Pultorak began to back away from movant. A second or two later, movant pointed
10 his weapon at Ranger Pultorak. Id. at 115-116. Officer Hardin heard a shot, and started to shoot
11 at movant. Id. at 118-119. He did not know who fired the first shot, but, ultimately Officer
12 Hardin fired 12 rounds at movant. Id. at 141, 151. At some point, movant focused his attention
13 on Officer Hardin and shot at him at least twice. Id. at 119. Officer Hardin was backing up
14 during the exchange of gun fire and fell over the campsite's firepit onto the ground. Id. at 120.
15 Eventually, he took cover behind a tree, noticed that his firearm's clip was empty, and reloaded it.
16 Id. at 121. The shooting stopped. Officer Hardin heard movant say that he was hit and that it was
17 over, or words to that effect. Id. at 122. He approached movant with his weapon drawn and
18 noticed that he was laying on the ground. Id. at 122-124. Officer Hardin handcuffed him. Id. at
19 124.

20 Officer Hardin returned to his CHP vehicle, informed dispatch that shots were fired, and
21 requested an ambulance and a helicopter to treat movant and Ranger Pultorak, as both had been
22 shot. Id. at 125. He returned to the campsite with his medical bag and began to provide first aid
23 treatment to movant. Id. at 126.

24 The parties stipulated that Officer Hardin received medical treatment for a gunshot wound
25 to his lower right leg. ECF No. 176 at 156-157.

26 **b. Testimony of Ranger Pultorak**

27 Uniformed Patrol Ranger Pultorak from BLM's Nevada County office was on duty on
28 June 14, 2014. ECF No. 176 at 158-161. That day, he carried a .40 caliber Sig Sauer P229

1 firearm loaded with 13 rounds. ECF No. 176 at 166-168. He was patrolling the South Yuba
2 campground, but before reaching it, he stopped at North Bloomfield Road. Id. at 169. While
3 removing a mattress that someone had dumped in the area, Ranger Pultorak noticed a pickup
4 truck that was driving through “a very brushed-in” trail. Id. at 172-173. He activated the
5 emergency lights on his patrol vehicle to stop the pickup truck. Id. at 174.

6 The driver of the truck, who was later identified as movant, tried to exit the vehicle, but
7 Ranger Pultorak told him to sit back down inside the truck. Id. at 174-175. Movant gave
8 Pultorak his driver’s license, registration, and proof of insurance for the pickup truck. Id. at 175.
9 Ranger Pultorak also identified the two other passengers in the truck as Kevin and Michael
10 Radon. Id. at 176. After running their information through dispatch, Ranger Pultorak learned
11 that there were no outstanding warrants for movant or the passengers. Id. at 177. Ranger
12 Pultorak told movant that he pulled him over because the area was closed to vehicle traffic. Id. at
13 177. Movant became argumentative about the road closure and, ultimately, Ranger Pultorak told
14 him that “if he was found in that area again he would be cited at least, if not possibly have his
15 vehicle impounded.” Id. at 178. Pultorak conceded on cross-examination that there was no road
16 closure sign posted in the area. ECF No. 177 at 7. After approximately 15 minutes, movant
17 drove away and Ranger Pultorak drove his vehicle up the trail where the pickup had come from.
18 ECF No. 176 at 178-179.

19 Ranger Pultorak ultimately stopped his vehicle at a campsite area where he found two
20 motorcycles, bedding, food, and camping equipment. Id. at 180. One motorcycle had an expired
21 registration plate on it and the other had only a VIN for purposes of identifying it. Id. at 180.
22 Ranger Pultorak determined by contacting the Forest Service dispatch that the VIN came back to
23 a non-recovered vehicle. Id. at 181. He then requested that a CHP officer respond to the
24 campsite to help impound one or both of the motorcycles. Id. at 181.

25 Once CHP Officer Hardin arrived, Ranger Pultorak learned that the VIN was reported as
26 stolen. Id. at 184. While both officers were at the campsite, Ranger Pultorak “heard some
27 rustling and crunching of brush” which he thought was made by a person. Id. at 185. Ranger
28 Pultorak began walking towards the tree line and yelled out twice, “Hello. Police.” Id. at 188.

1 After the second time, movant appeared from the downhill portion of the campsite and said, "It is
2 me. You dealt with me earlier. I'm just coming up to get my stuff." Id. at 188-189. He was
3 wearing jeans and a shirt that covered his belt area. Id. at 189. As movant was approaching,
4 Ranger Pultorak told him to stop and he complied. Id. at 190. Ranger Pultorak asked movant if
5 he was armed and he said yes. Id. at 190. At that point, Ranger Pultorak told movant to turn
6 around and movant said, "No, I'm not turning around." Id. at 190. Pultorak pulled out his
7 handcuffs with his left hand, took a step towards movant, and told him to turn around again. Id.
8 at 191-193.

9 Movant took a bladed stance and reached towards his waistband. Id. at 193-194. This
10 alarmed Ranger Pultorak because he thought movant was "going for the weapon he said he had."
11 Id. at 194. Ranger Pultorak moved to his right and saw movant "draw something big and silver
12 out of his waistband." Id. at 194-195. He crouched down and began to draw his service weapon.
13 Id. at 195-196. Next, he heard a loud bang in his left ear, felt pain in his left shoulder, and knew
14 that he had been shot. Id. at 195. Ranger Pultorak returned fire and kept moving to his right. Id.
15 at 195-197. They exchanged gunfire for "a couple seconds," with Ranger Pultorak firing about
16 seven shots. Id. at 199. Ranger Pultorak reloaded his weapon and heard Officer Hardin tell
17 movant to drop his weapon. Id. at 199-200. Movant responded by saying that he had dropped his
18 weapon and threw it away. Id. at 200. After handcuffing movant, Officer Hardin left the
19 campsite to go get his medical kit. Id. at 202. Ranger Pultorak then notified the Forest Service
20 dispatch that shots had been fired. Id. at 203.

21 Ranger Pultorak was transported via ambulance and then helicopter to the hospital where
22 he received treatment for his gunshot wound. ECF No. 176 at 207. The parties stipulated that
23 Ranger Pultorak was treated for a "through and through" gunshot wound to his left shoulder.
24 ECF No. 177 at 65.

