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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FREDERICK DARREN BERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. C13-246RAJ

ORDER

This matter comes before the court on a motion calendar it created to address petitioner’s motion invoking 28 U.S.C. § 2255, as well as various motions filed by petitioner. The court DENIES as MOOT petitioner’s motion to stay proceedings pending petition for writ of mandamus. Dkt. # 23. The court notes that petitioner has filed a fourteen-page objection and motion to strike in addition to his twenty-one-page overlength reply. Dkt. ## 20, 22. The court granted petitioner thirty pages for his opening brief. Dkt. # 5. Accordingly, his reply should not have exceeded fifteen pages. Local Rules W.D. Wash. CR (“LCR”) 7(f)(4). Nevertheless, the court has considered the entirety of petitioner’s twenty-one-page reply brief. Dkt. # 22. However, requests to strike material contained in an opposition brief must be brought in the responsive brief, not in a separate motion. *See* LCR 7(g). Petitioner filed a separate objection and motion to strike. Dkt. # 20. Given that combining petitioner’s reply and objections yields thirty-

1 seven pages, and the court did not approve an overlength reply brief, the court has
2 disregarded petitioner's objections and motion to strike. Dkt # 20. The court also notes
3 that the Government has not provided pin point citations throughout most of its
4 opposition, or clearly marked the relevant portions of its exhibits, in violation of LCR
5 10(e)(6) and 10(e)(10). As a result, the court has been unable to locate the evidence
6 underlying many of its representations.¹ To the extent the court was unable to locate the
7 evidence underlying a particular representation, the court has disregarded such
8 representation.

9 For the reasons stated herein, the court concludes that petitioner has not
10 established a valid challenge to the sentence this court imposed in February 2012. Dkt. #
11 95. The court also DENIES petitioner's motion for evidentiary hearing because the
12 petition, files and record of the case conclusively show that he is not entitled to relief.
13 Dkt. # 24; *See United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004) (petitioner
14 entitled to evidentiary hearing only if (1) petitioner alleges specific facts which, if true,
15 would entitle him to relief, and (2) the petition, files and record of the case cannot
16 conclusively show that he is entitled to relief).

17 Petitioner pleaded guilty to one count of Wire Fraud, one count of Money
18 Laundering, and one count of Bankruptcy Fraud – Asset Concealment. Dkt. # 78. This
19 court imposed a two hundred sixteen month sentence in accordance with the parties' plea
20 agreement. *Id.* at 8; Dkt. # 95 at 2. Petitioner did not appeal, and, instead, filed his
21 section 2255 motion.

22 Petitioner raises six claims in his section 2255 petition: (1) the government and
23 trustee Calvert conspired to deny petitioner effective assistance of counsel; (2) counsel
24 should have moved to suppress statements made by petitioner on August 11, 2010; (3)

25
26 ¹ The court notes that the Government has provided some citations to the record as part of the
27 procedural history, background information, and summary of investigations, which the court has
28 reviewed.

1 counsel should have negotiated proffer protection prior to agreeing to the September 20,
2 2010 proffer; (4) counsel should have moved to suppress the fruits of the August 27,
3 2010 search and seizure; (5) counsel should have undertaken their own independent
4 forensic accounting; and (6) counsel should have moved for dismissal of petitioner's
5 indictment alleging outrageous government conduct. Dkt. # 1.

6 As part of his plea agreement, petitioner waived any right to collaterally attack his
7 conviction except as it may relate to the effectiveness of legal representation. Dkt. # 78
8 at 8. Accordingly, his section 2255 petition is limited to claims for ineffective assistance
9 of counsel.

