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

8 Adnan Alisic,

9 Plaintiff,

10 vs.

11 United States of America,

12 Defendant.
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Nos. CV-11-0063-PHX-DGC;
CR-06-0717-PHX-DGC

ORDER

14 On November 28, 2007, following a six-day jury trial, Adnan Alisic was found
15 guilty of three charges related to the robbery of an armored car, including one count of
16 conspiracy to interfere with interstate commerce by threats or violence (conspiracy to
17 commit robbery); one count of interference with interstate commerce by threats or
18 violence (robbery); and one count of carrying a firearm in relation to a crime of violence
19 or possessing a firearm in furtherance of a crime of violence. *See* Criminal Doc. 161. On
20 April 9, 2008, the Court sentenced Alisic to concurrent terms of 151 months in prison for
21 the conspiracy and robbery convictions, and a consecutive term of 60 months on the
22 firearm conviction. *See* Criminal Docs. 209 & 210. Alisic filed a timely appeal, and on
23 November 18, 2009, the Ninth Circuit Court of Appeals affirmed his conviction. *See*
24 Criminal Doc. 274. The Supreme Court denied Alisic's petition for certiorari on
25 March 23, 2010. *See* Doc. 4 at 2.

26 On January 7, 2011, Alisic filed a pro se motion to vacate, set aside, or correct
27 sentence pursuant to 28 U.S.C. § 2255. Doc. 1. The Court denied the motion with leave
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1 to amend (Doc. 3), and Alisic filed an amended motion on March 21, 2007. Doc. 4.
2 Alisic asserts ten grounds based on ineffective assistance of counsel: (1) counsel failed to
3 investigate co-defendants Bakir Mujkic and Daniel Mujkic, (2) counsel failed to
4 adequately cross-examine Daniel Mujkic, (3) counsel failed to investigate and call five
5 eye-witnesses and co-defendant Ismar Kabaklic, (4) counsel failed to present evidence to
6 support his duress defense, (5) counsel failed to request accomplice testimony,
7 (6) counsel did not object to the Court's application of a preponderance of the evidence
8 standard for enhancements at sentencing, (7) counsel failed to file a pre-sentencing
9 memorandum, (8) counsel failed to object to calculation of criminal history points at
10 sentencing, (9) counsel failed to present the testimony of his friends and family at
11 sentencing, and (10) counsel's advice to take the case to trial under a duress defense
12 severely prejudiced him. Doc. 4 at 2-11. Subsequently, Alisic filed a motion, without
13 explanation or argument, to dismiss grounds 1-9. Doc. 6.

14 Respondents filed a response to all grounds, and Alisic filed a reply. Docs. 7, 8. United
15 States Magistrate Judge Mark E. Aspey issued a report and recommendation ("R&R")
16 that Alisic's motion to vacate, set aside, or correct sentence be denied because he had not
17 shown that his counsel's performance was deficient or that he was prejudiced by any
18 alleged deficiency. Doc. 9 at 8. Alisic filed objections to the R&R on December 5, 2011.
19 Doc. 12. He did not request oral argument. For the reasons stated below, the Court will
20 deny Alisic's motion to dismiss grounds 1-9 as moot, deny Alisic's request for an
21 evidentiary hearing, accept the R&R's recommendations, and deny Alisic's motion to
22 vacate, set aside, or correct sentence.

23 **I. Standard of Review.**

24 A party may file specific written objections to the R&R. The Court must
25 undertake de novo review of those portions of the R&R to which specific objections are
26 made. The Court may accept, reject, or modify, in whole or in part, the findings or
27 recommendations of the Magistrate Judge. The Court may also receive further evidence
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1 or recommit the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b);
2 28 U.S.C. § 636(b)(1).

3 **II. Analysis.**

4 **A. Motion to Dismiss Grounds 1-9.**

5 The Court has not previously ruled on Alisic’s request to dismiss grounds 1-9 of
6 his motion. *See* Doc. 6. These grounds remained part of Alisic’s motion at the time
7 Respondent filed its response, Alisic filed his reply, and Judge Aspey issued the R&R.
8 The Court will deny the motion to dismiss as moot and will address all of Alisic’s
9 objections to the R&R.

