

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATHANIEL WELLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. C21-602RSM

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

I. INTRODUCTION

Before the Court is Petitioner’s 58-page § 2255 Motion to Vacate, Set Aside, or Correct Sentence. Dkt. #1. Nathaniel Wells challenges the 134-month sentence imposed on him by this Court following his guilty plea for conspiracy to commit bank fraud. *Id.* at 2; Case No. 2:16-cr-0007-RSM, Dkts. #230, #232. Petitioner challenges his sentences on ten grounds, detailed below. Dkt. #1. After full consideration of the record, and for the reasons set forth below, the Court DENIES Mr. Wells’s § 2255 Motion.¹

¹ Toward the end of his Motion, Mr. Wells suggests re-assignment to a new judge in this case “is advisable.” *See* Dkt. #1 at 52-54. Mr. Wells has not filed a separate recusal motion as required by Local Civil Rule 3(f). His reasons for recusal (*e.g.* “Judge Martinez will feel, in these current proceedings, that he has already spent enough time on the case... and therefore he does not need to consider the case anew...”) do not include extrajudicial bias and could be said to apply to any judge considering a § 2255 motion on their own prior criminal case—a common occurrence. The Court would decline to recuse even if these reasons were properly presented.

II. BACKGROUND

1
2 The Court generally agrees with the relevant background facts as set forth by the
3 Government and demonstrated by court records. *See* Dkt. #11 at 5–14. Mr. Wells does not
4 dispute the vast majority of this procedural background. He mainly disputes details of the
5 financial fraud victims’ injuries and whether these injuries satisfied the elements of conspiracy
6 to commit bank fraud. The Court will attempt to focus only on those facts relied on by the
7 Court in reaching its ruling.
8

9 On January 14, 2016, the Government filed an indictment charging Mr. Wells and two
10 codefendants with Conspiracy to Commit Bank Fraud. Case No. 2:16-cr-0007-RSM, Dkt. #35.
11 A superseding indictment was later filed adding a fourth codefendant. Case No. 2:16-cr-0007-
12 RSM, Dkt. #53. On January 6, 2017, Mr. Wells pleaded guilty without the benefit of a plea
13 agreement. Case No. 2:16-cr-0007-RSM, Dkt. #114.
14

15 In July, August, and September of 2017, a four-day evidentiary hearing was held to
16 determine sentencing guideline enhancements and the amount of restitution owed. Mr. Wells
17 submitted a memorandum with several evidentiary and legal arguments. Case No. 2:16-cr-
18 0007-RSM, Dkt. #163.
19

20 Prior to sentencing, Wells moved to withdraw his guilty plea and to dismiss the
21 indictment. Case No. 2:16-cr-0007-RSM, Dkt. #205.
22

23 Sentencing occurred on March 30, 2018. Case No. 2:16-cr-0007-RSM, Dkt. #230. The
24 Court denied Mr. Wells’s motion to withdraw his plea and to dismiss the indictment and denied
25 his motion for reconsideration of its prior Guidelines determinations. Case No. 2:16-cr-0007-
26 RSM, Dkt. #299 at 3–4. The Court restated its written Guidelines calculation—total offense
27 level 32, Criminal History Category VI—yielding a Guidelines range of 210 to 262 months.
28

1 Case No. 2:16-cr-0007-RSM, Dkt. #299 at 3. The Court imposed a 134-month prison sentence,
2 followed by 5 years of supervised release, and ordered \$5,816,938.82 in restitution. Case No.
3 2:16-cr-0007-RSM, Dkt. #232 and Dkt. #299 at 22-24. This sentence was based in part on a
4 finding of ten or more victims. The court also imposed a sentence for Wells's supervision
5 revocation: 36 months' imprisonment with no following supervision. Case No. 2:16-cr-0007-
6 RSM, Dkt. #299 at 26. This sentence was ordered to run concurrently with the sentence in his
7 current criminal case. *Id.*

9 Mr. Wells appealed his conviction and both sentences. Case No. 2:16-cr-0007-RSM,
10 Dkt. #235.

11 The Government later raised an issue with the factual support for the number of victims
12 and moved for a limited remand to resolve this issue, which the Ninth Circuit granted. Case
13 No. 2:16-cr-0007-RSM, Dkt. #314. On remand, new evidence was collected by the
14 Government to support the ten-or-more-victims finding. Case No. 2:16-cr-0007-RSM, Dkt.
15 #334. Mr. Wells objected to this evidence and asked for an evidentiary hearing. Case No.
16 2:16-cr-0007-RSM, Dkt. #343. The Court denied Mr. Wells' request and reaffirmed its ruling
17 about the number of victims enhancement. Case No. 2:16-cr-0007-RSM, Dkt. #347.

