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

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9 United States of America,
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11 Plaintiff/Respondent,
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13 v.
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15 Richard Larry Self,
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17 Defendant/Movant.

No. CV13-08199-PCT-DGC (JFM)
CR10-08036-PCT-DGC

ORDER

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Movant Richard Larry Self filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. CVDoc. 1.¹ United States Magistrate Judge James F. Metcalf issued a report and recommendation (“R&R”) recommending that the motion be denied. CVDoc. 29 at 52. Movant filed an objection to the R&R on February 2, 2015. CVDoc. 34. For the reasons set forth below, the Court will accept the R&R and deny Movant’s motion.

I. Background.

On March 9, 2010, a grand jury indicted Movant on four counts of Possession of Child Pornography, with forfeiture allegations. CRDoc. 1. Movant was arrested on March 14, 2010, and the Court appointed trial counsel soon after. CRDocs. 5, 14, 19. Movant made four motions to continue trial, the last of which was filed on September 17, 2010. CRDocs. 20, 23, 26, 32. The Court granted all four motions and

¹ Documents filed in CV-13-08199-PCT-DGC will be referred to as “CVDoc” and documents filed in the related criminal action, CR-10-8036-PCT-DGC, will be referred to as “CRDoc.”

1 scheduled trial to start November 17, 2010. CRDOcs. 21, 25, 28, 41, 49.

2 On September 21, 2010, the government filed a superseding indictment charging
3 Movant with three counts of Transportation of Child Pornography, three counts of
4 Possession of Child Pornography, and forfeiture allegations. CRDoc. 35. On
5 October 13, 2010, Movant's counsel filed a motion to suppress evidence obtained from
6 the search warrant issued January 27, 2010. CRDoc. 47. The motion was based on
7 staleness and lack of probable cause. CRDoc. 47 at 6-10. The parties fully briefed the
8 issue, and the Court denied Movant's motion. CRDOcs. 47, 56, 65, 69.

9 On November 10, 2010, one week before Movant's trial date, Movant requested
10 new counsel. CRDoc. 74; CVDoc. 34 at 37-38. Movant believed his attorney had failed
11 to properly investigate his case (by not pursuing leads Movant suggested or interviewing
12 witnesses Movant claimed would discredit prosecution witnesses), did not believe he was
13 innocent, and would not present him with an unbiased defense. After considering
14 Movant's complaints, the Court rejected the request, stating that based on the information
15 Movant had provided, a different lawyer would not give Movant a better defense than the
16 one current counsel was set to present. CRDoc. 74.

17 Trial proceeded as scheduled, and the jury found Movant guilty on all counts. *Id.*;
18 CRDoc. 90. Counsel moved for a downward departure and variance at the sentencing.
19 CRDoc. 93. The Court denied the request for an extension and Movant was sentenced to
20 concurrent terms of 135 months for each transportation charge and 120 months for each
21 possession charge – an effective sentence of 135 months. CRDOcs. 95, 97.

22 On appeal, Movant challenged the trial court's denial of his motion to suppress,
23 arguing that the search warrant was stale and insufficient to establish probable cause.
24 CRDoc. 117. Movant also challenged his sentence as procedurally erroneous and
25 substantively unreasonable. *Id.* The Ninth Circuit rejected Movant's claims and affirmed
26 his conviction and sentence. *Id.*

27 On July 29, 2013, Movant filed his pro se motion to vacate. CVDoc. 1.
28 Magistrate Judge Metcalf issued his R&R on October 31, 2014. CVDoc. 29. Movant has

1 filed an objection on Grounds One through Eight. CVDoc. 34.

2 **II. Legal Standard.**

3 Under § 2255, a person in custody may “move the court which imposed the
4 sentence to vacate, set aside or correct the sentence” on the grounds that “the sentence
5 was imposed in violation of the Constitution or laws of the United States, or that the court
6 was without jurisdiction to impose such sentence, or that the sentence was in excess of
7 the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. §
8 2255(a).