10 **B. Objections to the R&R.**

11 Alisic objects that Judge Aspey “failed to articulate his rational for his denial of
12 [Alisic’s] motion, but instead issued a summary denial.” Doc. 12 at 1. Alisic makes five
13 specific objections. He asserts that Judge Aspey (1) failed to address his request for an
14 evidentiary hearing, (2) applied the *Strickland* standard unreasonably, (3) failed to
15 analyze counsel’s failure to investigate, (4) failed to analyze counsel’s cumulative errors,
16 and (5) failed to consider the totality of Alisic’s evidence.

17 **1. Evidentiary Hearing.**

18 Alisic asked Judge Aspey to schedule an evidentiary hearing “to develop the
19 factual and legal bases” for his request for post-conviction relief. *See* Doc. 4 at 13.
20 Judge Aspey did not address this request in the R&R.

21 In determining whether to grant an evidentiary hearing, a court must consider
22 whether, accepting the truth of petitioner’s factual assertions that are not directly and
23 conclusively refuted by the record, petitioner could prevail on his claims. *United States*
24 *v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *Turner v. Calderon*, 281 F.3d 851
25 (9th Cir. 2002). To show that he is entitled to an evidentiary hearing, Alisic must allege
26 “specific factual allegations that, if true, state a claim on which relief could be granted.”
27 *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (internal quotations and
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1 citations omitted). An evidentiary hearing may only be denied if the claim is “so
2 palpably incredible or patently frivolous as to warrant summary dismissal.” *United*
3 *States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004) (quoting *Leonti*, 326 F.3d at 1116).

4 To prevail on a claim of ineffective assistance of counsel, Alisic must show (1) his
5 attorney’s performance was unreasonable under prevailing professional standards; and
6 (2) there is a reasonable probability that but for counsel’s unprofessional errors, the
7 results would have been different. *United States v. Blaylock*, 20 F.3d 1458, 1465
8 (9th Cir. 1994) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). “*Strickland*
9 defines a reasonable probability as ‘a probability sufficient to undermine confidence in
10 the outcome.’” *Id.*

11 Alisic cites to his affidavit as stating events that, if true, establish the first prong of
12 the *Strickland* test. Doc. 12 at 1. Alisic does not identify which facts in the six page
13 affidavit warrant a hearing. Upon reviewing Alisic’s objections to the R&R, the Court
14 finds that Alisic’s ineffective assistance claim is based, in part, on the following facts not
15 directly refuted on the record: (1) after Alisic admitted to counsel that he was guilty of
16 the crime and Alisic was actively pursuing a plea, counsel advised Alisic that he would
17 have “a good chance” to prevail at trial under a duress defense and “a very strong
18 chance” to win at trial on the weapons charge (Doc. 4 at 49, ¶¶ 3-6), (2) counsel did not
19 talk to Alisic or return hundreds of phone calls for several months before trial (*Id.* at 51,
20 ¶ 12), (3) counsel did not have time to talk with Alisic during trial, and despite making
21 repeated assurances to call witnesses, counsel did not depose or call any witnesses other
22 than Alisic for his defense (*Id.* at 51-53, ¶¶ 9-10, 15-22).

23 The Court agrees that these allegations, if true, state a claim that counsel’s
24 performance was deficient under the first prong of *Strickland*. But as more fully
25 discussed in response to Alisic’s specific objections below, the Court finds that Alisic has
26 not shown there is a reasonable probability that, but for counsel’s unprofessional errors,
27 the results in this case would have been different. The Court finds that Alisic has not
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1 established cause for an evidentiary hearing because without a showing of prejudice the
2 facts alleged do not state a claim upon which relief could be granted.

3 Alisic makes an additional argument regarding Judge Aspey's treatment of the
4 evidence. Alisic refers to three pieces of evidence allegedly corroborating the facts in his
5 affidavit – a March 23, 2007 letter from his counsel Stephen C. Kunkle regarding his plea
6 option; counsel's notes from one of his visits; and the affidavit of Ismar Kabaklic. *Id.*
7 Alisic argues that Judge Aspey ignored this evidence and presented only Respondent's
8 evidence in the R&R: specifically, only the parts of the plea-advice letter that were
9 detrimental to Alisic's claim. *Id.* at 2.

10 The R&R states that “[i]n response to the section 2255 motion, Respondent
11 presents evidence that Alisic knowing[ly] rejected the plea agreements offered to Alisic
12 against his counsel's advice.” Doc. 9 at 5. The R&R cites from Respondent's arguments
13 and the March 23 letter, as follows (Respondent's words are in regular type and Alisic's
14 counsel's words to Alisic are italicized):

15 Defense counsel's letter dated March 23, 2007, recounts a
16 similar history of events:

17 *You rejected the current plea offer on the table,*
18 *believing that a trial was in your better interest to resolve this*
case. That is your decision to make, even if it may be an
unwise decision.