18 The case went back up on appeal. Mr. Wells's direct appeal did not raise any issue
19 about the sentence imposed for his supervised release revocation. Regarding his conviction for
20 conspiracy to commit bank fraud, he raised the following issues:

- 21 1. The Court erred by applying the predominance-of-the-evidence and not the clear-and-
22 convincing-evidence standard in determining the Guidelines enhancements for loss
23 amount, relevant conduct, and leadership role;

- 1 2. The Court erred in holding that all the losses caused by the conspiracy were attributable
2 to Wells as relevant conduct;
- 3 3. The Court erred in holding that Wells qualified for a leadership enhancement;
- 4 4. In calculating the loss amount, the Court erred in holding that Wells was liable for all
5 losses caused by the conspiracy;
- 6 5. In calculating the loss amount under the Guidelines, the Court erred in holding Wells
7 liable for actual and intended losses, not just actual losses;
- 8 6. The Court erred in holding that Wells’s crime involved ten or more victims;
- 9 7. The Court erred in denying his motion to dismiss for lack of subject matter jurisdiction
10 without holding a hearing to determine whether the payment processors were “financial
11 institutions” within the meaning of the bank-fraud statute;
- 12 8. The Court erred in denying Wells’s motion to withdraw his guilty plea;
- 13 9. The Court erred in holding Wells jointly liable for the entire amount of restitution
14 ordered; and
- 15 10. During the limited remand, the Court erred in reaffirming its ten-or-more victims
16 finding without holding an evidentiary hearing.

17
18
19
20 *United States v. Wells*, 9th Cir. Case No. 18-30074, Dkts. #10 and #61. The Ninth Circuit
21 rejected these arguments and affirmed Wells’s conviction and sentences. *United States v.*
22 *Wells*, 804 F. App’x 515 (9th Cir. 2020).

23
24 Mr. Wells filed this instant petition on May 3, 2021. Dkt. #1. He requests an
25 evidentiary hearing to address the merits of his claims, dismissal of the superseding indictment,
26 resentencing, suppression of evidence, and that the Court vacate his guilty plea. *Id.* at 58.

III. DISCUSSION

A. Legal Standard

A motion under 28 U.S.C. § 2255 permits a federal prisoner in custody to collaterally challenge his sentence on the grounds that it was imposed in violation of the Constitution or laws of the United States, or that the Court lacked jurisdiction to impose the sentence or that the sentence exceeded the maximum authorized by law.

A petitioner seeking relief under Section 2255 must file his motion with the one-year statute of limitations set forth in § 2255(f).

A claim may not be raised in a Section 2255 motion if the defendant had a full opportunity to be heard on the claim during the trial phase and on direct appeal. *See Massaro v. United States*, 123 S. Ct. 1690, 1693 (2003). Where a defendant fails to raise an issue before the trial court, or presents the claim but then abandons it, and fails to include it on direct appeal, the issue is deemed “defaulted” and may not be raised under Section 2255 except under unusual circumstances. *Bousley v. United States*, 523 U.S. 614, 622 (1998); *see also United States v. Braswell*, 501 F.3d 1147, 1149 & n.1 (9th Cir. 2007). Unless the petitioner can overcome this procedural default, the Court cannot reach the merits of his claims. *See Bousley*, 523 U.S. at 622. To do so, the petitioner must “show both (1) ‘cause’ excusing his double procedural default, and (2) ‘actual prejudice’ resulting from the errors of which he complains.” *United States v. Frady*, 456 U.S. 152, 168 (1982).² To demonstrate “cause” for procedural default, a defendant generally must show that “some objective factor external to the defense” impeded his adherence to a procedural rule. *Murray*, 477 U.S. at 488. *See also United States v. Skurdal*, 341 F.3d 921, 925 (9th Cir. 2003). The Supreme Court has held that “cause” for

² Another means by which procedural default may be excused is by establishing actual innocence. *See Bousley*, 523 U.S. at 622.