9 A party may file specific written objections to the R&R’s proposed findings and
10 recommendations. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C). The Court must
11 undertake a de novo review of those portions of the R&R to which specific objections are
12 made. *See id.*; *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*,
13 328 F.3d 1114, 1121 (9th Cir. 2003). The Court may accept, reject, or modify, in whole
14 or in part, the findings and recommendations made by the magistrate judge. Fed. R. Civ.
15 P. 72(b); 28 U.S.C. § 636(b)(1).

16 In the context of ineffective assistance of counsel claims, “[j]udicial scrutiny of
17 counsel’s performance must be highly deferential.” *Strickland v. Washington*, 466 U.S.
18 668, 689 (1984). The Court must apply a strong presumption that counsel rendered
19 adequate assistance and exercised reasonable professional judgment. *Id.* To prevail on a
20 claim for ineffective assistance, Movant must show that “(1) his attorney’s performance
21 was unreasonable under prevailing professional standards, and (2) a reasonable
22 probability that but for counsel’s unprofessional errors, the results would have been
23 different.” *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (quoting
24 *Strickland*, 466 U.S. at 687-94). *Strickland* defines reasonable probability as “a
25 probability sufficient to undermine confidence in the outcome.” *Id.*

26 **III. Analysis.**

27 **1. Ground 1: Ineffective Assistance on Search Warrant.**

28 Movant objects on Ground 1(a), asserting that Judge Metcalf misunderstood his

1 claim; on Grounds 1(b) and (c), arguing that Counsel was ineffective by failing to
2 challenge the search based on improper service of the warrant; and on Ground 1(d),
3 arguing that counsel failed to challenge the illegal search and seizure of Movant’s person
4 during the warrant’s execution. CVDoc. 34 at 2-9.

5 **A. Ground 1(a).**

6 Movant asserts that his Ground 1(a) claim was misunderstood as challenging “the
7 staleness of the evidence in the probable cause.” *Id.* at 2. In clarifying his argument,
8 Movant claims that trial counsel was ineffective because she failed to challenge the
9 search warrant on the basis that it contained no new probable cause, and was an improper
10 reissue of a previously voided warrant. *Id.* at 2-3 (citing *Sgro v. United States*, 287
11 U.S. 206 (1932)).

12 Judge Metcalf understood Movant’s position on Ground 1(a) – that the second
13 search warrant was improper because it did not present new support for probable cause,
14 and that a new probable cause statement should have been required for a valid warrant.
15 CVDoc. 29 at 6-8. Judge Metcalf decided that *Sgro v. United States*, 287 U.S. 206
16 (1932), and the other cases relied on by Movant do not stand for the proposition that
17 every warrant must be accompanied by new affidavits or statements. *Id.* at 7. Rather, a
18 warrant must simply be based on timely information. *Id.* The Court finds Judge
19 Metcalf’s analysis to be sound. *See id.* at 6-8. Movant failed to show that new affidavits
20 and statements of probable cause were required for a valid search warrant, and trial
21 counsel’s “failure to raise a meritless legal argument does not constitute ineffective
22 assistance of counsel.” *Baumann v. United States*, 692 F.2d 565, 572 (9th Cir. 1982).

23 **B. Grounds 1(b) and (c).**

24 In his objection on Grounds 1(b) and (c), Movant reasserts the same arguments of
25 improper service he made in his motion to vacate. *See* CVDoc. 2 at 2-3; CVDoc. 21 at 3-
26 4; CVDoc. 34 at 3-6. The Court agrees with the R&R’s analysis that a challenge to the
27 search based on timing or lack of service would have been meritless, and failure to make
28 the arguments was not ineffective assistance. CVDoc. 29 at 8-11.