19 Defense counsel was obviously frustrated with
20 Petitioner, when defense counsel was making efforts to get
21 the case resolved with the prosecutor, per Petitioner's
22 expressed desire:

22 *. . . Unbelievably, you rejected this “third” offer,*
which had been changed to reflect your desire for less
exposure by the judge at sentencing. . . Inexplicably, you
23 *rejected that plea offer . . . Please reconsider your options.*

24 Defense counsel's letter is replete with an urging for
25 the Petitioner to accept a plea agreement:

26 *If you do not desire a plea offer to a range of*
imprisonment for 10 to 12 years, you can reject that offer as
you have previously indicated to me you wanted to do. I do
27 *not believe that is a good choice. At trial, your odds of*
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1 *success are very limited, if not downright bad. I never like to*
2 *think I will lose at trial, but in this instance, there is a lot of*
3 *evidence stacked against you.*

4 Doc. 7 at 22-23.

5 Alisic argues that Judge Aspey left out parts of the letter that support his
6 ineffective assistance claim. Doc. 12 at 2. Specifically, he argues that the letter shows
7 that he “was willing to sign a plea at one point in time.” *Id.* (citing March 23 letter
8 (“your desire was for a 12 year cap, and that you would settle for a 14 year cap, if the
9 prosecutor was not willing to go to 12.”)); *see* Doc. 4 at 65. Alisic argues that counsel’s
10 visitation notes back this up, noting that Alisic “wanted a 12 yr. cap.” *Id.*; *see* Doc. 4 at
11 66. Alisic’s principal argument is that while he was awaiting the government’s third plea
12 offer, counsel discussed the details of the crime with him for the first time and convinced
13 him that he would have a good chance to win on a duress defense and to defeat the
14 weapons charge, and his decision to reject a plea was based on this conversation. *Id.* at
15 49, ¶¶ 6-7, 28. As the portions of the letter already cited show, however, when the
16 government presented Alisic with the plea terms he had previously requested, counsel
17 could hardly have been more clear that he thought going to trial was not a good choice,
18 that Alisic’s odds of success were “very limited, if not downright bad,” and that there was
19 “a lot of evidence stacked against [him].” *See* March 23 letter, Doc. 4 at 65. It is clear
20 that Alisic rejected the government’s plea in direct contravention of his counsel’s advice.
21 As a result, any prejudice resulting from Alisic’s choice not to accept the plea cannot be
22 attributed to counsel’s deficient performance at the plea stage.

23 Mr. Kabaklic’s affidavit, showing that he would testify to Alisic’s reasons and
24 fears for committing the crime and that there were no real weapons involved, also does
25 not support Alisic’s ineffective assistance claim. *See* Doc. 12 at 2. Alisic alleges that
26 counsel’s performance was deficient because Alisic based his decision to go to trial on
27 counsel’s promise to call witnesses, and counsel did not actually call these witnesses or
28 respond to Alisic’s repeated requests to do so. Doc. 4 at 49-53, ¶¶ 6, 9-22; 28. Alisic

1 alleges that he told counsel, on the day of trial when he discovered that counsel only
2 intended to call Alisic as a witness in his own defense, that he did not want to go to trial
3 without any other witnesses to corroborate his testimony. He alleges that he would never
4 have taken his case to trial if he had known he would be the only witness in his own
5 defense. *Id.* at 51, ¶ 15; 53, ¶ 28.

6 Counsel's choice of whether or not to present particular witnesses is a matter of
7 trial strategy to which courts show great deference. *See Hein v. Sullivan*, 601 F. 3d 897,
8 918 (9th Cir. 2010); *U.S. v. Ferreira-Alameda*, 815 F.2d 1251, 1253 ("Review of
9 counsel's performance is highly deferential and there is a strong presumption that
10 counsel's conduct fell within the wide range of reasonable representation."). The Court
11 will address counsel's alleged failure to present particular evidence or testimony in
12 relation to Alisic's specific objections below. As to counsel's performance during the
13 plea stage, Alisic presents no facts showing that counsel promised to call specific
14 witnesses, including Mr. Kabaklic, at the time Alisic chose to reject the government's
15 third plea offer. Nor could counsel's letter have left Alisic with any doubt that counsel
16 did not believe that Alisic had a good chance of success at trial even after considering the
17 possible evidence and witnesses that could help establish a duress defense. Even if
18 counsel at an earlier time in plea negotiations convinced Alisic that witness testimony,
19 including that of Mr. Kabaklic, would be helpful to him at trial, Alisic could not
20 reasonably have relied on counsel's proposed use of this testimony as a basis for rejecting
21 a plea in the face of counsel's own unambiguous advice, once the government made its
22 plea offer, asking Alisic to "please reconsider your options," and stating that his odds for
23 success at trial were "very limited, if not downright bad." Thus, Alisic's allegation that
24 he would not have gone to trial if he had known he would be the only witness cannot
25 support a claim that counsel erred in advising him when he chose to reject the
26 government's offer.

