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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,)	
)	
Plaintiff/Respondent,)	CR 04-00313 PHX FJM
)	CIV 09-01023 PHX FJM (MEA)
v.)	
)	REPORT AND RECOMMENDATION
DERRICK McCREARY,)	
)	
Defendant/Movant.)	
)	
_____)	

TO THE HONORABLE FREDERICK J. MARTONE:

Mr. Derrick McCreary ("Movant") filed a motion to correct, vacate, or set aside criminal convictions and sentences, pursuant to 28 U.S.C. § 2255, on May 14, 2009. Respondent filed a Response in Opposition to Motion for Reduction of Sentence Under 28 U.S.C. § 2255 ("Response") (Docket No. 11) on October 19, 2009. Movant's reply (Docket No. 12) to the response was docketed on November 19, 2009.

I. Procedural History

On March 30, 2004, Movant and two co-defendants were indicted on nine charges of, *inter alia*, conspiracy to commit armed robbery.¹ A superseding indictment, charging one count of conspiracy, two counts of armed bank robbery, and two counts of the use of the firearm in the commission of a crime, in

¹ A third co-defendant was charged on only three counts.

1 violation of 18 U.S.C. § 924(c), was filed February 16, 2005.

2 Movant and his non-pleading co-defendant were tried
3 together and the trial lasted approximately two weeks. At trial
4 the government introduced the testimony of the pleading co-
5 defendant and a "cooperating witness" and evidence of text
6 messages sent or received by Movant discussing the alleged
7 conspiracies. The jury instructions included definitions of the
8 use, carrying, possession, and brandishing of a weapon in
9 relation to a crime of violence as those terms are relevant to
10 a violation of section 924. The jury was instructed regarding
11 guilt both by aiding and abetting and guilt as a conspirator.

12 On June 22, 2005, a jury found Movant guilty on one
13 count of conspiracy, two counts of bank robbery, and two counts
14 of the use of a weapon in the commission of a crime of violence.
15 On or about December 14, 2005, Movant was sentenced to an
16 aggregate sentence of 504 months imprisonment.

17 Movant took a direct appeal of his convictions and
18 sentences. In his direct appeal Movant argued the Court
19 improperly admitted text messages between Movant and his co-
20 conspirators. Movant further argued that the government
21 elicited conflicting testimony before the grand jury.
22 Additionally, Movant argued the jury should have received a
23 "mere presence" instruction and that the government improperly
24 vouched for testifying co-conspirators at trial. See United
25 States v. McCreary, 308 Fed. App. 39, 41-42 (9th Cir. 2008).
26 Movant's direct appeal was denied in a decision issued on or
27 about February 7, 2008. Movant sought certiorari, which was
28 denied by the United States Supreme Court on June 9, 2008. See

1 Reply at 3.

2 In his action to vacate his convictions and sentences
3 Movant asserts the jury instructions unconstitutionally added a
4 charge of possession of a firearm to Counts Three and Five of
5 the superseding indictment. Movant also argues he was denied
6 effective assistance of counsel because his attorney failed to
7 appeal or address Movant's right to be tried, convicted, and
8 sentenced based upon the exact charges listed in the superseding
9 indictment. Movant also contends he could not properly be
10 convicted on Count Five because this count does not state or
11 charge a federal crime covered by 18 U.S.C. § 924(c)(1)(A)(ii).
12 Movant further alleges his convictions should be vacated because
13 the prosecutor improperly vouched for the honesty and
14 truthfulness of a government witness.

15 II. Discussion

16 Relief is precluded on a section 2255 claim that was
17 raised and decided in the movant's direct appeal. See, e.g.,
18 United States v. Scrivner, 189 F.3d 825, 282 (9th Cir. 1999);
19 United States v. Redd, 759 F.2d 699, 701 (9th Cir. 1985); Odom
20 v. United States, 455 F.2d 159, 160 (9th Cir. 1972).
21 Additionally, because "[h]abeas review is an extraordinary
22 remedy and will not be allowed to do service for an appeal,"
23 Bousley v. United States, 523 U.S. 614, 621, 118 S. Ct. 1604,
24 1610 (1998), absent a showing of cause and prejudice, a federal
25 habeas petitioner procedurally defaults all claims which are not
26 raised in his direct appeal, other than claims asserting the
27 petitioner was deprived of the effective assistance of counsel.
28 See United States v. Frady, 456 U.S. 152, 167-68, 102 S. Ct.