1 **C. Ground 1(d).**

2 Movant’s objection on Ground 1(d) is somewhat unclear. *See* CVDoc. 34 at 6-9.
3 In his motion to vacate, Movant argued that trial counsel should have challenged the
4 search of his truck on the ground that agents improperly searched Movant’s person,
5 improperly seized Movant’s effects, and improperly detained Movant without issuing a
6 *Miranda* warning. CVDoc. 2 at 3-5; CVDoc. 21 at 4-6. Judge Metcalf found that a
7 challenge of the search by trial counsel on those grounds would have been meritless.
8 CVDoc. 29 at 11-14. Further, Judge Metcalf noted that even if the court assumed the
9 searches were improper, Movant failed to show how he was prejudiced by the search of
10 his personal effects. *Id.* at 14. In his objection, Movant states that he believed he was
11 under arrest during his detention and that he need not show prejudice. CVDoc. 34 at 7-9.

12 The Court has reviewed the R&R’s treatment of Ground 1(d) and agrees that any
13 challenge to the search of Movant’s person or to his detention would have been meritless.
14 CVDoc. 29 at 11-14. Movant’s claim that he was not given a *Miranda* warning lacks
15 merit because Movant does not claim that he was interrogated or that any statement
16 obtained in violation of *Miranda* was used against him at trial. *See United States v. Kim*,
17 292 F.3d 969, 976 (9th Cir. 2002) (holding that a defendant is entitled to a *Miranda*
18 warning when police questioning exceeds the scope of a *Terry* stop and becomes a
19 custodial interrogation); *see also United States v. Patane*, 542 U.S. 630, 641 (2004)
20 (“Potential violations [of the *Miranda* rule] occur, if at all, only upon the admission of
21 unwarned statements into evidence at trial.”).

22 **2. Ground 2: Ineffective Assistance on Double Jeopardy.**

23 Movant states in his objection that he stands by his original challenge that counsel
24 was ineffective in failing to challenge Movant’s convictions based on double jeopardy.
25 CVDoc. 34 at 9. Movant reasserts that: (1) the three possession of child pornography
26 charges amounted to a single offense, and (2) his possession convictions were lesser
27 included offenses of his transportation convictions. *Id.* at 9-10; CVDoc. 2 at 5-6;
28 CVDoc. 21 at 6-8.

1 Applying 18 U.S.C. § 2252(a)(5)(B) and its reference to a defendant’s possession
2 of “any” material containing child pornography, Judge Metcalf found that possession of
3 multiple materials containing child pornography established multiple violations of the
4 possession statute. CVDoc. 29 at 16. Because each possession charge in this case relied
5 on separate material, multiple possession charges were appropriate and a challenge by
6 trial counsel on this basis would have been futile. *Id.*

7 Judge Metcalf also determined that although possession of child pornography can
8 be a lesser included offense of transportation of child pornography, Movant failed to
9 show that the images used to support his possession charges were the same images used
10 to support his transportation charges. *Id.* at 17. Movant therefore has failed to show that
11 counsel was ineffective for failing to raise it.

12 The Court has reviewed Judge Metcalf’s reasoning on these issues and finds it to
13 be correct. Movant’s Ground 2 objection is without merit and will be denied.

14 **3. Ground 3: Ineffective Assistance on Prosecutorial Misconduct.**

15 Movant asserts that (1) trial counsel failed to challenge admission of prejudicial
16 stories based on authenticity, and (2) the government failed to investigate fingerprint and
17 DNA evidence that would have exonerated Movant.² CVDoc. 34 at 10-15.