2. Misapplication of the Strickland Standard.

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2 Alisic argues that Judge Aspey misapplied the *Strickland* standard because he was
3 not required to show that, but for counsel’s errors, he would surely have been acquitted,
4 but only a “reasonable probability that the result of the trial would have been more
5 favorable.” Doc. 12 at 3 (citing *McClellan v. Rapelje*, No. 2:08-CV-1075, 2011 WL
6 2447999 (E.D. Mich. June 14, 2011)). Alisic takes issue with Judge Aspey’s statement
7 that “it is clear . . . that Movant would have been found guilty of the charges against
8 him.” *Id.* (quoting Doc. 9 at 8). Judge Aspey’s full statement is as follows:
9 “Additionally, it is clear that, once the decision to proceed to trial was made by Movant,
10 even if the testimony he proposes had been introduced, especially given that Movant
11 himself testified, Movant would have been found guilty of the charges against him.”
12 Doc. 9 at 8.

13 As stated in the R&R, a showing of prejudice under *Strickland* requires that there
14 be “a reasonable probability that[,] but for counsel’s unprofessional errors, the results
15 would have been different.” Doc. 9 at 6 (citing *United States v. Blaylock*, F. 3d 1458,
16 1465 (9th Cir. 1994) (quoting *Strickland*). As Alisic argues, this standard does not
17 require a showing of “sure acquittal” before making a finding of prejudice; a “reasonable
18 probability” that the results would have been different or more favorable suffices. Judge
19 Aspey’s statement, however – concluding that it was clear that Alisic would nonetheless
20 have been found guilty of the charges against him – shows that Judge Aspey applied the
21 correct standard and found no “reasonable probability” of a more favorable result.

22 The Court also does not find that Judge Aspey’s conclusion was error. Alisic
23 presents several pages of arguments addressing both his duress defense and the weapons
24 charge to show that there was, in fact, a “reasonable probability” that the results would
25 have been different but for counsel’s alleged errors. *See* Doc. 12. 3-10. Alisic alleges
26 that counsel was ineffective for not interviewing Mr. Kabaklic, who would have testified
27 as to Alisic’s fears and reasons for committing the crimes (*id.* at 3), but Alisic does not
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1 show how this testimony would have helped establish the elements needed for a
2 successful duress defense: an imminent threat of death or serious bodily injury and a lack
3 of reasonable opportunity to escape. *See U.S. v. Shryock*, 342 F. 3d 948 (9th Cir. 2003).
4 Alisic also refers to unspecified people in police reports who witnessed events in the
5 crime, but he does not show how presenting their testimony would have led to a more
6 favorable result. *Id.* at 4. Similarly, Alisic points to evidence counsel failed to present
7 that would have shown other peoples’ involvement in the crime – a map of Scottsdale
8 that would have shown that Alisic and his co-defendants could not have returned to their
9 Scottsdale hotel when a witness said he saw someone enter their room, corroborating the
10 testimony of one of the co-defendants that others were involved – but Alisic does not
11 show how the possibility of others’ involvement would have led to a reasonable
12 probability of a different result. *Id.* at 4-7. Alisic’s arguments appear to be based on his
13 claim, not fully explained in his motion, that showing that “Tony” existed would, more
14 likely than not, have led to a different outcome in the case. *See* Doc. 4 at 21. Even
15 accepting that “Tony” was the alleged source of Alisic’s duress, as presented in his own
16 testimony (*see* Government’s Response to Petitioner’s Amended Motion, Doc. 7 at 20),
17 Alisic alleges no evidence or testimony about “Tony” or the others allegedly involved to
18 show that there is a reasonable probability the jury would have accepted Alisic’s duress
19 defense or otherwise reached a different result.