25 **c. Testimony of CHP Officer Zelhart**

26 On June 14, 2014, CHP Officer Zelhart responded to the call of an officer-involved
27 shooting. ECF No. 177 at 19. While he was rendering medical treatment, movant told him that
28 the officers were going to take his stuff and he had to shoot them. ECF No. 177 at 29.

d. Testimony of Paramedic Rutheford

When asked in the ambulance what happened, movant said that the officers drew their weapons on him and he didn't have any choice but to fire at them. ECF No. 177 at 54.

e. Testimony of Investigator Billingsly

On June 16, 2014, two criminal investigators from the Nevada County District Attorney's Office interviewed movant while he was still hospitalized for his gunshot wounds. ECF No. 177 at 118, 124. The investigators did not ask movant or any medical staff whether he was on any medication before interviewing movant. ECF No. 177 at 139. After movant waived his Miranda rights, movant told the investigators that he waited a couple of minutes before he announced his presence to the officers at his campsite. ECF No. 177 at 126-129. He was concerned that they were taking his belongings. Id. at 129. When asked if he had a weapon on the day of the shooting, movant stated that he told Ranger Pultorak that he was armed. Id. at 131. Later in the interview, movant explained that he had a weapon for security because he had come face-to-face with a bear on at least one occasion. Id. at 134-135. Movant also told the investigators that Pultorak was "twirling the handcuffs on one finger inside the loop, taunting him." Id. at 131. "Mr. Cole stated that Ranger Pultorak drew down on him, meaning he pointed his firearm towards Mr. Cole.... [and] [t]hat he drew his weapon and fired at Ranger Pultorak." Id. at 132. According to movant, "because of the contact earlier in the day and how surly and vicious Mr. Pultorak had spoken to him previous, he knew that he wanted to kill him when they met later in the day." Id. at 132-133. Based on this, movant told the investigators that he was in fear for his life on the afternoon of the shooting. Id. at 133. At another point in the interview, "Mr. Cole indicated that in a gunfight you don't wait to get shot, basically that you act first." Id. at 134. "When asked point blank who fired first, about – probably 40 minutes into the interview or longer, he said that the officers fired first." Id. at 136.

2. Defense In Chief

a. Brent Cole

Movant testified in his own defense that on the morning of the shooting he had been sleeping in his truck at the campsite. ECF No. 178 at 4-5 (RT of Feb. 10, 2015). He eventually

1 drove his truck along with Mike and Kevin Radon down towards North Bloomfield Road. ECF
2 No. 178 at 6. The truck was stopped by a ranger who asked movant for his license, registration,
3 and insurance which movant provided him. Id. at 6-8. The ranger told movant that the road he
4 had been driving on was completely brushed in and that it wasn't drivable so he was closing it.
5 Id. at 8. Movant asked him if there were any signs indicating that the road was closed and
6 whether it was BLM land. Id. at 8-9. According to movant, this made the ranger angry. Id. at 9.
7 Movant tried to tell the ranger that he had property back up the hill that he wanted to pick up, but
8 the ranger started screaming, and cut him off from speaking. Id. at 10. Movant then drove away
9 and dropped off Mike and Kevin Radon at their aunt's house which was approximately 11 miles
10 from the campsite. Id. at 10.

11 Movant returned to the intersection of Grizzly Hill Road and North Bloomfield Road and
12 parked his truck. ECF No. 178 at 10-11. He parked his truck at that location because the ranger
13 told him that he would be arrested and his vehicle towed if he saw him anywhere on BLM land
14 again. Id. at 11. Movant walked through the woods to get his backpack and other property from
15 the campsite. Id. at 11. Before he got to the campsite, he could hear and see the officers who
16 were packing everything up at the campsite and taking his property. Id. at 12. After five or ten
17 minutes, movant walked up the hill to talk to them about it. Id. at 12. Ranger Pultorak "poked
18 his head through the edge of the woods there and looked down the hill... and said something
19 about: Who goes there. Identify yourself." Id. at 12. After he identified himself, movant was
20 told that he could come up the hill and get his things from the campsite. Id. at 12-13. When
21 movant got to the campsite clearing, Ranger Pultorak asked him about the two motorcycles. Id. at
22 13-14. Movant told him that the Honda motorcycle belonged to Mike Radon, and that he didn't
23 know where the partially disassembled motorcycle came from. Id. at 13-14. Ranger Pultorak
24 then told movant that he was towing both motorcycles. Id. at 14. At that point, movant told him
25 that the backpack was his and that he wanted to get his other personal belongings. Id. at 14.
26 Ranger Pultorak "responded by pulling out handcuffs and brandishing them." Id. at 15.
27 According to movant, Ranger Pultorak was wearing a serape or poncho over his uniform and
28 pulled the handcuffs out from underneath it. Id. at 15. Ranger Pultorak then asked movant if he

1 was armed. Id. at 15. Movant told him that he was armed. Id. at 15. Both officers drew their
2 guns at that point. Id. at 15.

3 Movant pivoted on his right foot and pulled his left foot back to get away. Id. at 16. As
4 soon as Ranger Pultorak got his gun up he shot movant just below his naval. Id. at 16-17. At that
5 point, Ranger Pultorak was about four feet away from movant. Id. at 20. After he was shot,
6 movant drew his weapon and fired six shots. Id. at 20. Movant's first shot struck Ranger
7 Pultorak in the shoulder. Id. at 20. Next, movant shot "a deliberate miss" over Ranger Pultorak's
8 head. Id. at 21. Officer Hardin also started to shoot at movant and shot him two times in the arm.
9 Id. at 21. Next, movant shot towards Officer Hardin aiming for his lower leg to try to knock him
10 down. Id. at 21. This shot missed and hit the coffee pot instead. Id. at 21. Movant fired a
11 second time at Officer Hardin which grazed his leg. Id. at 22. Officer Hardin then shot movant
12 in the groin. Id. at 22. Movant was shot up pretty bad and needed help so he told Officer Hardin
13 "that it was over." Id. at 22. In total, movant was shot five times. Id. at 19. The entire shootout
14 lasted ten to twelve seconds. Id. at 23.

15 While being treated, movant spoke with Paramedic Rutherford. Id. at 25. At that point,
16 movant was feeling light headed and dizzy. Id. at 25. Movant remembers telling him that the
17 officers drew down on him and that he had to return fire. Id. at 26.