18 **A. Failure to Challenge Stories Based on Authenticity.**

19 On February 8, 2010, a search warrant was executed at Movant’s residence.
20 CVDoc. 29 at 2. Along with other evidence, agents found several hundred pages of
21 printed documents containing fictional narratives describing sexual conduct with children
22 (the “stories”). *Id.* Following notice that the government intended to use the stories at
23 trial, Movant’s counsel argued the stories were unfairly prejudicial under Federal Rule of
24 Evidence 404(b) and that the government possessed other evidence sufficient to show

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26 ² Movant’s argument regarding a vindictive superseding indictment was raised for
27 the first time in Movant’s reply brief. CVDoc. 29 at 18 n.5; CVDoc. 21 at 8-11. The
28 Court “will not consider new arguments raised for the first time in a reply brief.” *Bach v.*
Forever Living Prods. U.S., Inc., 473 F. Supp. 2d 1110, 1122 n.6 (W.D. Wash. 2007)
(citing *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837 n.6 (9th Cir. 2004)); see *Gadda v.*
State Bar of Cal., 511 F.3d 933, 937 n.2 (9th Cir. 2007).

1 Movant had knowledge of the contents of the electronic storage media that contained
2 child pornography. CRDoc. 57 at 7. The Court concluded that the stories were
3 admissible only with redactions and other limitations. CRDoc. 70 at 5-7.

4 Movant contends that his counsel should have challenged the authenticity of the
5 stories and the fact that the admitted stories involved a truck driver, a veteran, or a
6 character named “Rick,” all of which might describe Movant. Given the vigorous
7 arguments that were made by defense counsel regarding the stories and the limitations the
8 Court placed on their admission at trial, including limiting the number of stories
9 admitted, redacting portions of the stories, and limiting instructions to the jury, the Court
10 cannot conclude that the evidence would have been any different had defense counsel
11 made the arguments Movant suggests. Copies of the stories were found in Defendant’s
12 home and on electronic storage media in his truck, facts the jury could take into account
13 in deciding whether they were authentic. The similarity of some of the stories to Movant
14 was further evidence of their authenticity. The Court agrees with Judge Metcalf’s
15 conclusion that the additional arguments suggested by Movant would have had no effect
16 on admission of the redacted stories at trial. CVDoc. 29 at 19-20. Because it is unlikely
17 that the outcome would have been different, trial counsel was not ineffective for failing to
18 make the arguments identified by Movant. *See Strickland*, 466 U.S. at 691-92.

19 **B. Failure to Investigate Fingerprint and DNA Evidence.**

20 Movant argues that trial counsel was ineffective for failing to assert a claim of
21 prosecutorial misconduct based on the government’s failure to follow through on
22 fingerprint and DNA evidence. CVDoc. 34 at 14-15. The R&R concluded that Movant
23 “misapprehends the obligation of the prosecution,” and has overstated the persuasive
24 effect that the DNA and fingerprint evidence would have had. CVDoc. 29 at 22-23. The
25 R&R also notes that trial counsel may have had a tactical reason for not pursuing the
26 evidence in question. *Id.* at 23-24. Movant objects to these conclusions, and argues that
27 the persuasive effect of the testing cannot be overstated because it would have rebutted
28 testimony from his wife and supported Movant’s denial of ownership. CVDoc. 34 at 14-

1 15. Additionally, Movant claims “there is no possible way for the magistrate court to
2 constru [sic] [that trial counsel’s decision not to pursue testing was tactical], short of
3 talking to the dense [sic] attorney.” CVDoc. 34 at 15.

4 Movant’s objections are without merit. The R&R’s statement that trial counsel’s
5 decision not to pursue testing may have been tactical is supported by the fact that trial
6 counsel highlighted the lack of testing during trial, both on cross examination and in
7 closing argument. CRDoc. 112 at 397-98; CRDoc. 113 at 441. Defense counsel might
8 well have concluded that the ability to make these arguments at trial outweighed the
9 potential benefits and risks of pushing the government to complete the testing.
10 Additionally, the government had no obligation to pursue the fingerprint and DNA
11 analysis, and a prosecutorial misconduct charge on this basis would have been meritless.
12 *See Arizona v. Youngblood*, 488 U.S. 51, 59 (1988) (“[T]he defendant is free to argue to
13 the finder of fact that a . . . test might have been exculpatory, but the police do not have a
14 constitutional duty to perform any particular tests.”); *United States v. Polizzi*, 801 F.2d
15 1543, 1553 (9th Cir. 1986) (holding government has no duty to disclose exculpatory
16 material that the prosecutor was neither aware of nor in possession of).