20 Alisic also alleges that counsel’s failure to present Ismar Kabaklic’s testimony that
21 no one involved in the crime had a real gun prejudiced him because there was a
22 reasonable probability that this affected the outcome. Doc. 20 at 10. Alisic’s arguments
23 consist of attacking the sufficiency of the evidence upon which the jury actually
24 convicted Alisic on the gun charge. *See id.* at 8-10. Specifically, Alisic calls into
25 question the testimony of Bakir Mujkic and Daniel Mujkic linking him to a gun because
26 this testimony came from plea-bargained co-defendants and they contradicted themselves
27 about what they actually saw on cross examination. *Id.* at 8-9. Alisic also argues that the
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1 government's physical evidence was weak because there were no fingerprints connecting
2 him to the gun recovered from the van used in the crime. *Id.* at 10. Alisic argues that
3 because his conviction on the gun charge was based on weak evidence, there is a
4 reasonable probability that, had counsel had Ismar Kabaklic testify, the jury would have
5 reached a different result. *Id.* But Mr. Kabaklic's statement that "nobody had a real gun"
6 (*see* Declaration of Ismar Kabaklic, Doc. 4 at 57-59, ¶ 7) conflicts with the testimony of
7 two witnesses whom defense counsel already cross-examined and with the fact that
8 police recovered an actual gun from the van used in the crime. Given these facts, the
9 Court cannot find a reasonable probability that Mr. Kabaklic's testimony would have
10 caused the jury to reach a different result on the gun charge, or that counsel's failure to
11 present Mr. Kabaklic as a witness is sufficient grounds to undermine confidence in the
12 outcome of this charge.

13 The Court will accept the R&R's finding that Alisic has failed to show that
14 counsel's alleged deficiencies prejudiced him at trial.

15 **3. Counsel's Failure to Investigate.**

16 Alisic argues that Judge Aspey failed to analyze counsel's failure to investigate.
17 Alisic alleges that counsel told him before trial that he would investigate all needed
18 witnesses, but failed to do so. Doc. 12 at 12. In addition to the proposed testimony
19 discussed above, Alisic argues that counsel failed to investigate or present testimony
20 from five eye-witnesses who saw a "suspect" or a person who "looked like he didn't
21 belong" inside a nearby retirement center at the time of the crime and that this person was
22 not Alisic. *Id.*, *see* Doc. 4 at 8-11. In his motion, Alisic argued that the testimony of
23 these witnesses would corroborate his own testimony that "Tony" was involved and
24 "[Alisic's] duress defense would be amplified many times and most likely than not, the
25 outcome of this case would have been different." Doc. 4 at 28. For the reasons already
26 discussed, the Court is not persuaded that counsel's failure to investigate or present these
27 witnesses was improper or that Alisic has shown that he was prejudiced by the omission
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1 of their testimony. The evidence against Alisic was overwhelming. The Court accepts
2 Judge Aspey's conclusion that Alisic has failed to show that counsel's actions in failing
3 to investigate or call these witnesses were deficient or that counsel's alleged deficiencies
4 prejudiced Alisic at trial.

5 Alisic also argues that Judge Aspey failed to address the fact that the
6 government's evidence on the gun charge was weak. Doc. 12 at 13. Alisic has only
7 made claims of ineffective assistance of counsel, not insufficiency of the evidence to
8 convict him of the gun charge. As stated above, Alisic has not shown that, but for
9 counsel's failure to call Ismar Kabaklic, there is a reasonable probability the jury would
10 have reached a different result on this charge.

11 **4. Cumulative Errors.**

12 Alisic argues that Judge Aspey failed to analyze the cumulative effect of counsel's
13 errors. Alisic cites *Killian v. Poole*, in which the Ninth Circuit states that "even if no
14 single error were prejudicial, where there are several substantial errors, 'their cumulative
15 effect may nevertheless be so prejudicial as to require reversal.'" 282 F. 3d 1204, 1211
16 (9th cir. 2002) (quoting *United States v. de Cruz*, 82 F.3d 856, 868 (9th Cir.1996)); *see*
17 *also Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir.1992).

18 Judge Aspey did not find any substantial errors showing that counsel's
19 performance was deficient. *See* Doc. 9 at 8 ("Movant has not established that his
20 counsel's performance with regard to either counseling Movant to accept the plea
21 agreement or his counsel's trial performance was unconstitutionally deficient, or that any
22 alleged deficiency was prejudicial to Movant.") Judge Aspey could not then assess the
23 cumulative effect of alleged errors for which he found no reasonable basis. The Court
24 will nevertheless undertake an analysis of the cumulative effect of those errors for which
25 it finds Alisic has made a sufficient claim.