18 During movant's interview at the hospital, movant was still on morphine which had a
19 "mental effect" on him. Id. at 27. Movant was not told that the investigators were from the
20 District Attorney's Office. Id. at 27. Instead, he was told that they were independent
21 investigators and he told them what happened as best he could remember. Id. at 27.

22 Movant explained during his testimony that he had a gun at the campsite to protect
23 himself from a 500 pound bear. Id. at 28.

24 On cross examination, movant admitted that he took his pistol out of a case in his truck,
25 loaded it, and put it in a holster on his hip before he walked back up towards his campsite to
26 reclaim his property. Id. at 36. For the first time, movant also indicated that both officers were
27 carrying assault rifles. Id. at 39-40. Movant watched both officers leave the campsite armed with
28 assault rifles and come back to the campsite without them. Id. at 40. From the moment when

1 Ranger Pultorak pulled out his handcuffs, movant testified that he feared for his life. Id. at 47.
2 Movant also testified that he had not heard the audio transcript of his hospital interview with
3 investigators and that the transcript “is not necessarily accurate.” Id. at 52.

4 **b. Captain Catiglioni**

5 The defense also called Paul Castiglioni who helped treat movant for his gunshot wounds.
6 ECF No. 178 at 57, 59. He picked up a pair of handcuffs that he saw on the ground. Id. at 61.
7 He was told by law enforcement to put them back where they were and leave them. Id. at 61.

8 **c. Michael Radon**

9 On the day of the shooting, Michael Radon testified that he was with movant when they
10 were stopped by a ranger. ECF No. 178 at 70. He had parked his motorcycle and had been
11 camping for several days at the campsite where the shooting took place. ECF No. 178 at 70-71.
12 He found the “junk bike” a couple of days before the incident and took it to the campsite as well.
13 Id. at 71. Mr. Radon asked movant for a ride to his aunt’s. Id. at 72. After being stopped in
14 movant’s pickup truck by the ranger, they were told that the road was closed. Id. at 74. At least
15 three times, movant tried to ask the ranger if there were any road closed signs posted. Id. at 74-
16 75. The ranger interrupted him each time and wouldn’t let him speak. Id. at 74-75. According to
17 Mr. Radon, the ranger was “really agitated.” Id. at 75. On cross-examination, Mr. Radon
18 admitted that movant was able to ask the ranger how the road was closed if there was no sign and
19 that it was BLM land. Id. at 78. At the end of the traffic stop, the ranger told movant that he
20 would impound his truck if he saw him on the road again. Id. at 79.

21 **d. Kevin Radon**

22 Kevin Radon also testified about his encounter with a BLM ranger on the morning of the
23 shooting when he was a passenger in movant’s pickup truck. ECF No. 178 at 82. The ranger told
24 them that the road they were driving on was closed. ECF No. 178 at 83. When movant asked if
25 there was a sign indicating that the road was closed, the ranger became loud and obnoxious and
26 declared, “He’s the sign.” Id. at 83-84. On cross-examination, he indicated that movant kept
27 trying to argue with the ranger and would not drop the issue about the road closure. Id. at 87.

28 /////

1 **3. Prosecution's Rebuttal**

2 In rebuttal, the government recalled Ranger Pultorak who testified that he was not wearing
3 a poncho on the day of the shooting during any of his interactions with movant. ECF No. 178 at
4 96. He also testified that he did not remove his AR-15 rifle from his vehicle at any time during
5 the traffic stop or while at the campsite. ECF No. 178 at 97. Ranger Pultorak denied twirling his
6 handcuffs after encountering movant at the campsite. Id. at 97.

7 The jury deliberated for approximately an hour and a half on February 10, 2015. ECF No.
8 178 at 151. At 10:30 the next morning, the jury returned a guilty verdict on all three counts of the
9 indictment. ECF No. 178 at 152; ECF No. 67 (Verdict Form).

10 **B. Sentencing**

11 On February 27, 2015, movant filed a motion to discharge his counsel and to represent
12 himself. ECF No. 69. Following a hearing, the motion was granted on April 24, 2015. ECF Nos.
13 77. Trial counsel was ordered to remain in the case in an advisory capacity. ECF Nos. 77. On
14 August 28, 2015, the court sentenced movant to a total term of 355 months imprisonment,
15 followed by 36 months of supervised release. ECF Nos. 153, 156.

16 **C. Direct Appeal**

17 Appointed counsel represented movant on the appeal of his conviction and sentence.
18 Movant raised three issues on appeal. He challenged his indictment on the ground that the
19 government interfered with the independence of the grand jury. He challenged his sentence on
20 the basis that he was denied his right of allocution. Finally, movant argued that his two assault
21 convictions were not "crimes of violence" for purposes of his separate firearms conviction. On
22 May 21, 2018, the Ninth Circuit rejected these challenges and affirmed movant's conviction. See
23 ECF No. 193 (Unpublished Memorandum Opinion).

24 Movant petitioned the United States Supreme Court for a writ of certiorari, which was
25 denied on November 13, 2018. ECF No. 216 at 18. The Supreme Court denied movant's
26 separate petition for writ of mandamus on October 1, 2018. Id. at 19.

27 **D. Rule 33 Motion**

28 While his direct appeal was pending, movant filed a Rule 33 motion for a new trial. ECF

Nos. 189-190, 195-196 (amended motion). The court deferred consideration of the motion until movant's direct appeal was decided. ECF No. 192. By order dated March 14, 2019, the court denied movant's motion for a new trial on the grounds that the claims were raised and rejected on direct appeal, lacked merit, or were untimely filed. ECF No. 211.