17 **4. Ground 4: Failure to Object to Prior Bad Acts.**

18 Movant asserts that trial counsel was deficient in failing to challenge admission of
19 the fictional stories for lack of attribution. CVDoc. 34 at 16-19. He also claims trial
20 counsel failed to investigate evidence that would have supported his denial of authorship.

21 As discussed in the R&R, trial counsel did oppose the stories’ admission under
22 Federal Rule of Evidence 404(b) and 403, and renewed the objection again at trial to
23 every story admitted. CVDoc. 29 at 26. Counsel also argued to the jury that the
24 government could not attribute the stories to Movant, pointing out that multiple people
25 had access to Movant’s residence, computer, and other media while Movant was away
26 for extended periods of time as a truck driver. CRDoc. 113 at 442-44.

27 “[A] court must indulge a strong presumption that counsel’s conduct falls within a
28 wide range of reasonable professional assistance” and “the defendant must overcome the

1 presumption that . . . the challenged action ‘might be considered sound trial strategy.’”
2 *Strickland*, 466 U.S. at 689 (citation omitted). “There are countless ways to provide
3 effective assistance in any given case.” *Id.* Movant has failed to show trial counsel’s
4 decisions as anything but reasonable trial strategy, and thus the Court will deny his
5 Ground 4 objection.

6 **5. Ground 5: Omitted Evidence.**

7 Movant argues that trial counsel was ineffective because she did not introduce the
8 following evidence: (1) AOL account time of access logs; (2) that Movant’s AOL
9 account information and credit/debit card information were posted on a corkboard so
10 others could pay bills; (3) a receipt showing that Movant’s wife purchased eight of the
11 thumb drives that were found in Movant’s truck, along with the bag they were found in;
12 (4) evidence that Movant used a different computer than the one that was found to have
13 child pornography; (5) evidence that four of the five computers seized were free of any
14 child pornography; and (6) evidence to impeach Movant’s wife by showing she had a
15 propensity to lie about Movant. CVDoc. 34 at 19-24. Further, Movant claims trial
16 counsel should have called the following witnesses: James Holdgrafer, Laura Holdgrafer,
17 Robin Dufresne, and Sandy Maranda. *Id.* at 20-22. According to Movant, these
18 witnesses would have testified that Movant did not take a computer with him on road
19 trips unless his wife or daughters were accompanying him, Movant’s wife brought the
20 computer on the road trip on which they were searched, Movant’s brother-in-law had
21 access to the computers for over a month, and Movant’s wife used the thumb drives for
22 pictures and music storage. *Id.*

23 Movant concedes that trial counsel did elicit testimony on cross-examination that
24 others had access to his home, computer, thumb drives, truck, and AOL Account. *Id.* at
25 19-20. Movant also concedes that trial counsel elicited testimony from government
26 experts that they could not place defendant at the computer, or say with certainty who
27 plugged in the thumb drives to load or view files. *Id.*

28 Judge Metcalf reviewed each of Movant’s omitted evidence claims in great detail.

1 CVDoc. 29 at 29-40. The Court has reviewed these claims and Movant’s objections, and
2 agrees with Judge Metcalf’s analysis. Regarding witnesses not selected to testify, trial
3 counsel had strong tactical reasons for not calling them. *Id.* at 33-35. With regard to
4 evidence that Movant’s wife purchased the thumb drives and bag seized during the
5 search, that four of five computers were free of child pornography, and that Movant did
6 not frequently take a laptop with him on road trips, many of these facts were brought out
7 on cross-examination and the remainder would not have altered the outcome of the trial.
8 *Id.* at 32, 35-38. With regard to evidence that Movant’s wife was a perjurer, Federal Rule
9 of Evidence 608(b) prevented use of the exhibits Movant suggests. *Id.* at 39.