26 Alisic lists five errors that he argues Judge Aspey should have considered. Two of
27 these alleged errors – counsel's failure to conduct any investigation and failure to call any
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1 witnesses to corroborate Alisic's testimony – the Court has already addressed, finding
2 that Alisic has failed to show prejudice. Two other alleged errors – that counsel failed
3 sufficiently to explain the duress defense and failed to explain the penalty of conviction
4 after trial – are brought for the first time in Alisic's objections and are not a proper basis
5 for Alisic's objection to the R&R. The Ninth Circuit has held “‘categorically that an
6 unsuccessful party is not entitled as of right to *de novo* review by the [district] judge of an
7 argument never seasonably raised before the magistrate.’” *United States v. Howell*, 231
8 F.3d 615, 621 (9th Cir. 2000) (citation omitted). The Court will not consider the
9 potential cumulative effect of unsubstantiated errors not previously alleged.

10 The remaining alleged error – that counsel failed to communicate with Alisic
11 before trial – is one that Alisic alleged in his motion, particularly in the context of
12 counsel's failure to abide by Alisic's requests that he investigate and prepare witnesses to
13 testify. *See, e.g.*, Doc. 4 at 5, 12. Although the allegation that counsel failed to meet with
14 Alisic, taken as true, may constitute behavior that falls below professional standards,
15 “lack of communication between attorney and client without resulting prejudice does not
16 constitute ineffective assistance of counsel.” *Morse v. Montana*, No. 89-35078, 1989
17 WL 150611, at *2 (9th Cir. Dec. 12, 1989). Alisic states in his own affidavit that he was
18 guilty of the crime and that he admitted this to counsel. Doc. 4 at 48, ¶¶ 3-4. Alisic has
19 not shown that he was prejudiced by counsel's failure to follow through with
20 investigating and calling proposed witnesses because Alisic has not shown a reasonable
21 probability that doing so would have led to a different or more favorable result at trial.
22 The Court does not find that the cumulative effect of counsel's failure to meet with Alisic
23 and other alleged errors is so prejudicial as to warrant relief.

24 **5. Failure to Consider the Totality of the Evidence.**

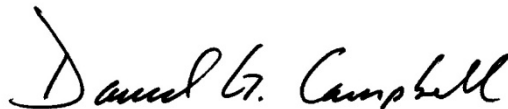
25 Alisic argues that Judge Aspey failed to consider the totality of the evidence.
26 Doc. 12 at 15. Alisic's claim appears to be based on the fact that Judge Aspey only cited
27 from parts of counsel's letter advising him to accept the government's plea offer and not
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1 from parts that show Alisic initially wanted to sign a plea. *Id.* at 15-16. Alisic offers a
2 timeline of the plea negotiations to show that he pursued a plea until counsel proposed
3 the duress defense, and only rejected the plea because, after this conversation, counsel
4 gave no reasonable explanation for his “change of heart” and nothing in the case had
5 changed. *Id.* at 16. As the Court has already discussed, Alisic’s choice to rely on an
6 earlier conversation with counsel as a basis for going to trial rather than to accept a plea,
7 as counsel ultimately urged him to do, cannot be attributed to counsel’s deficient
8 representation. Counsel cannot be faulted for proposing a possible defense while
9 awaiting the government’s response to Alisic’s plea request, particularly where counsel
10 later advised Alisic that accepting the offer was in his best interest. Alisic presents no
11 evidence that Judge Aspey failed to consider that could support Alisic’s ineffective
12 assistance claim.

13 **IT IS ORDERED:**

- 14 1. Alisic’s motion to dismiss grounds 1-9 (Doc. 6) is **denied** as moot.
- 15 2. Alisic’s request for an evidentiary hearing (Doc. 4) is **denied**.
- 16 3. Magistrate Judge Mark E. Aspey’s R&R (Doc. 9) is **accepted**.
- 17 4. Alisic’s amended motion to vacate, set aside, or correct sentence (Doc. 4)
18 is **denied**.
- 19 5. A certificate of appealability and leave to proceed *in forma pauperis* on
20 appeal are **denied**
- 21 6. The Clerk of the Court is directed to **terminate** this action.

22 Dated this 3rd day of February, 2012.

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David G. Campbell
United States District Judge