1 1584, 1594 (1982); United States v. Johnson, 988 F.2d 941, 945
2 (9th Cir. 1993). "[T]o obtain collateral relief based on trial
3 errors to which no contemporaneous objection was made, a
4 convicted defendant must show both (1) 'cause' excusing his
5 double procedural default, and (2) 'actual prejudice' resulting
6 from the errors of which he complains." Fraday, 456 U.S. at 167-
7 68, 102 S. Ct. at 1594. See also United States v. Ratigan, 351
8 F.3d 957, 964 (9th Cir. 2003). A defendant has not established
9 he was deprived of the effective assistance of counsel if his
10 claims would not have succeeded on appeal. Turner v. Calderon,
11 281 F.3d 851, 872 (9th Cir. 2002).

12 Accordingly, the only claims in Movant's section 2255
13 which are not precluded are Movant's claims of ineffective
14 assistance of counsel.

15 **Movant's ineffective assistance of counsel claims**

16 Claims of ineffective assistance of counsel are
17 properly raised for the first time in a section 2255 action.
18 See United States v. McKenna, 327 F.3d 830, 845 (9th Cir. 2003).

19 The Sixth Amendment guarantees criminal
20 defendants the right to effective assistance
21 of counsel. Strickland v. Washington, 466
22 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674
23 (1984).... To prevail on a claim of
24 ineffective assistance of counsel, Movant
25 must show 1) his attorney's performance was
26 unreasonable under prevailing professional
27 standards; and 2) there is a reasonable
28 probability that but for counsel's
unprofessional errors, the results would have
been different. United States v. Blaylock,
20 F.3d 1458, 1465 (9th Cir. 1994) (quoting
Strickland, 466 U.S. at 687, 104 S. Ct. at
2064). "Strickland defines a reasonable
probability as 'a probability sufficient to
undermine confidence in the outcome.'" Id.

United States v. Span, 75 F.3d 1383, 1386-87 (9th Cir. 1996).

1 In order to find that Movant was deprived of the
2 effective assistance of counsel and grant him habeas relief, the
3 Court must conclude counsel's performance was incompetent and
4 that his deficient performance prejudiced Movant.

5 [N]ot every case of deficient performance
6 under Strickland represents a constructive
7 denial of the right to counsel. In fact, it
8 will be the rare claim of ineffective
9 assistance that is tantamount to a
10 constructive denial of counsel. Strickland
remains the norm for ineffective assistance
claims, and the Supreme Court has made clear
that it will not countenance a per-se
prejudice exception which will swallow the
actual prejudice Strickland rule.

11 Glover v. Miro, 262 F.3d 268, 276-77 (4th Cir. 2001). See also
12 Hasan v. Galaza, 254 F.3d 1150, 1154 (9th Cir. 2001); United
13 States v. Cruz-Mendoza, 147 F.3d 1069, 1072 (9th Cir. 1998).

14 Movant must overcome a strong presumption that his
15 counsel's representation was within a wide range of reasonable
16 professional assistance. See United States v. Molina, 934 F.2d
17 1440, 1447 (9th Cir. 1991). Movant must establish that, but for
18 counsel's alleged errors, the result of his trial would have
19 been different. Hasan, 254 F.3d at 1154. Additionally, Movant
20 bears the burden of providing sufficient evidence from which the
21 Court can conclude his counsel was ineffective. See Turner, 281
22 F.3d at 878.

23 Counsel is not ineffective if counsel "fails" to raise
24 a meritless argument. See, e.g., Wilson v. Henry, 185 F.3d 986,
25 991 (9th Cir. 1999); James v. Borg, 24 F.3d 20, 27 (9th Cir.
26 1994); Morrison v. Estelle, 981 F.2d 425, 427-28 (9th Cir.
27 1992); Baumann v. United States, 692 F.2d 565, 572 (9th Cir.
28 1982) ("The failure to raise a meritless legal argument does not

1 constitute ineffective assistance of counsel.").

2 Movant asserts he was denied the effective assistance
3 of counsel because his trial counsel failed to address and his
4 appellate counsel failed to assert Movant's right to be tried,
5 convicted, and sentenced based upon the exact charges listed in
6 the superseding indictment. Movant's counsel was not
7 ineffective for "failing" to raise the claims stated by Movant.
8 Movant has not established prejudice because he has not shown
9 that, had counsel alleged Movant was not tried, convicted, and
10 sentenced based upon the exact charges listed in the superseding
11 indictment, any of these arguments would have successfully
12 resulted in a reversal. See Wildman v. Johnson, 261 F.3d 832,
13 840 (9th Cir. 2001). Movant has not shown he was prejudiced by
14 any alleged failure of counsel to raise a particular argument.
15 Movant has not provided the Court with a claim that appellate
16 counsel failed to raise which would have been a "dead-bang
17 winner." Banks v. Reynolds, 54 F.3d 1508, 1515 (10th Cir.
18 1995).