E. Section 2255 Motion

On November 6, 2019, movant filed the pending § 2255 motion raising seven claims for relief. ECF No. 216. Movant contends:

- First, that the prosecutor committed misconduct by concealing material witnesses; making knowingly false statements to the court; suborning perjury in order to discredit movant's testimony; and, concealing material facts from the court and jury. ECF No. 216 at 7. As a result, movant's Rule 33 motion was erroneously denied by the trial court. Id. This claim centers around potential witness Christopher Donegan, who movant alleges was concealed by the prosecution to discredit his testimony. Id.
- Second, that his trial counsel was ineffective in violation of the Sixth Amendment. ECF No. 216 at 7. Specifically, he faults trial counsel for failing to: 1) file a motion to quash the indictment; 2) file a motion to suppress his statements; 3) call the witnesses movant instructed him to call; 4) introduce exculpatory evidence; 5) secure any expert witness and adequately examine the prosecution's witnesses; 6) challenge the use of perjured testimony by the prosecution; and 7) inform the court that movant wanted to represent himself. ECF No. 216 at 7. Movant alleges that his trial counsel was provided with potential witness Christopher Donegan's statement to an investigator in October 2014, but he did not use this information at trial to prove that the prosecution engaged in misconduct. Id.
- Third, that his appellate counsel was also ineffective in violation of the Sixth Amendment by failing to raise strong issues on appeal. ECF No. 216 at 8. Here, movant asserts that appellate counsel should have raised a violation of the Speedy Trial Act and failed to challenge jury instructions numbers 14 and 16. ECF No. 216 at 8. Appellate counsel "was imposed as a MASTER who failed and/or refused to follow Cole's direction or

allow him to participate and was unavailable to consult with Cole most of the time except by mail.” ECF No. 216 at 8 (emphasis in original).

- Fourth, that the decision in Davis v. United States, 588 U.S. 445 (2019), is retroactively applicable to his case. ECF No. 216 at 8. As a result, his conviction for discharging a firearm during a crime of violence should be vacated.
- Fifth, that he was denied his right to “self-represent and locus standi by this Court, a structural error....” ECF No. 216 at 8.
- Sixth, that his conviction under 18 U.S.C. § 924(c) is an ex post facto law and violates the Second, Eighth, Ninth, and Tenth Amendments to the U.S. Constitution. ECF No. 216 at 9.
- Finally, that the court lacked jurisdiction, rendering his criminal judgment void. ECF No. 216 at 9.

F. Motion to Amend § 2255 Motion

In his motion to amend and expand the record, movant requests to add claims to his pending § 2255 motion. ECF No. 250. Specifically, movant seeks to add (1) challenges to the trial court’s jurisdiction, (2) various ineffective assistance of counsel (“IAC”) claims against the attorneys who represented him at his initial appearance and at trial after the Federal Public Defender’s Office withdrew, (3) a Faretta challenge to the denial of his right to represent himself at his initial appearance, and (4) a challenge to the lack of an impartial investigation in his case.²

G. Respondent’s Omnibus Opposition

Respondent filed an omnibus opposition to the claims presented in movant’s § 2255 motion as well as his motion to amend. ECF No. 291. First, respondent submits that several of movant’s claims are procedurally defaulted because he could have raised them on direct appeal, but failed to do so. ECF No. 291 at 12-19. According to respondent, this applies to his claim that he was denied the right to represent himself (Claim 5); his ex post facto challenge (Claim 6); and

² See Faretta v. California, 422 U.S. 806 (1975) (holding that criminal defendants have a constitutional right to proceed without counsel when they voluntarily and intelligently elect to do so).

1 claims asserting that the prosecution presented false testimony at trial and concealed a material
2 witness (Claim 1). Absent cause and prejudice or actual innocence, the court cannot review these
3 claims on the merits.

4 With respect to the claim based on the government's suppression of potential witness
5 Christopher Donegan, respondent points out that movant was aware of this purported witness
6 prior to his sentencing when he filed a motion in arrest of judgment as well as a Rule 33 motion.
7 See ECF Nos. 116, 132. Additionally, "Nevada County Sheriff Deputy Liller's report indicated
8 that although briefly detained at the scene, Donegan had no substantive information about the
9 shooting to share with law enforcement and was released once law enforcement had made this
10 determination and positively identified him." ECF No. 291 at 17. Even reviewing movant's
11 evidence of Mr. Donegan's interview with a defense investigator indicates that he was not a
12 witness to the actual shooting, but only arrived afterwards. ECF No. 216 at 83-89 (August 8,
13 2014 interview with Chris Donegan by Beresford Investigations).

14 With respect to the IAC claims, respondent asserts that the attorney at movant's initial
15 appearance did inform the court that he wanted to represent himself, but the court took the matter
16 under submission. ECF No. 291 at 20. Therefore, counsel's performance was not deficient in the
17 manner identified in the § 2255 motion. The remaining claims against movant's initial
18 appearance attorney fail because even the § 2255 motion itself does not establish how the
19 outcome of movant's case would have been any different. ECF No. 291 at 20-21.

20 Respondent submitted two affidavits from trial counsel disputing that any other witnesses
21 would have been able to testify about who fired the first shot in this case. ECF No. 292 at 4, 9-
22 10. Trial counsel also indicated that he "never felt that any attempt to argue the exact placement
23 of wounds would – under these circumstances – be of any help." ECF No. 292 at 4. Thus,
24 according to respondent, a ballistics expert would not have changed the outcome of this case. "It
25 is altogether unclear from Cole's briefing how these other 'experts' would have convinced the
26 jury that Ranger Pultorak fired at Cole first or that the shooting did not happen as the officers
27 described it." ECF No. 291 at 25. The claim that trial counsel failed to call witnesses movant
28 requested is entirely conclusory because movant does not provide the names of any witnesses or

1 declarations attesting to what their testimony would have been. ECF No. 291 at 26. Respondent
2 generally argues that “[g]iven the overwhelming evidence of guilt and the jury’s rejection of
3 Cole’s self-defense argument at trial, it cannot be said that [trial counsel’s] alleged failures
4 presented a reasonable probability that the outcome of Cole’s trial would have been different.”
5 Id. at 26.

6 Respondent submitted an affidavit from appellate counsel that “describes in detail the
7 issues she considered prior to filing Cole’s direct appeal in the Ninth Circuit.” ECF No. 291 at
8 27. The additional claims that movant wanted appellate counsel to raise were not meritorious in
9 counsel’s independent judgment. Respondent emphasizes that the Sixth Amendment does not
10 require appellate counsel to include every issue that their client requests to be raised on appeal.
11 ECF No. 291 at 28 (citing Jones v. Barnes, 463 U.S. 745, 751 (1983) (holding that “neither
12 Anders nor any other decision of this Court suggests, however, that the indigent defendant has a
13 constitutional right to compel appointed counsel to press nonfrivolous points requested by the
14 client, if counsel, as a matter of professional judgment, decides not to present those points”)).

