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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MICHAEL PAUL GRADNEY,

11 Petitioner,

12 v.

13 UNITED STATES OF AMERICA,

14 Respondent.

CASE NO. C15-0623JLR

ORDER DENYING
PETITIONER'S MOTION
UNDER 28 U.S.C. § 2255

15 **I. INTRODUCTION**

16 This matter comes before the court on Petitioner Michael Paul Gradney's motion
17 to vacate, set aside, or correct his sentence. (Mot. (Dkt. # 1).) Mr. Gradney, proceeding
18 *pro se*, brings his motion pursuant to 28 U.S.C. § 2255. (*See id.*; Dkt.) Respondent
19 United States of America ("the government") opposes the motion. (Resp. (Dkt. # 17).)
20 Having considered Mr. Gradney's motion, the documents filed in support thereof and
21 opposition thereto, the balance of the record, and the relevant law, the court DENIES Mr.
22 Gradney's motion.

II. BACKGROUND

On December 17, 2012, a jury convicted Mr. Gradney of firearm and drug trafficking charges. *United States v. Gradney*, No. CR11-0363JLR (W.D. Wash. 2013) (hereinafter, *Gradney I*), Dkt. # 123. The trial lasted six days. *Id.*, Dkt. ## 115-27. On April 1, 2013, the court sentenced Mr. Gradney to 180 months of imprisonment followed by five years of supervised release. *Id.*, Dkt. # 133. Mr. Gradney appealed his conviction to the Ninth Circuit Court of Appeals, which affirmed the jury verdict. *Id.*, Dkt. ## 136, 173. Mr. Gradney filed the instant Section 2255¹ motion on April 14, 2015. *Id.*, Dkt. # 175; (Mot. at 1.)

In addition to his motion, Mr. Gradney submitted a supplement, which purports to add grounds for relief not contained in his motion. (*See Supp.* (Dkt. # 9).) The court liberally construes the motion and supplement to cumulatively argue five grounds for relief:

- Ineffective assistance of trial counsel (*see Mot.* at 4-5; *see also Gradney Decl.* (Dkt. # 2) ¶¶ 6-13; Reply (Dkt. # 24) at 10-12, 15-17);
- Violation of the right to confrontation (*see Mot.* at 5-6; Reply at 12-14);
- Ineffective assistance of appellate counsel (*see Mot.* at 7-8);
- Post-trial conduct by trial counsel (*see Mot.* at 8-9; Reply at 20, 28); and

¹ “A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255(a).

1 for counsel's unprofessional errors, the result of the proceeding would have been
2 different." *Id.* at 688, 694.

3 With respect to the first prong, the defendant must show that "in light of all the
4 circumstances, the identified acts or omissions were outside the wide range of
5 professionally competent assistance." *Id.* at 690. At this step, judicial scrutiny is highly
6 deferential: there is a strong presumption that counsel's performance fell within the wide
7 range of reasonably effective assistance.² *Id.* at 689. With respect to the second prong,
8 "[a] reasonable probability is a probability sufficient to undermine confidence in the
9 outcome." *Id.* at 694.

10 Having laid out the framework that applies to the majority of Mr. Gradney's
11 arguments, the court turns to the bases for Mr. Gradney's motion.

12 **C. Ineffective Assistance of Trial Counsel**

13 In his criminal case, Mr. Gradney repeatedly objected to the DNA evidence related
14 to the firearm at issue. Mr. Gradney contends that the police contaminated the evidence
15 during their search. (Mot. at 4-4a.) In his current motion, Mr. Gradney argues that his
16 trial counsel, Gabriel Levy, provided ineffective assistance by failing to move to suppress
17 the contaminated evidence. (*Id.*; see also Gradney Decl. ¶ 6 (making the same argument
18 as to Mr. Gradney's subsequent trial counsel, Stephan Illa).) However, Mr. Gradney's

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20 ² That deference is further enhanced as applied to the performance of appellate counsel.
21 *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) ("In many instances, appellate counsel
22 will fail to raise an issue because she foresees little or no likelihood of success on that issue;
indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of
effective appellate advocacy."); see also *Pollard v. White*, 119 F.3d 1430, 1435-37 (9th Cir.
1997) (extending the *Strickland* framework to claims pertaining to appellate counsel).

1 counsel did file a motion to suppress that evidence, and the court denied that motion.³

2 *See Gradney I*, Dkt. ## 18, 38. There was no deficient performance on this ground.