19 Movant contends section 924(c) creates two separate
20 offenses. However, the Ninth Circuit Court of Appeals has held
21 that section 924(c) creates only a single offense. See United
22 States v. Arreola, 467 F.3d 1153, 1157-58 (9th Cir. 2006).
23 Because Movant asserts his counsel was ineffective for failing
24 to raise an argument which has been rejected, Movant has not
25 established prejudice arising from his counsels' allegedly
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1 deficient performance.²

2 In reply to the answer to his section 2255 motion,
3 Movant again alleges that his conviction violated the Fifth
4 Amendment because the jury instructions "resulted in a
5 constructive amendment to the indictment." Reply at 4. Movant
6 also contends that, other than a "non-specific pretrial notice
7 that one or more individuals would testify as to Movant's
8 possession of the charged firearm and a witness list the day
9 before trial, the Movant received no other information or
10 discovery as to these unindicted charges." Id. These
11 allegations simply repeat claims which were denied in Movant's
12 direct appeal or were procedurally defaulted by Movant's failure
13 to present them in his direct appeal. The only claims properly
14 presented in this section 2255 action are the claims of
15 ineffective assistance of counsel, the merits of which are not
16 supported by the allegations in Movant's reply to the answer to
17 his section 2255 petition.

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21 ² Respondent argues:

22 Pursuant to the superseding indictment, Counts Three and
23 Five alleged that the defendant and others "did use, carry
24 and brandish a firearm, that is, a handgun, during and in
25 relation to a crime of violence, that is, Armed Bank
26 Robbery" in violation of § 924(c)(1)(A). In the jury
27 instructions the [] Court explained that the government
28 must prove every element of the offense beyond a reasonable
doubt, including that (1) "the defendant used, carried,
possessed or brandished the firearm (2) during and in
relation to the crime of armed bank robbery." (ER-2- Trial
Tr. Vol. VII, 1441-45, June 21, 2005.) Since the jury
instructions explained the elements of a single offense in
a straightforward and cogent manner, the District Court did
not add a charge to the superseding indictment or commit a
plain error by doing so.

1 **III. Conclusion**

2 Other than his ineffective assistance of counsel
3 claims, Movant procedurally defaulted his section 2255 claims by
4 failing to raise them in his direct appeal. Movant has not
5 shown cause and prejudice regarding his default of these claims.
6 Movant has not established that he was denied the effective
7 assistance of counsel because Movant has not shown that he was
8 prejudiced by his counsels' failure to raise a meritless
9 argument.

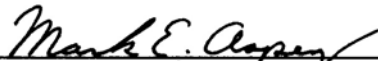
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11 **IT IS THEREFORE RECOMMENDED** that Mr. McCreary's Motion
12 to Vacate, Set Aside, or Correct Sentence, be **denied and**
13 **dismissed with prejudice.**

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15 This recommendation is not an order that is immediately
16 appealable to the Ninth Circuit Court of Appeals. Any notice of
17 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
18 Procedure, should not be filed until entry of the district
19 court's judgment.

20 Pursuant to Rule 72(b), Federal Rules of Civil
21 Procedure, the parties shall have ten (10) days from the date of
22 service of a copy of this recommendation within which to file
23 specific written objections with the Court. Thereafter, the
24 parties have ten (10) days within which to file a response to
25 the objections. Pursuant to Rule 7.2, Local Rules of Civil
26 Procedure for the United States District Court for the District
27 of Arizona, objections to the Report and Recommendation may not
28 exceed seventeen (17) pages in length.

1 Failure to timely file objections to any factual or legal
2 determinations of the Magistrate Judge will be considered a
3 waiver of a party's right to de novo appellate consideration of
4 the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
5 1121 (9th Cir. 2003) (en banc). Failure to timely file
6 objections to any factual or legal determinations of the
7 Magistrate Judge will constitute a waiver of a party's right to
8 appellate review of the findings of fact and conclusions of law
9 in an order or judgment entered pursuant to the recommendation
10 of the Magistrate Judge.

11 DATED this 3rd day of December, 2009.

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16 Mark E. Aspey
17 United States Magistrate Judge
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