15 Respondent next contends that “[n]otwithstanding Davis’s invalidation of the so-called
16 residual clause of § 924(c), Cole’s conviction remains intact. ECF No. 291 at 28. “In United
17 States v. Juvenile Female, 566 F.3d 943, 947 (9th Cir. 2009), the Ninth Circuit concluded that
18 assaulting a federal officer with a deadly or dangerous weapon and inflicting bodily injury is a
19 crime of violence under the definition found in 18 U.S.C. § 16.” Id. at 29.

20 Regarding movant’s vague challenges to the trial court’s jurisdiction, respondent submits
21 that there is no merit to his argument, which is why his attorneys did not raise the issue at his
22 initial appearance, trial, or on appeal. “This court properly exercised subject matter jurisdiction
23 over Cole from the inception of this case.” ECF No. 291 at 33.

24 **H. Movant’s Reply to Omnibus Opposition**

25 By way of reply, movant continues to assert that his conviction is void because this court
26 did not have personal or subject matter jurisdiction over his case since the state court brought
27 charges against him first. ECF No. 309 at 7-8. According to movant, the Double Jeopardy clause
28 barred his subsequent federal trial after the state charges were dismissed. Id. at 11. Movant

1 further asserts that state and federal officials “colluded and conspired to change [the] venue and
2 institute a federal prosecution, then dismiss the state’s prosecutions....” ECF No. 309 at 10.
3 With respect to the procedural default of several of his claims, movant contends that his case falls
4 within the actual innocence exception. *Id.* at 23. For the first time, movant explains that
5 Christopher Donegan’s testimony would be relevant even though he arrived after the shooting
6 because he could reveal the perjured testimony of the two officers because he heard them
7 discussing what their story was going to be. *Id.* at 31. Movant further asserts that Jury
8 Instruction No. 16 was constitutionally deficient because it “directed the jury to assume criminal
9 intent and presume that the accused had no right to resist any force that was used against him to
10 accomplish their undeclared desire to take him into custody and deprive him of his liberty after
11 having taken his property for their own personal use.” ECF No. 309 at 41. Movant submitted
12 additional exhibits identified as appendices to his reply. *See* ECF Nos. 310-312.

13 II. Legal Standards

14 A federal inmate may move to vacate, set aside, or correct his sentence “upon the ground
15 that the sentence was imposed in violation of the Constitution or laws of the United States, or that
16 the court was without jurisdiction to impose such sentence, or that the sentence was in excess of
17 the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. §
18 2255(a). Not every asserted pretrial or trial error gives rise to a § 2255 claim. The statutory basis
19 for § 2255 relief is intended to be narrow and is not intended to operate as a “chance at a second
20 appeal.” *See United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010); *United States v.*
21 *Johnson*, 988 F.2d 941, 945 (9th Cir. 1993) (“Section 2255 ... is not designed to provide criminal
22 defendants multiple opportunities to challenge their sentence.”); *United States v. Addonizio*, 442
23 U.S. 178, 185 (1979) (“unless the claim alleges a lack of jurisdiction or constitutional error, the
24 scope of collateral attack [under § 2255] has remained far more limited”). Accordingly, a § 2255
25 movant generally may not relitigate issues that were already decided adversely on direct appeal.
26 *Odom v. United States*, 455 F.2d 159, 160 (9th Cir. 1972). To be entitled to § 2255 relief,
27 movant has the burden of establishing an error of constitutional magnitude which had a
28 substantial or injurious effect or influence on the jury’s verdict. *See United States v. Frady*, 456

1 U.S. 152, 170 (1982) (establishing that movant has the burden); United States v. Montalvo, 331
2 F.3d 1052, 1058 (9th Cir. 2003) (stating that “Brecht’s harmless error standard applies to habeas
3 cases under § 2255”). If movant so demonstrates, the court “shall vacate and set the judgment
4 aside and shall discharge the prisoner or resentence him or grant a new trial or correct the
5 sentence as may appear appropriate.” 28 U.S.C. § 2255(b).

6 Movant alleges that he was denied the effective assistance of trial and appellate counsel.
7 The two prong standard announced in Strickland v. Washington, 466 U.S. 668 (1984), governs
8 movant’s IAC claims. In order to be entitled to relief, movant has the burden of establishing: 1)
9 that his defense counsel’s performance was deficient; and, 2) that he was actually prejudiced by
10 counsel’s acts or omissions. When reviewing the performance prong, the court must determine,
11 whether in light of all the circumstances, the identified acts or omissions were outside the wide
12 range of professionally competent assistance. Strickland, 466 U.S. at 690. Prejudice is found
13 where “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of
14 the proceeding would have been different.” Id. at 694. A reasonable probability is “a probability
15 sufficient to undermine confidence in the outcome.” Id.

16 If the court finds that movant’s allegations are sufficient to support both prongs of the
17 Strickland test, “a district court must grant a hearing to determine the validity of a petition
18 brought under... [§ 2255], ‘[u]nless the motions and the files and records of the case conclusively
19 show that the prisoner is entitled to no relief.’” United States v. Blaylock, 20 F.3d 1458, 1465
20 (9th Cir. 1994) (quoting 28 U.S.C. § 2255). In other words, an evidentiary hearing is required if
21 (1) movant alleges “specific facts, which, if true would entitle him to relief; and (2) the petition,
22 files, and record of the case cannot conclusively show that the petitioner is entitled to no relief.”
23 United States v. Howard, 381 F.3d 873, 877 (9th Cir. 2004). No hearing is necessary if movant’s
24 allegations, viewed against the record, fail to state a claim for relief or are “so palpably incredible
25 or patently frivolous as to warrant summary dismissal.” United States v. McMullen, 98 F.3d
26 1155, 1159 (9th Cir. 1996) (internal quotations and citations omitted); see also Howard, 381 F.3d
27 at 879 (bald, conclusory or inherently incredible allegations do not support a hearing).