10 These arguments are classic examples of second-guessing strategic decisions by
11 trial counsel. The presumption in favor of trial counsel’s decisions precludes habeas
12 relief on such a basis. Ground 5 lacks merit.

13 **6. Ground 6: Errors in the Pre-Sentence Report.**

14 Movant argues that trial counsel was ineffective because she failed to correct a
15 number of inaccuracies in the pre-sentence report (“PSR”), did not allow Movant to
16 interview with the probation officer, and never provided Movant with a copy of the PSR.
17 CVDoc. 34 at 24-31; CVDoc. 2 at 17-18.

18 The R&R addressed each claim regarding the PSR and found they lacked merit.
19 CVDoc. 29 at 41-44. The Court agrees. The Court found that Movant had no criminal
20 history points, resulting in a criminal history category of I, and sentenced him at the
21 bottom of the guideline range. CRDoc. 114 at 6, 11. The Court based its sentencing
22 decision on Movant’s possession of hundreds of photographs and videos of child
23 pornography, his perpetuation of the market for child pornography, his fixation on sexual
24 abuse of children as reflected in many stories he wrote about abusing children, and his
25 failure to accept responsibility. CRDoc. 114 at 10-11. Movant has not shown that the
26 alleged errors in the PSR concerning his prior arrests and various allegations of sexual
27 abuse had any effect on his sentence. *See Strickland*, 466 U.S. 691 (“An error by
28 counsel, even if professionally unreasonable, does not warrant setting aside the judgment

1 of a criminal proceeding if the error had no effect on the judgment.”).

2 Nor can the Court conclude that trial counsel was ineffective when she
3 recommended that Movant not have an interview with the probation officer who was
4 preparing the PSR. *See* CVDoc. 29 at 43-44. Trial counsel may well have concluded
5 that Defendant’s demeanor and lack of contrition would result in a less favorable
6 recommendation. Additionally, Movant has failed to show how the interview would have
7 affected the outcome of his sentencing. *See Strickland*, 466 U.S at 691-92.

8 Lastly, Movant claims that trial counsel never provided him with a copy of the
9 PSR or reviewed it with him. This claim is significantly undermined, however, by the
10 fact that Movant referred to the “Probation Report” in his pre-sentencing letter to the
11 Court, commenting on some of the matters raised in this habeas petition. CRDoc. 96 at 2.
12 Nor did Movant contradict his counsel’s specific statement at the sentencing hearing that
13 she had reviewed the PSR with him. *Id.* at 44; CRDoc. 114 at 3. Ground 6 lacks merit.

14 **7. Ground 7: Evidence of Third Party Guilt.**

15 Movant argues that counsel was ineffective by failing to (a) present evidence from
16 the forensic expert that someone else could have committed the crime; (b) pursue
17 discovery and disclosures from the prosecution; (c) investigate whether another person
18 authored the fictional stories; (d) object to the stories; (e) call witnesses for the defense;
19 (f) present a defense; (g) investigate information that Movant did not own a computer
20 until May 2008, that the other computers were clean and available for others to use, and
21 that the program used to write the stories was not on his computer; (h) show that the
22 computers could not have been placed on the bottom bunk of the truck at the time of the
23 search; (i) impeach the government’s witnesses; and (j) object to references to Movant’s
24 ex-wife as such at trial, even though they remained married at that time. CVDoc. 34 at
25 31-37; CVDoc. 29 at 45.³

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27 ³ The R&R did not reach a number of Movant’s additional arguments regarding
28 trial counsel’s failures because they were raised for the first time in his reply brief.
CVDoc. 29 at 45. These include counsel’s failure to present bank statements showing
illegal activity in his account, failure to impeach Movant’s ex-wife, failure to impeach
Agent Schrable, failure to present evidence about Movant’s brother-in-law, and failure to