1 failure to raise an issue exists “where a constitutional claim is so novel that its legal basis is not
2 reasonably available to counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984). The “prejudice” prong
3 of the test requires demonstrating “not merely that the errors at . . . trial created a possibility of
4 prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire
5 trial with error of constitutional dimensions.” *Fraday*, 456 at 170.

7 **B. Evidentiary Hearing**

8 The Court finds that an evidentiary hearing is not required in this case because Mr.
9 Wells’s allegations can be refuted from the record on procedural grounds. *See* Dkt. #11 at 5
10 (citing 28 U.S.C. §2255(b); *Shah v. United States*, 878 F.2d 1156, 1161-62 (9th Cir. 1989)).

12 **C. Analysis**

13 There is no dispute that Mr. Wells meets the “custody” requirement of the statute and
14 that this is Motion is timely under § 2255(f).

15 The Court has identified ten grounds/claims for relief raised in this Motion. The
16 Government presents many overlapping arguments for why these claims must be dismissed, not
17 all of which need to be discussed. The Government’s central argument for denying relief is
18 because Mr. Wells has not raised many of these issues on appeal—so called procedural
19 default—and because he has failed to demonstrate actual prejudice from the alleged errors due
20 to a central misunderstanding of the elements the Government needed to prove for the charge
21 of conspiracy to commit bank fraud. More specifically, the Government asserts:
22

23
24 Except for his ineffective-assistance-of-counsel claim (Claim 4),
25 all of Wells’s current claims are based on evidence that was
26 adduced at the presentencing evidentiary hearing, as well as prior
27 discovery (Claims 1-3, 5-9), or else challenge the legality of the
28 sentence imposed for his supervision revocation (Claim 10). With
the exception of Wells’s challenge to the Guidelines burden of
proof (Claim 9) and the Guidelines enhancements for loss amount,
number of victims, and leadership role (Claim 8 in part), the

1 remainder of Wells’s current claims—Claims 1-3, 5-7, 8 in part,
2 10—were not raised on appeal and, except for the enhancement for
3 possessing device-making equipment (Claim 8, in part), were also
4 not raised in this Court prior to entry of judgment. Accordingly,
5 these previously-unraised claims have been procedurally defaulted.
6 *See Bousley v. United States*, 523 U.S. 614, 622 (1998); *United*
7 *States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998). Unless
8 Wells can overcome these procedural defaults, the Court cannot
9 grant relief on these claims. *See Bousley*, 523 U.S. at 622; *United*
10 *States v. Seng Chen Yong*, 926 F.3d 582, 590 (9th Cir. 2019). To
11 do so, Wells must show both “cause” excusing the default and
12 “actual prejudice” resulting from the errors of which he
13 complains.” *United States v. Frady*, 456 U.S. 152, 168 (1982). He
14 cannot.

15 Dkt. #11 at 17. The Court agrees that Mr. Wells’s claims 1-3, 5-7, 8 in part, and 10 are
16 procedurally defaulted. Whether or not he can show “cause” is tied in with his ineffective
17 assistance claim. The Court will now address whether he can show actual prejudice for any of
18 his claims.

19 Mr. Wells pleaded guilty to conspiracy to violate 18 U.S.C. §1344(2), which
20 criminalizes “a scheme or artifice . . . to obtain money, funds, credits, assets, securities, or other
21 property owned by or under the custody of or control of a financial institution, by means of
22 material, false or fraudulent pretenses, representations, or promises.” Case No. 2:16-cr-0007-
23 RSM, Dkt. #272 at 5. A “financial institution” includes an FDIC-insured bank, *see* 18 U.S.C.
24 §20(1), and the indictment listed four such banks affected by the scheme: KeyBank, Green Dot
25 Bank, Sunrise Bank, and JP Morgan Chase. Case No. 2:16-cr-0007-RSM, Dkt. #53. During the
26 change-of-plea hearing, Wells admitted to conspiring to obtain money “from another source”
27 by fraud, and defense counsel speculated that “other source” was “probably the payment
28 processor, which we understand to be subsidiaries of various banks.” Case No. 2:16-cr-0007-
RSM, Dkt. #272 at 13-14.