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III. Analysis

A. Procedurally Defaulted Claims

“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.” United States v. Ratigan, 351 F.3d 957, 962 (9th Cir. 2003) (citing Bousley v. United States, 523 U.S. 614, 622 (1998)). Nonconstitutional sentencing errors “may not be raised under § 2255 if [they were] not raised at sentencing or on direct appeal.” United States v. McMullen, 98 F.3d 1155, 1157 (9th Cir. 1996) (finding that a challenge to the type of methamphetamine for which he was sentenced was procedurally defaulted for failing to raise it on direct appeal); United States v. Schlesinger, 49 F.3d 483, 485 (9th Cir. 1995). Here, movant has procedurally defaulted his prosecutorial misconduct claims as well as his Faretta claim because these issues were not raised on direct appeal.³

To excuse his procedural default, movant asserts that he is actually innocent. “To be credible, such a[n actual innocence] claim requires petitioner to 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 v. Delo, 513 U.S. 298, 324 (1995). Here, movant presents no new reliable evidence that meets this definition of actual innocence. He does not come forward with an affidavit from Christopher Donegan and, more importantly, even movant acknowledges that Mr. Donegan was not at the campsite during the shootout. So any affidavit from Mr. Donegan would not constitute new reliable evidence of who fired first in this case. Thus, it would not exonerate movant even if it was part of the evidentiary record in this case.

Furthermore, movant has not established cause and prejudice to excuse his procedural default. “Cause” can be established “where a constitutional claim is so novel that its legal basis [was] not reasonably available to counsel [at trial or on direct appeal]....” Reed v. Ross, 468 U.S. 1, 16 (1984). To establish prejudice, movant must demonstrate “not merely that the

³ These claims were raised for the first time as claims one, five, and seven in movant’s § 2255 motion and were also included in his amended § 2255 motion.

errors...created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” United States v. Frady, 456 U.S. 152, 170 (1982). He must show a “reasonable probability” that, absent the error, the result of the proceedings would have been different. Strickler v. Greene, 527 U.S. 263, 289 (1999).

Liberally construing his pleadings, movant asserts that this default was caused by the ineffectiveness of his appellate counsel. See Murray v. Carrier, 477 U.S. 478, 488 (1986) (finding that constitutionally ineffective assistance of counsel can constitute cause to excuse a procedurally defaulted claim). However, appellate counsel submitted a declaration indicating that, in her professional judgment, the claims that movant now includes in his present § 2255 motion were not viable issues on appeal. See ECF No. 292 at 97-102. None of these claims were so novel that they were not reasonably available to appellate counsel. Nor does counsel’s conduct amount to constitutionally deficient performance that would excuse the default of these claims. See Cockett v. Ray, 333 F.3d 938, 943 (9th Cir. 2003) (recognizing that appellate counsel’s ignorance or inadvertence in failing to raise a claim does not constitute IAC “unless it rises to the level of constitutionally ineffective assistance of counsel”). As a result, he has not established cause to excuse his procedural default. For this reason, movant has not demonstrated cause or prejudice to excuse his procedurally defaulted claims.

B. Merits Based Claims

1. Ineffective Assistance of Counsel

Movant’s IAC claims are not procedurally barred from review on the merits.⁴ Therefore, the court addresses each of these claims in light of the record developed during this § 2255 proceeding.

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⁴ Since IAC claims usually rely on facts outside of the record, they are not generally raised on direct appeal. Instead, they are properly presented for the first time on habeas review. See Massaro v. United States, 538 U.S. 500, 505 (2003) (excluding all IAC claims from the type of claims that are procedurally defaulted for not raising them during direct appeal); United States v. Braswell, 501 F.3d 1147, 1149 n. 1 (9th Cir. 2007).

a. Counsel at Initial Appearance

In his amended § 2255, movant faults the attorney representing him at his initial appearance because he: 1) “failed to object to the unlawful commencement of the prosecution by an information without an indictment...; 2) failed to enforce the treaty formed by the Northwest Ordinance; 3) failed to object to the denial of bail; 4) failed to enforce movant’s right “to plead and manage his own cause personally with the assistance of counsel...”; and, 5) failed to challenge venue. ECF No. 250 at 6. However, movant includes the relevant portion of the transcript from his initial appearance where his attorney informed the court that movant “would like legal assistance, but does not wish to be represented by anyone.” ECF No. 250 at 7; see ECF No. 174 at 3 (transcript of initial appearance). His attorney further indicated that he was not sure if movant wanted “hybrid representation, or self-representation. When asked if he wanted to represent himself he indicated that he wants legal assistance....” ECF No. 174 at 3. After trying to engage movant about his choices which resulted in movant citing chapter and verse of the Judiciary Act of 1789, the court declined “to get into an extended conversation” and appointed the Office of the Federal Defender to represent movant. ECF No. 174 at 3-4. The court then informed movant that it would address the issue again in a week after movant had more time to talk with his attorney about it. Id. at 4. Since the IAC claim for not informing the court of movant’s desire to manage his own defense is belied by the record, the undersigned recommends that this claim be denied. The remaining IAC claims against counsel at his initial appearance fail based on lack of prejudice. Simply put, movant doesn’t even argue, much less demonstrate, that the outcome of the proceeding would have been any different had his counsel made the various legal challenges he asserts should have been made. The court recommends that these claims be denied because movant has not demonstrated that his counsel’s performance was prejudicial. See Strickland, 466 U.S. at 668.

b. Trial Counsel

Movant raises seven separate subclaims as to trial counsel. See ECF No. 216 at 7. Respondent obtained two separate declarations from trial counsel before he passed away. ECF No. 292 at 4, 9-10. Movant did not acknowledge the declarations in his reply. Having reviewed

1 the record in this case, and except with respect to the Miranda/suppression issue discussed in
2 more detail below, the court finds that all of the IAC claims against trial counsel fail for two
3 separate and independent reasons. First, movant's IAC claims as to trial counsel are conclusory,
4 as he does not provide any declarations from an expert witness or fact witness who would have
5 testified in a manner that could have changed the outcome at his trial. See James v. Borg, 24 F.3d
6 20, 26 (9th Cir. 1994) (finding that completely conclusory habeas claims do not warrant relief).
7 Simply put, the jury must not have found movant's self-defense claim credible. That credibility
8 assessment by the jury would not have changed based on movant's challenges to trial counsel's
9 performance in this case. See Jackson v. Virginia, 443 U.S. 307, 326 (1979) (stating that a jury's
10 credibility assessment is entitled to great deference on habeas review). For similar reasons, the
11 court finds that the IAC of trial counsel claims also fail based on lack of prejudice to movant. See
12 Strickland, 466 U.S. at 668; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) (emphasizing that a
13 "[f]ailure to satisfy either prong of the Strickland test obviates the need to consider the other.").