1 Judge Metcalf found arguments (a), (b), (c), (g), (h), and (j) to be unsupported, and
2 explained why. CVDoc. 29 at 45-47. He found arguments (d), (e), (f) and (i) to be
3 repetitive of earlier grounds already dismissed. *Id.* at 47-48. Movant objects to these
4 conclusions, sometimes citing evidence and often with only conclusory assertions.
5 CVDoc. 34 at 31-33. The Court again concludes, however, that Movant is second-
6 guessing his trial counsel’s strategic decisions on how best to try this case. Although the
7 Court does not doubt that Movant genuinely believes a better defense could have been
8 mounted, that is not the test for ineffective assistance. Movant must show that his
9 attorney’s performance was unreasonable under prevailing professional standards, and,
10 but for counsel’s unprofessional errors, the results of his trial would have been different.
11 *Strickland*, 466 U.S. at 687-94. The “highly deferential” approach the Court must take
12 when evaluating counsel’s performance precludes the kind of issue-by-issue criticism
13 Movant levels in Ground 7. *Id.* at 689.

14 After a de novo review, the Court finds Judge Metcalf’s discussion of the
15 arguments raised in Ground 7 to be correct. CVDoc. 29 at 45-48. The Court will accept
16 the R&R’s findings and deny Movant’s Ground 7 objections.

17 **8. Ground 8: Abuse of Discretion.**

18 Movant asserts that (a) the Court abused its discretion by refusing Movant’s pre-
19 trial request for new counsel, and (b) counsel was ineffective “for not challenging the
20 lesser included offenses, and greater offense.” CVDoc. 34 at 37-39.

21 Judge Metcalf properly notes that “to the extent that Movant might have intended
22 to assert direct challenges on these decisions of the trial court, the claims would be
23 procedurally defaulted for failing to raise them on direct appeal.” CVDoc. 29 at 49; *see*

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25 have the jury instructed on his theory of defense. *Id.* Movant asserts in his objection that
26 he did raise these claims in his opening brief, but the Court has reviewed that brief and
27 can find no mention of them. Movant does state in his opening brief that “[a] criminal
28 defendant has the right to have the Jury instructed on his/her theory of defense separate
and apart from instructions given on the elements of the charged offense.” CVDoc. 2 at
20. But Movant then asserts that trial counsel called no witnesses, presented no evidence,
and thus “allow[ed] the Jury to believe there was no defense.” *Id.* This is not a challenge
to trial counsel’s effectiveness on jury instructions as raised in his reply.

1 *Massaro v. United States*, 538 U.S. 500, 504 (2003) (“[C]laims not raised on direct
2 appeal may not be raised on collateral review unless the petitioner shows cause and
3 prejudice.”). Judge Metcalf decided that Movant’s first claim was not procedurally
4 defaulted because Movant was not directly claiming that the Court abused its discretion,
5 but rather that trial counsel was ineffective for failing to object to the Court’s decision as
6 an abuse of discretion. CVDoc. 29 at 49. Here, Movant’s objection makes no such
7 distinction. *See* CVDoc. 34 at 41 (“Defendant believes he has shown abuse of discretion
8 of the Court, in refusing defendant substitute counsel.”). Accordingly, Ground 8(a) is
9 procedurally defaulted and will be denied.

10 Movant’s argument in Ground 8(b) regarding the lesser included offenses is the
11 same argument made in Ground 2 and will be denied for the reasons discussed above.

12 **IT IS ORDERED:**

- 13 1. The R&R (CVDoc. 29) is **accepted**.
- 14 2. The motion to vacate sentence (CVDoc. 1) is **denied**.
- 15 3. The Clerk is directed to terminate this action.

16 Dated this 15th day of April, 2015.

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20 _____
21 David G. Campbell
22 United States District Judge
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