3 Mr. Gradney alternatively argues that Mr. Levy provided ineffective assistance of
4 counsel by failing to move to exclude the DNA evidence on the basis that the defense
5 was not provided a sufficient sample. (Mot. at 4a; *see also* Reply at 10-12; Gradney
6 Decl. ¶ 4.) The record, however, demonstrates that the court provided both sides the
7 maximum opportunity to develop their DNA evidence by continuing the trial, *Gradney I*,
8 Dkt. # 54, and holding evidentiary hearing, *id.*, Dkt. ## 55, 57-58. Moreover, as Mr.
9 Gradney acknowledges, Mr. Levy hired an expert to observe the DNA analysis, and the
10 expert informed Mr. Levy that he “believed the results were valid.” (Reply at 12; *see*
11 *also* Resp. Ex. 2 (“Levy Decl.”) (Dkt. # 17-1) ¶¶ 4-6.) Mr. Levy’s decision not to further
12 challenge the DNA evidence falls within the wide range of reasonably effective
13 assistance, and thus the court rejects this ground for ineffective assistance of trial counsel.
14 *See Strickland*, 466 U.S. at 689-90.

15 Finally, Mr. Gradney includes in his declaration several further allegations that
16 could amount to ineffective assistance. (*See* Gradney Decl. ¶¶ 9-13.) However, the
17 record belies these allegations. Mr. Gradney states that Mr. Illa told Mr. Gradney that he
18 “would not be able to file any pre-trial motions” (*id.* ¶ 9) and that Mr. Illa “assured” Mr.
19 Gradney that he would win at trial (*id.* ¶ 13). To the contrary, Mr. Illa filed a series of
20 pretrial motions in Mr. Gradney’s criminal trial. *See Gradney I*, Dkt. ## 72-77. Mr.

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22 ³ The motion was filed by Michael Martin, who preceded Mr. Levy as Mr. Gradney’s
trial counsel. *See Gradney I*, Dkt. # 18.

1 Illa's records confirm that he fully explained to Mr. Gradney why he opted to file some
2 but not all of the pretrial motions that Mr. Gradney sought. (Resp. Ex. 7 (Dkt. # 17-1) at
3 1-2.) In addition, Mr. Illa sent a letter to Mr. Gradney on August 22, 2012, in which Mr.
4 Illa indicated "that it is highly likely" that Mr. Gradney would be convicted if he
5 proceeded to trial. (Resp. Ex. 6 (Dkt. # 17-1) at 1.) These records belie Mr. Gradney's
6 arguments, and the court concludes Mr. Illa did not perform deficiently.

7 **D. Violation of the Right to Confrontation**

8 Mr. Gradney next argues that his Sixth Amendment right to confront witnesses
9 was violated at trial. (Mot. at 5-5a.) Specifically, he points to testimony about several
10 confidential informants who themselves did not testify during trial. (*Id.*) In response, the
11 government provides evidence that the prosecution provided information about those
12 informants to Mr. Illa in advance of trial. (Resp. at 6; Resp. Ex. 3 ("Illa Decl.") (Dkt.
13 # 17-1) ¶¶ 5.1.1.-5.1.2.; Resp. Ex. 4 (Dkt. # 17-1).) In reply, Mr. Gradney changes his
14 argument to contend that Mr. Illa provided ineffective assistance by failing to object to
15 hearsay testimony about those witnesses. (Reply at 13-14; *see also* Mot. at 5a.)

16 Mr. Illa confirms that he made repeated objections to out-of-court statements at
17 trial. (Illa Decl. ¶¶ 5.2-5.4.) The court sustained some of those objections and others
18 resulted in a different question being asked. (*Id.* ¶ 5.4.) Mr. Illa further indicates, with
19 citation to the trial transcript, that "the prosecution appeared to be careful not to elicit
20 inadmissible statements by the informants." (*Id.* ¶ 5.3.) It is clear from the record that
21 there was no violation of Mr. Gradney's right to confront witnesses, nor was trial counsel
22 ineffective by failing to object to hearsay.

1 **E. Ineffective Assistance of Appellate Counsel**

2 Mr. Gradney’s third ground for relief is that his appellate counsel failed to “move
3 to preserve the DNA evidence.” (Mot. at 7.) However, the testing performed in advance
4 of trial entirely consumed that DNA evidence. (Levy Decl. ¶ 7.) Mr. Gradney does not
5 identify any other “biological evidence” (Mot. at 7), and he apparently abandons this
6 ground for relief in his reply (*see generally* Reply). The court therefore rejects Mr.
7 Gradney’s claim for ineffective assistance of appellate counsel.