14 Movant also challenges trial counsel's decision not to file a motion to suppress statements
15 he made to investigators from the Nevada County District Attorney's Office while hospitalized.
16 This claim too fails for lack of prejudice, though merits additional explanation. "[T]he failure to
17 file a suppression motion does not constitute per se ineffective assistance of counsel."
18 Kimmelman v. Morrison, 477 U.S. 365, 384 (1986). An IAC claim based on counsel's failure to
19 file a motion to suppress requires that the Strickland test be met, which in this context requires
20 showing a constitutional violation giving rise to a meritorious suppression motion. Id. at 375; see
21 United States v. Upshaw, No. 1:14-cr-00256 LJO SKO, 2019 WL 1170483, at *6 (E.D. Cal. Mar.
22 13, 2019).

23 The transcript of movant's interrogation at the hospital demonstrates he waived his
24 Miranda rights. ECF No. 292 at 14. Assuming for the sake of argument that movant's waiver—
25 elicited two days after he was shot multiple times and while he was apparently heavily
26 medicated—was involuntary, movant has not shown prejudice from trial counsel's failure to file a

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1 suppression motion.⁵ Movant's first contention is that the audio and transcript of the
 2 interrogation should have been introduced at trial. ECF No. 216 at 37. But a successful
 3 suppression motion would have barred the prosecution from introducing any of the contents of
 4 the interrogation at trial. It would not have led to the introduction of those contents as a whole.
 5 Movant also contends that counsel's failure to file a suppression motion "fraudulently" led the
 6 jury to believe that movant "confessed." *Id.* However, trial counsel effectively cross examined
 7 one of the investigators about movant's interrogation, including eliciting the fact that movant had
 8 claimed multiple times during the interrogation that Ranger Pultorak fired first. *See* ECF No.
 9 291-1 at 207-226 (RT at 199-218). As respondent correctly notes, trial counsel's ability to elicit
 10 favorable testimony about movant's claims to have acted in self-defense likely "boster[ed] the
 11 defendant's claim of self-defense." ECF No. 291 at 17. Thus, movant has not shown prejudice as
 12 to this aspect—of any other—of his IAC claims against trial counsel. Movant's IAC claims as to
 13 trial counsel should be denied.

14 **c. Appellate Counsel**

15 In response to movant's IAC claims, appellate counsel also submitted a declaration. This
 16 declaration indicates that she spent almost 25 hours communicating with movant during the entire
 17 appellate process. ECF No. 292 at 100. The majority of this time was spent responding to
 18 movant's letters and responding to his inquiries about his case. ECF No. 292 at 100. The record
 19 also establishes that appellate counsel went so far as to file a petition for certiorari in movant's
 20 case because, in her professional opinion, there was a meritorious claim to raise. Based on this
 21 record, the undersigned cannot conclude that appellate counsel's performance was either deficient
 22 or prejudicial as defined by *Strickland*. *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir.

23
 24 ⁵ It is far from clear that movant's waiver was invalid. Governing law on *Miranda* waivers in the
 25 context of hospitalization and heavy medication is shockingly permissive. *See, e.g., United*
 26 *States v. Lewis*, 833 F.2d 1380, 1384-85 (9th Cir. 1987) (holding statement voluntary despite fact
 27 that defendant had recently returned from surgery on her shoulder, was in pain, and had recently
 28 received a general anesthetic); *United States v. Martin*, 781 F.2d 671, 673-74 (9th Cir. 1985)
 (holding statement voluntary even though defendant under the influence of Demerol, a pain killer,
 and still in pain). Moreover, the transcript from movant's interrogation indicates he was coherent.
See ECF 292 at 12-68.

1 1989) (emphasizing that “[t]he failure to raise a meritless legal argument does not constitute
 2 ineffective assistance of counsel”) (citation omitted). Winnowing out weaker arguments is a
 3 hallmark of effective appellate advocacy. See Jones v. Barnes, 463 U.S. 745, 751-52 (1983).
 4 Accordingly, the undersigned recommends denying movant’s ineffective assistance of appellate
 5 counsel claims.

6 **2. Prosecutorial Misconduct**

7 The court separately addresses the merits of movant’s prosecutorial misconduct claim
 8 only with respect to his assertion that the prosecution suppressed potential witness Christopher
 9 Donegan.⁶ In his pleadings before this court, movant makes much of this potential witness and
 10 alleges that the prosecution violated its obligations under Brady v. Maryland, 373 U.S. 83 (1963),
 11 by failing to disclose information about Donegan. Upon closer review of the record, however, the
 12 undersigned finds that this claim does not warrant relief even on the merits.

13 A Brady violation is established when (1) the evidence at issue is “favorable to the
 14 accused, either because it is exculpatory, or because it is impeaching; (2) that evidence was
 15 “suppressed by the State, either willfully or inadvertently”; (3) and prejudice ensued. Strickler v.
 16 Greene, 527 U.S. 263, 281–82 (1999). Prejudice is established when there is a reasonable
 17 probability that the outcome of the proceeding would have been different in light of the
 18 suppressed evidence. See Strickler, 527 U.S. at 281. Review of the trial transcripts shows that
 19 the outcome of movant’s trial would not have changed had Donegan testified about what he saw
 20 after the shootout. Even assuming for the sake of argument that Donegan’s potential testimony
 21 constituted impeachment evidence under Brady, any suppression of it by the prosecution was not
 22 prejudicial.⁷ Therefore, this claim should be denied.

23 **3. Davis Challenge to Count Three**

24 In claim four, movant claims that he is entitled to relief based on the Supreme Court
 25 decision in United States v. Davis, 588 U.S. 445 (2019), which held that the residual clause of 18

26 ⁶ The court, *supra*, concluded that movant’s prosecutorial misconduct claims were procedurally
 27 defaulted for failing to raise them on direct appeal.

28 ⁷ A review of Mr. Donegan’s interview with a defense investigator does not demonstrate its value
 even as impeachment evidence. See ECF No. 216 at 83-89.

