

1 NOT FOR PUBLICATION
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Brandon Hullaby,
10 Movant/Defendant,
11 v.
12 United States of America,
13 Respondent/Plaintiff.
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No. CV-14-01767-PHX-SRB
CR09-01406-PHX-SRB

ORDER

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16 Defendant Brandon Hullaby filed his Motion to Vacate, Set Aside or Correct
17 Sentence pursuant to 28 U.S.C. § 2255 on August 7, 2014. He raised one claim for relief.
18 Hullaby asserts that an intervening change in the law required that his sentencing
19 entrapment defense be decided by a jury rather than by the court at sentencing. The
20 Government filed a response in opposition. Hullaby filed a reply. On November 9,
21 2015, the Magistrate Judge issued his Report and Recommendation concluding that
22 Hullaby's claims are plainly barred as procedurally defaulted and recommending that the
23 Motion to Vacate be dismissed with prejudice and that a Certificate of Appealability be
24 denied. Hullaby filed timely written objections.

25 The factual and procedural background is accurately related in the Report and
26 Recommendation. What is most significant for purposes of this Section 2255 motion is
27 the decision by the Ninth Circuit Court of Appeals filed October 9, 2013 in *United States*
28 *v. Cortes*, 757 F.3d 850 (9th Cir. 2014). When *Cortes* was decided Hullaby's direct

1 appeal was pending before the Ninth Circuit, had been fully briefed and oral argument
2 had been held. Hullaby's appellate counsel brought the *Cortes* decision to the attention
3 of the Court of Appeals in a motion for supplemental briefing filed October 10, 2013.
4 Because Hullaby's case was still pending on direct review, the *Cortes* holding is
5 applicable, if relevant. Counsel urged that the Court of Appeals review this Court's
6 failure to submit the issue of sentencing entrapment to the jury for plain error.

7 The Government opposed the motion for supplemental briefing on several
8 grounds, including that the issue was not preserved for appeal because Hullaby did not
9 request the jury be instructed on sentencing entrapment and conceded that the issue was
10 one to be resolved by this Court at sentencing. The Government also argued that because
11 Hullaby had not requested a sentencing entrapment jury instruction that the appellate
12 review would be for plain error by this Court in failing to sua sponte instruct the jury on
13 sentencing entrapment. The Government argued that Hullaby could not make that
14 showing because this Court correctly rejected Hullaby's sentencing entrapment
15 arguments on the merits and because the jury rejected the traditional entrapment claim on
16 the merits, thus demonstrating that the absence of a jury instruction on sentencing
17 entrapment did not seriously undermine the fairness of the trial or otherwise affect
18 Hullaby's substantial rights. The Court of Appeals denied the motion for supplemental
19 briefing without explanation on November 1, 2013. The Court of Appeals issued its
20 opinion on December 4, 2013. The Court of Appeals held that this Court did not err in
21 rejecting Hullaby's sentencing entrapment argument:

22 [b]ecause there was "no evidence of the type of reluctance and inducement
23 present in cases where we have found sentencing entrapment." (citations
24 omitted). The district court reasonably determined that the amount of
25 cocaine at issue was set above the amount that would trigger a mandatory
minimum sentence in order to have a high enough value to interest the
conspirators, not to enhance the sentence artificially.

26 (*United States v. Hullaby*, No. 2:09-CR-01406-SRB-3, Doc. 496-2, Mem. Op. at
27 4.)

28 While the Court does not disagree with the Magistrate Judge that Hullaby

1 procedurally defaulted this claim by failing to raise it in his appellate briefs, the
2 Court disagrees with the Magistrate Judge that the decision *Alleyne v. United*
3 *States*, 133 S. Ct. 2151 (2013), is the reason that Hullaby is not entitled to relief.

4 In this Court's view, it is the *Cortes* decision which is significant not the
5 *Alleyne* decision. In *Cortes* the Court of Appeals expressly noted "We have never
6 held that sentencing entrapment is a jury question, but the Supreme Court's
7 precedent and our own make clear that it must be." 757 F.3d at 861. Prior to this
8 pronouncement in *Cortes* the Ninth Circuit had held that sentencing entrapment
9 was a question for the court at sentencing and the Supreme Court's decision in
10 *Alleyne* did not necessarily put Hullaby and his counsel on notice of the change in
11 the law that *Cortes* announced.

12 Having said that, however, this Court's review of *Cortes* and the inference
13 that it draws from the denial of the motion for supplemental briefing, together
14 with the holding of the Court of Appeals in Hullaby's appeal on the issue of
15 sentencing entrapment demonstrates that Hullaby is not entitled to relief on the
16 merits of his claim. The *Cortes* court noted:

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18 A criminal defendant is entitled to present his sentencing entrapment
19 defense to the jury if the success of that defense would result in a lower
20 statutory sentencing range. That is, if there is some foundation in the
evidence that he would be subject to a lesser statutory minimum or
maximum sentence if his sentencing entrapment defense were to
succeed. . . .

21 *Id.* at 863.

22 In Hullaby's case there was no foundation in the evidence, that is, there was
23 no evidence sufficient to present sentencing entrapment to a jury. As this Court
24 found, and the Court of Appeals affirmed, there was no evidence of sentencing
25 entrapment in this case. Therefore, under *Cortes* there was no foundation for the
26 submission of any jury instruction on this issue. On the merits Hullaby's
27 arguments based on *Cortes* must be rejected. While Hullaby may have cause for
28 his procedural default, that is, his failure to raise this issue in his briefs on appeal,

1 he has shown no actual prejudice and, therefore, his procedural default cannot be
2 excused nor could he succeed on the merits of his claim even if properly
3 preserved.

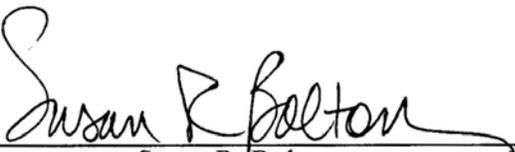
4 IT IS ORDERED overruling Hullaby's objections to the Report and
5 Recommendation of the Magistrate Judge.

6 IT IS FURTHER ORDERED that Brandon Hullaby's Motion to Vacate,
7 Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is denied and
8 dismissed with prejudice.

9 IT IS FURTHER ORDERED denying any Certificate of Appealability and leave
10 to proceed in forma pauperis on appeal. The dismissal of the motion is justified by a plain
11 procedural bar and jurists of reason would not find the procedural ruling debatable and
12 because Petitioner has not made a substantial showing of the denial of a constitutional
13 right.

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15 Dated this 24th day of February, 2016.

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Susan R. Bolton
United States District Judge