10 A party raising a claim of ineffective assistance of counsel in a case that resulted
11 in a guilty plea must not only show that counsel's representation fell below an objective
12 standard of reasonableness, but that there is a reasonable probability that the defendant
13 would not have pleaded guilty but for the ineffective assistance. *United States v.*
14 *Baramdyka*, 95 F.3d 840, 844 (9th Cir. 1996) (citing *Strickland v. Washington*, 466 U.S.
15 668, 686-90 (1984)); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). To establish such a claim,
16 a petitioner must overcome the strong presumption that counsel's conduct falls within a
17 wide range of reasonable professional assistance. *Id.*

18 **A. Claim 1: The Government and trustee Calvert conspired to deny petitioner**
19 **effective assistance of counsel**

20 With respect to the first claim, the court agrees with the government that such a
21 claim is subject to the waiver of appeal. However, petitioner argues that leveraging a
22 threat of criminal forfeiture against a third party solely to scuttle a criminal defendant's
23 ability to pay his chosen attorney or to eliminate the funding for an independent forensic
24 accounting offends due process. Dkt. # 22 at 5. First, petitioner has not provided any
25 evidence that would support a finding that the government threatened forfeiture "solely to
26 scuttle [his] ability to pay his chosen attorney." Second, while petitioner does have a

1 constitutional right to his attorney of choice, he does not have a constitutional right to use
2 assets connected with the illegal conduct to pay for that attorney. *See Kaley v. United*
3 *States*, 134 S.Ct. 1090, 1102-03 (2014). The Supreme Court recently held that where the
4 assets' connection to the allegedly illegal conduct is not in dispute, a pretrial seizure is
5 wrongful only when there is no probable cause to believe the defendants committed the
6 crimes charged. *Id.* at 1103. "Or to put the same point differently, such a freeze is
7 erroneous—notwithstanding the weighty burden it imposes on the defendants' ability to
8 hire a chosen lawyer—only when the grand jury should never have issued the
9 indictment." *Id.* There is no evidence before the court that the grand jury should not
10 have issued the indictment.

11 Petitioner also argues that the government and trustee Calvert conspired to
12 interview him outside the presence of counsel. Petitioner relies on *Massiah v. United*
13 *States*, 377 U.S. 201 (1964) and its progeny. Under *Massiah*, "[o]nce a defendant's Sixth
14 Amendment right to counsel has attached, the government is forbidden from 'deliberately
15 eliciting' incriminating statements from the defendant." *Randolph v. Cal.*, 380 F.3d
16 1133, 1143 (9th Cir. 2004) (citing *Massiah*, 377 U.S. at 206). "This prohibition has been
17 extended to the use of jailhouse informants who relay incriminating statements from a
18 prisoner to the government." *Id.* Thus, to demonstrate a *Massiah* violation here,
19 petitioner must demonstrate that trustee Calvert was acting as an agent of the government
20 when he obtained information from petitioner, and that trustee Calvert "made some effort
21 to stimulate conversations about the crime charged." *Id.* at 1144. However, there is no
22 evidence before the court that trustee Calvert was working as an agent of the government
23 during the August 11, 2010, interview. While there is evidence that the government and
24 trustee Calvert may have been cooperating with respect to exchanging information for
25 investigatory purposes, there is no evidence that trustee Calvert was acting at the
26 direction of the government, that the government even knew about the August 11

1 interview before it occurred, or that the interview was the likely result of the
2 government's acts.

3 Additionally, the Sixth Amendment right to counsel and the *Massiah* line of cases
4 do not apply to interviews that occur before the initiation of adversary criminal
5 proceedings. *United States v. Hayes*, 231 F.3d 663, 669 (9th Cir. 2000). The Supreme
6 Court, the Ninth Circuit, “and every other circuit to consider a similar issue has adhered
7 to the rule that adversary judicial proceedings are initiated ‘by way of formal charge,
8 preliminary hearing, indictment, information, or arraignment.’” *Id.* at 675. Here, the
9 felony information was filed on October 14, 2010. CR10-310RAJ, Dkt. # 4. The
10 interview petitioner complains of that was conducted by trustee Calvert took place in
11 August 2010. Since the interview took place before adversary judicial proceedings had
12 been initiated, the Sixth Amendment right to counsel had not attached, and *Massiah* is
13 inapplicable. Accordingly, even if trustee Calvert was a government agent, petitioner
14 was not denied effective assistance of counsel under the Sixth Amendment.

