NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROGER DALE WHITE, Defendant-Appellant.	No. 18-16037 D.C. Nos. 2:16-cv-02121-SRB 2:91-cr-00264-SRB-3 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Submitted March 14, 2019**

Before: WALLACE, FARRIS, and TROTT, Circuit Judges.

Federal prisoner Roger Dale White appeals from the district court's judgment denying his 28 U.S.C. § 2255 habeas motion. We have jurisdiction under 28 U.S.C. § 2253[1], and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[1] The district court issued a general certificate of appeal ("COA") without identifying the specific issues certified for appeal. Consistent with *Slack v.*

At White's original trial arising from the fatal beating of a 92-year old victim, a Federal Bureau of Investigation Laboratory hair examiner provided testimony, portions of which have since been discredited as exceeding the limits of science. In particular, the hair examiner improperly testified that she could determine that certain hairs found on a board at the crime scene originated from the victim's head. On appeal, White alleges that he is entitled to resentencing because this erroneous testimony swayed the sentencing judge into believing that White had used the board to beat the victim, and thus deserved a life sentence instead of the 540-month sentence that another participant in the crime received.

Reviewing de novo, *United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), we agree with the district court that the admission of this improper testimony was harmless error, *see Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). Even apart from the discredited portions of the hair examiner's testimony, a great deal of evidence at trial indicated the hairs on the board likely originated from the victim. Given the limited nature of the examiner's testimony and the other evidence in the record, the erroneous testimony would have had no impact on the sentencing judge's conclusions regarding White's participation in beating the

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McDaniel, 529 U.S. 473, 482-484 (2000), we treat White's notice of appeal as an application for a COA as to the issues raised therein. We conclude that White has made the requisite "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), so we grant a COA and exercise jurisdiction over the issues on appeal. *See Schell v. Witek*, 218 F.3d 1017, 1021 n.4 (9th Cir. 2000).

victim or any finding that White's role in the overall crime was more aggravated than that of the co-participant who received a 540-month sentence. Therefore, the FBI hair examiner's erroneous testimony did not have a "substantial and injurious effect or influence" on the judge's decision to impose a life sentence. *Id.* at 637.

White also contends that the district court abused its discretion by denying his § 2255 motion without an evidentiary hearing. Because "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U.S.C. § 2255, the district court did not abuse its discretion by declining to hold an evidentiary hearing in this matter. *See also Shah v. United States*, 878 F.2d 1156, 1159 (9th Cir. 1989) ("Section 2255 requires only that the district court give a claim careful consideration and plenary processing, including full opportunity for presentation of the relevant facts. We entrust the choice of method to the court's discretion." (internal citations and quotations omitted)).

AFFIRMED.