1 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. However, the Supreme Court did not
2 invalidate the entire statute under which movant was convicted. The residual clause, which the
3 Davis decision affects, only applies if the elements of the crime of conviction did not include “the
4 use, attempted use, or threatened use of physical force against the person or property of another.”
5 18 U.S.C. § 924(c)(3)(A). In this case, the jury’s verdict form specifically found beyond a
6 reasonable doubt that movant used a deadly or dangerous weapon and inflicted bodily injury
7 against the officers in Counts I and II. ECF No. 67 (Verdict Form). Therefore, the residual
8 clause doesn’t apply to movant’s conviction for Count III because the elements of Counts I and II
9 themselves established that they were “crimes of violence.” There is no cogent argument that
10 movant is entitled to relief under Davis. Accordingly, claim four should be denied on the merits.

11 4. Ex Post Facto Challenge to Sentence

12 Liberally construing claim six as a constitutional challenge to movant’s sentence, it is not
13 procedurally defaulted even though he did not raise it on direct appeal. See United States v.
14 Schlesinger, 49 F.3d 483, 485 (9th Cir. 1999) (emphasizing that as to sentencing, “[a]lleged
15 constitutional violations are treated differently” on § 2255 review). In claim six, movant asserts
16 that 18 U.S.C. § 924(c) is an ex post facto law and constitutes a bill of attainder in violation of
17 Article I, Section 10 of the Constitution as well as the Second, Eighth, Ninth, and Tenth
18 Amendments. ECF No. 216 at 9. Movant’s only attempt to explain this claim indicates that
19 “[p]age limits preclude presenting [the] merits.” ECF No. 216 at 48. The court is hard pressed to
20 believe that any page limitation prevented the merits of this claim from being presented because
21 movant’s § 2255 motion is 171 pages long including the exhibits. ECF No. 216. Movant’s
22 amended § 2255 motion was 17 pages long and raised new claims for relief. The court finds that
23 this claim is conclusory and does not warrant habeas relief. See James, 24 F.3d at 26. Movant
24 bears the burden of demonstrating his entitlement to § 2255 relief, and he has not met that burden
25 for this claim. It is not this court’s job to go hunting through the record to develop the arguments
26 and facts supporting movant’s claims for relief. See United States v. Dunkel, 927 F.2d 955, 956
27 (7th Cir. 1991) (explaining that “[j]udges are not like pigs, hunting for truffles buried in briefs”).
28 Accordingly, this claim should be denied.

5. Jurisdiction

Movant also challenges the court's jurisdiction over his prosecution. In summary, movant alleges that federal officials and the Nevada County District Attorney's Office conspired to fabricate a federal prosecution against him. Unique due process or other legal issues might be presented if coordination between state and federal authorities at the outset resulted in criminal charges being first brought in state court—with no intention that the state prosecution would be pursued to trial—before being adopted in federal court. But even that hypothetical scenario would not present a jurisdictional issue. There was indisputably federal jurisdiction over movant's offenses, which involved assault on a federal law enforcement officer that occurred on federal land. See 18 U.S.C. § 3231 ("the district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States"); 18 U.S.C. § 111(a)(1) ("Whoever forcibly assaults...any [federal officer or any person assisting such a federal officer] shall ... be fined under this title or imprisoned..."). Moreover, movant presents no facts indicating improper coordination between state and federal officials. Movant's jurisdictional challenge fails.

6. New Claims Raised in Movant's Reply

In his reply to respondent's omnibus opposition, movant appears to raise new claims for relief for the first time including a Double Jeopardy claim as well as a challenge to Jury Instruction Number 16. ECF No. 309. In this regard, movant's habeas claims are a moving target. They change in every new pleading that movant files in this case. Since movant does not explain why he did not include these claims in his original or amended § 2255 motions, the court declines to exercise its discretion to consider them. See Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007) (emphasizing that "[t]he district court need not consider arguments raised for the first time in a reply brief").

IV. No Evidentiary Hearing is Warranted

Although movant requests an evidentiary hearing, the undersigned finds that one is not warranted because the files and records in this case conclusively show that he is not entitled to relief. See Blackledge v. Allison, 431 U.S. 63, 76 (1977); see also United States v. Mejia-Mesa,

1 153 F.3d 925, 929 (9th Cir. 1998) (noting that a “district court has discretion to deny an
2 evidentiary hearing on a § 2255 claim where the files and records conclusively show that the
3 movant is not entitled to relief.”). Therefore, there is no basis upon which to hold an evidentiary
4 hearing. See United States v. Quan, 789 F.2d 711, 715 (9th Cir. 1986) (stating that “[w]here a
5 prisoner’s motion presents no more than conclusory allegations, unsupported by facts and refuted
6 by the record, an evidentiary hearing is not required.”).

7 **V. Plain Language Summary for Pro Se Party**

8 Since movant is representing himself in this case, the court wants to make sure that the
9 words of this order are understood. The following information is meant to explain this order in
10 plain English and is not intended as legal advice.

11 The undersigned has reviewed the pleadings and record in this case and concluded that the
12 claims raised in the § 2255 motion and motion to amend the § 2255 motion do not warrant relief.
13 If this recommendation is adopted by the district judge assigned to your case, your post-
14 conviction motion will be denied and your case will be closed.

15 If you disagree with this recommendation, you have 21 days to explain why it is not
16 correct. Label your explanation as “Objections to Magistrate Judge’s Findings and
17 Recommendations.”

18 **VI. CONCLUSION**

19 Accordingly, IT IS HEREBY RECOMMENDED that:

- 20 1. Movant’s motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §
21 2255 (ECF Nos. 216 & 250) be denied for the reasons explained herein.
- 22 2. All pending motions related to the § 2255 motion (ECF Nos. 227, 266, 270, 275, 279,
23 285, 299, 317, 326, 343) be denied as moot.
- 24 3. The Clerk of the Court be directed to close the companion civil case No. 2:19-cv-2274-
25 WBS-SCR.
- 26 4. This recommendation has no effect on movant’s motion for compassionate release and
27 any motion related thereto (ECF Nos. 346, 366) which remains pending before Senior District
28 Judge William B. Shubb.

1 These findings and recommendations are submitted to the United States District Judge
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty one days
3 after being served with these findings and recommendations, any party may file written
4 objections with the court and serve a copy on all parties. Such a document should be captioned
5 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
6 objections shall be filed and served within fourteen days after service of the objections. The
7 parties are advised that failure to file objections within the specified time waives the right to
8 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

9 DATED: April 16, 2025

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12 SEAN C. RIORDAN
13 UNITED STATES MAGISTRATE JUDGE
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**Additional material
from this filing is
available in the
Clerk's Office.**