15 Accordingly, even if the first claim was an ineffective assistance of counsel claim,
16 plaintiff has failed to demonstrate that there was a constructive denial of counsel's
17 assistance or that the government interfered with counsel's assistance.

18 **B. Claim 2: Counsel should have moved to suppress statements made by petitioner**
19 **on August 11, 2010**

20 Petitioner relies on *Massiah* with respect to this claim as well. For the same
21 reasons stated above, failure to move to suppress the statements made in the August 11,
22 2010 interview was objectively reasonable where plaintiff has failed to provide any
23 evidence that would support a finding that trustee Calvert was a government agent, and
24 where *Massiah* is inapplicable.

25 In reply, petitioner argues that the failure to suppress resulted in a violation of his
26 Fifth Amendment right against self-incrimination. However, the Fifth Amendment

1 privilege against self-incrimination prohibits admitting statements given by a suspect
2 during a “custodial interrogation” without prior warning. *Illinois v. Perkins*, 496 U.S.
3 292, 296 (1990) (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). “Custodial
4 interrogation means ‘questioning initiated by law enforcement officers after a person has
5 been taken into custody....’” *Id.* There is no evidence before the court that would even
6 suggest that petitioner’s interview with trustee Calvert could be considered a custodial
7 interrogation.

8 Accordingly, the court finds that petitioner has failed to demonstrate unreasonable
9 conduct by his attorneys.

10 **C. Claim 3: Counsel should have negotiated proffer protection prior to agreeing to**
11 **the September 20, 2010 proffer**

12 Petitioner argues that counsel’s strategy to recommend that petitioner stop
13 insisting on an independent forensic accounting his prior counsel and conditioned a
14 proffer session on prior to the September 20, 2010 interview was objectively
15 unreasonable. Petitioner also argues in reply that counsel conducted virtually no
16 investigation prior to settling on this strategy, citing *Scott v. Schriro*, 567 F.3d 573, 585
17 (9th Cir. 2008).

18 On September 8, 2010, the court appointed Federal Public Defender Thomas
19 Hillier as counsel for Berg, and Mr. Hillier entered his notice of appearance on the same
20 day. CR10-310RAJ, Dkt. ## 2-3. On October 15 and 18, 2010, assistant federal
21 defenders Stansell and Levin entered notices of associations. *Id.*, Dkt. ## 5-6. One
22 month later on September 20, 2010, petitioner provided his proffer. *Id.*, Dkt. # 88-2.
23 Although petitioner argues that his counsel had conducted virtually no investigation prior
24 to the proffer, he fails to provide any evidence supporting this claim. Nothing in the
25 record suggests that the strategic decision to recommend that petitioner stop insisting on
26 an independent forensic accounting prior to a proffer, or his attorneys’ decision not to

1 negotiate protections prior to a proffer was unreasonable. Additionally, petitioner
2 repeatedly indicated his commitment to assist and cooperate with trustee Calvert and the
3 government. *See* Dkt. ## 6-1 & 6-2 (Exs. to Mem. supporting 2255 Mot.), Ex. I (8/8/10
4 email from Berg to Calvert: “my intent to cooperate at every level.”), Ex. K (emails to
5 trustee Calvert), Ex. V (9/27/2010 e-mail from Berg to Calvert: “I remain committed to
6 helping you when able.”). At the proffer, petitioner was advised of his rights, confirmed
7 that he understood that the government had not made him any promises, and confirmed
8 that he had sufficient time to consult with his attorneys, before continuing with the
9 proffer. Dkt. # 88-2 at 4-5 (9/20/2010 Tr. at 3:17-4:10). Petitioner’s repeated willingness
10 to cooperate and assist also supports a finding that counsel’s failure to seek proffer
11 protection was reasonable where there was no indication that proffer immunity would
12 have been forthcoming and where defendants who are forthright and cooperate with the
13 government typically receive more favorable terms in plea agreements.