8 **F. Post-Trial Conduct by Trial Counsel**

9 Mr. Gradney next faults Mr. Illa for “[f]ailure to claim ownership, file a Motion to
10 Return Real Property, and challenge forfeiture” of Mr. Gradney’s property. (Mot. at 8.)
11 However, as Mr. Gradney “categorically understands,” the “forfeiture argument are not
12 grounds seeking to overturn his conviction and sentence byway of subsection 2255
13 claim.” (Reply at 18.) Furthermore, Mr. Illa explained to Mr. Gradney the reasons for
14 Mr. Illa’s decision not to “challenge forfeiture,” which included strategic purposes
15 specific to Mr. Gradney’s criminal defense. (Illa Decl. ¶¶ 6.1-6.4.) Mr. Gradney
16 apparently does not accept those reasons, and he faults his appointed counsel for not
17 taking steps to act in a separate but related state civil proceeding. As Mr. Gradney
18 recognizes, this ground does not suffice to support a Section 2255 claim.

19 Mr. Gradney also replied with a new argument that the government created the
20 conflict of interest that required his first counsel, Mr. Martin, to withdraw from

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1 representation.⁴ (Reply at 19-27.) The facts belie this argument. Mr. Martin moved to
2 withdraw from representing Mr. Gradney in the criminal proceeding when Mr. Martin
3 learned that the government might call Mr. Martin to testify at Mr. Gradney’s trial.
4 *Gradney I*, Dkt. # 40 at 2. This situation arose when the government informed Mr.
5 Martin that it intended to introduce into evidence a letter drafted by Mr. Martin, in which
6 Mr. Gradney sought to reclaim the money that officers found in the same drawer as the
7 offending firearms and ammunition. *Id.* The alleged factual basis underlying this ground
8 for relief is therefore inaccurate, and the court therefore rejects this ground for Mr.
9 Gradney’s Section 2255 claim.

10 **G. Failure to Challenge Statements from the State Investigation**

11 Mr. Gradney’s fifth ground for Section 2255 relief is contained in his
12 “supplemental issue.” (*See Supp.*) Mr. Gradney appears to challenge the use of evidence
13 in his federal prosecution that was obtained in a state investigation. (*See id.* at 3.) At no
14 point does Mr. Gradney describe deficient performance by his counsel. (*See generally*
15 *id.*) Indeed, counsel filed a motion to suppress evidence obtained in the search, and the
16 court denied that motion. *Gradney I*, Dkt. ## 18, 38. The Ninth Circuit affirmed the
17 court’s ruling on the motion to suppress. *Id.*, Dkt. # 170. Mr. Gradney therefore raised
18 or could have raised any of the constitutional violations that he alleges in his direct
19 appeal to the Ninth Circuit. Those arguments that he actually raised cannot be raised


21 ⁴ The court also rejects this argument because it was raised for the first time in Mr.
22 Gradney’s reply. *See, e.g., F.T. Travel—N.Y., LLC v. Your Travel Ctr., Inc.*, 112 F. Supp. 3d
1063, 1079 (C.D. Cal. 2015) (collecting cases declining “to consider arguments that are raised
for the first time in reply”).

1 herein, and those that he could have raised can only be properly raised herein after a
2 showing of cause and actual prejudice for failure to raise them in his direct appeal. *See*
3 *United States v. Scrivner*, 189 F.3d 825, 828 (9th Cir. 1999); *Odom v. United States*, 455
4 F.2d 159, 160 (9th Cir.1972) (“The law in this circuit is clear that when a matter has been
5 decided adversely on appeal from a conviction, it cannot be litigated again on a 2255
6 motion.”); *Bousley v. United States*, 523 U.S. 614, 622 (1998). To the extent his
7 arguments could have been raised, but were not, on direct appeal, Mr. Gradney makes no
8 effort to establish cause or prejudice for that failure. (*See generally* Supp.; Reply.) The
9 court therefore rejects this argument.

10 IV. CONCLUSION

11 The court has liberally construed Mr. Gradney’s motion and rejected all of the
12 bases that Mr. Gradney argued entitle him to relief. For the reasons stated herein, the
13 court DENIES Mr. Gradney’s motion under 28 U.S.C. § 2255 (Dkt. ## 1, 9).

14 Dated this th14 day of April, 2016.

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17 JAMES I. ROBERT
United States District Judge
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