14 Accordingly, the court finds that petitioner has failed to demonstrate unreasonable
15 conduct by his attorneys.

16 **D. Claim 4: Counsel should have moved to suppress the fruits of the August 27,**
17 **2010 search and seizure**

18 Petitioner argues that his attorneys should have moved to suppress the fruits of the
19 8/27/2010 search because (1) the affidavit failed to inform the court that the premises
20 subject to the search contained information not covered by the search warrants; (2) the
21 affidavit misled the court as to the real risk of destruction and the images provided by
22 Lighthouse; (3) the affidavit failed to disclose that the probable cause for 11 of the 15
23 companies the government did not list on the search warrant affidavit had come courtesy
24 of an illegal data theft and password cracking undertaken by the trustee; and (4) the
25 affidavit misled the court to conclude that trustee Carey did not have control of the
26 entities she had been appointed to serve.

1 The record does not support any of petitioner’s allegations. First, the court finds
2 that the affidavit, which was executed on August 26, 2010, in support of the search
3 warrant for the subject locations provided adequate probable cause to search and seize
4 evidence subject to the search warrant. *See* Dkt. # 28-1. The affidavit properly provided
5 that the initial search of the data seized was to be conducted by a filter team that was not
6 involved in the investigation of the case against petitioner, and that only evidence subject
7 to the warrant would be provided to the investigatory team. *Id.* ¶ 118. There is no
8 evidence before the court that suggests that this did not occur. Second, the affidavit
9 properly indicated the inadequacy of the imaging that was being conducted by
10 Lighthouse, including that the imaging only captured data through a certain date, that Mr.
11 Berg and his counsel, rather than law enforcement, were solely responsible for providing
12 instruction and access to Lighthouse personnel, and that there was no indication as to
13 when the affiant would have access to the images. *Id.* ¶¶ 72-73. Petitioner has not
14 directed the court to any evidence that would support his speculation that these
15 representations are false or misleading. Additionally, evidence supports the affiant’s
16 statement that the trustee had not been provided access to all relevant documents,
17 including Mr. Berg’s private office and databases for several companies. *Id.* ¶¶ 70-76,
18 89; Dkt. # 6-1, Exs. S (noting that trustee Carey did not have control over all of Mr.
19 Berg’s companies as of 8/20/2010) & T (noting that trustee Calvert did not have access to
20 all relevant documents, including access to Mr. Berg’s private office and QuickBooks for
21 Meridian Partnership Management, Inc. as of 8/24/2010). Finally, the affidavit disclosed
22 that Trustee Calvert had used password cracking software to access other files that he had
23 accessed when Mr. Berg was not consulted or when he was unavailable. Dkt. # 28-1 ¶
24 91.

25 Accordingly, counsel’s decision not to move to suppress the fruits of the
26 8/27/2010 was reasonable.

1 **E. Claim 5: Counsel should have undertaken their own independent forensic**
2 **accounting**

3 Petitioner argues that counsel's failure to do an independent forensic accounting
4 was constitutionally deficient because (1) an independent forensic accounting would have
5 enabled petitioner to negotiate a better plea bargain, and (2) an independent forensic
6 accounting would have proven that the date of the Government indictment was off by at
7 least two years.² Dkt. # 6 at 19. With respect to the first argument, counsel for petitioner
8 did hire an independent forensic accountant, who acknowledged that the government's
9 loss calculations appeared to be reasonable. Berg represents that this expert admitted to
10 only reviewing the cover sheet provided by the government, and not the underlying data.
11 Petitioner has not provided any evidence supporting this assertion. Even if petitioner's
12 representation were true, however, petitioner has not demonstrated how counsel's
13 reliance on that expert is constitutionally defective. Nor has petitioner provided any
14 evidence that would support his market loss theory that this court previously rejected.
15 With respect to the second argument, petitioner himself testified that the fraud began in
16 2003 when he removed money out of fund two that he should not have. Dkt. # 88-2 at
17 48.

18 Finally, petitioner has failed to demonstrate any prejudice from counsel's failure to
19 conduct an independent accounting. There is no evidence in the record that even
20 remotely suggests that petitioner would have received a more favorable sentence had
21 there been an independent forensic accounting. *See Cullen v. Pinholster*, 131 S.Ct. 1388,
22 1403 (2011) ("The defendant must show that there is a reasonable probability that, but for
23 counsel's unprofessional errors, the result of the proceeding would have been different.
24 A reasonable probability is a probability sufficient to undermine confidence in the

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² The timeframe stated in the superseding indictment for wire fraud is as follows: Beginning at
27 an exact time unknown, but no later than sometime in 2003, and continuing until around August
28 2010. Dkt. # 8 at 1.

1 outcome. That requires a substantial, not just conceivable, likelihood of a different
2 result.”) (internal citations and quotations omitted).

3 The court finds that petitioner has failed to demonstrate any unreasonable conduct
4 on behalf of his attorneys in failing to undertake an independent forensic accounting.

5 **F. Claim 6: A motion to dismiss the petitioner’s indictment would have succeeded**

6 Petitioner argues that a motion to dismiss the indictment based on outrageous
7 government conduct would have succeeded because (1) of the conspiracy between trustee
8 Calvert and the government to deny him effective assistance of counsel; (2) of the
9 conspiracy between Calvert and the government to interview him without counsel
10 present; (3) the government proxied its prosecutorial machinery to trustee Calvert; (4) the
11 government joined its investigation with trustee Calvert to subvert *United States v.*
12 *Comprehensive Drug Testing, Inc.* (“*CDT III*”), 621 F.3d 1162 (9th Cir. 2010) (en banc);
13 (5) the government violated *Brady*; and (6) the government reverse engineered its bank
14 statement database.

15 The court finds that there is no evidence to support any allegation of outrageous
16 government conduct. Petitioner’s interpretation of the evidence is belied by the actual
17 record. The court has already addressed the first two allegations above. With respect to
18 the third allegation, the record indicates that the timing of petitioner’s arrest was in
19 reaction to the government’s discovery that petitioner allegedly lied to the FBI and the
20 bankruptcy trustees about his assets. CR10-310RAJ, Dkt. # 1 (Compl. & Aff.) ¶ 7. The
21 record also demonstrates that petitioner himself testified that the first time he removed
22 money out of fund two when he should not have was in 2003. CR10-310RAJ, Dkt. # 88-
23 2 at 49 (9/20/2010 Tr. At 48:1-49:25). With respect to the fourth allegation, there is no
24 evidence before the court that the government violated *CDT III*, which approved certain
25 procedural safeguards when the government seeks a search warrant that authorizes broad
26 seizure of electronic data to ensure that data beyond the scope of the warrant would not

1 fall into the hands of investigating agents. Rather, the affidavit supporting the search
2 warrant indicates compliance with *CDT III*. Dkt. # 28-1 ¶ 118. Nothing in *CDT III*
3 prohibits parties from agreeing to waive the *CDT III* procedural safeguards. With respect
4 to the fifth allegation, the record demonstrates that there was no *Brady* violation. Dkt. #
5 6-1 (7/31/2011 Hrg. Tr. at 9:7-17:24), Ex P at 8-16. With respect to the final allegation,
6 there is no evidence that supports petitioner's argument that the government's
7 calculations had been "reverse engineered."

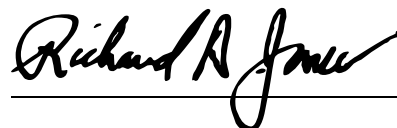
8 The court finds that petitioner has not demonstrated any unreasonable conduct on
9 behalf of his attorneys in failing to move to dismiss the indictment.

10 **G. Conclusion**

11 For the reasons stated herein, the court DENIES petitioner's § 2255 motion and
12 directs the clerk to DISMISS this action and enter judgment for respondent.

13 Because the court finds that reasonable jurists would not debate the resolution of
14 this motion, the court declines to issue a certificate of appealability. *See* Fed. R.
15 Governing § 2255 Proceedings, Rule 11(a); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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17 DATED this 3rd day of April, 2014.

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21 The Honorable Richard A. Jones
22 United States District Judge