1 During the pretrial evidentiary hearing, the evidence showed that the fraudulently
2 obtained funds were not received from payment processors directly; those funds were obtained
3 from FDIC-insured banks that held the payment processors' settlement accounts. However,
4 with the exception of Key Bank, none of the financial institutions named in the indictment had
5 direct losses due to the underlying criminal scheme. The losses were actually born by payment
6 processors or victim-merchants, none of which meet the legal definition of a "financial
7 institution." Mr. Wells has latched onto this fact to demonstrate actual prejudice and to support
8 his ineffective assistance of counsel claim.
9

10 The Government explains its reasons for charging Mr. Wells as they did:

11 Wells also misunderstands how the bank-fraud statute works.
12 Wells first insists that the statute requires proof that a bank "owned
13 'and' had custody and control" of the property at issue. [Dkt. #1] at
14 31-32. This is wrong; the property must be "owned by, or under
15 the custody or control of, a financial institution." 18 U.S.C.
16 §1344(2) (emphasis added). By its terms, §1344(2) is not limited to
17 bank-owned property; it includes property held as a custodian for a
18 third-party. *See also Shaw v. United States*, 137 S. Ct. 462, 466
19 (2016). Wells also seems to believe that the government was
20 required to prove that a false representation was made directly to a
21 FDIC-insured institution. [Dkt. #1] at 30. This too is wrong; it is
22 sufficient if the "false statement is the mechanism naturally
23 inducing a bank (or custodian of bank property) to part with money
24 in its control," even if that false statement is made to a third party.
25 *Loughrin v. United States*, 573 U.S. 351, 363-64 (2014). And
26 Wells is also wrong to insist that the government was required to
27 prove he "knew the banks" held the money at issue. [Dkt. #1] at
28 30. Nothing in §1344(2) "demands that a defendant have a specific
intent to deceive a bank." *Loughrin*, 573 U.S. at 357. The statute
only requires that the defendant engage in a scheme to obtain
money in a bank's custody and control by false pretenses; the
government is not required to prove the defendant knew the
identity of the bank holding the funds. *See id.* at 355-58.

Under a proper reading of the bank fraud statute, there is no
problem with the government's theory of the case. Wells insists
that the government was required to prove that fraudulent refunds
were funded directly by banks named in the indictment, and

1 reasons this requires proof that the victim-merchants who were
2 defrauded held accounts at those banks. [Dkt. #1] at 5-7, 26, 30-33.
3 Of course, since Wells was convicted of conspiracy, not
4 substantive bank fraud, the government was not required to prove
5 that anyone was actually defrauded; the agreement to engage in the
6 scheme is the crime. This point aside, and again ignoring that
7 developing proof of the crime was not the point of the evidentiary
8 hearing, Wells is just wrong on this point. If put to its proof, all the
9 government would need to show was that Wells agreed to
10 participate in a scheme involving merchants who used a payment
11 processor whose settlement account was at a named bank, e.g., that
12 Chase Paymentech processed transactions for retailers and held its
13 settlement account at JP Morgan Chase. This is because, given the
14 settlement process attendant with credit/debit/gift cards, the
15 conspirators' misrepresentations (fraudulently loading cards)
16 naturally induced named financial institutions to pay money from
17 payment-processor settlement accounts in the course of processing
18 fraudulent refunds. [Transcript of evidentiary hearing] 36-40. This
19 is what the hearing evidence showed, and agreeing to engage in
20 this scheme is conspiracy to commit bank fraud.

21 Dkt. #11 at 21–22.

22 The Court finds that the Government correctly states the elements of the crime charged
23 and how they were met in this case. A correct reading of the charges and the facts presented to
24 the Court in the evidentiary hearing makes it impossible for Mr. Wells to demonstrate actual
25 prejudice from the alleged constitutional errors in this Motion. Without actual prejudice, Mr.
26 Wells's claims are properly dismissed, as discussed individually below.

27 **1. Brady Violation re: Victim-Merchants**

28 Mr. Wells first argues that the Government failed to disclose that the victim-merchants
who suffered losses in this case did not hold accounts at any banks named in the indictment.

Dkt. #1 at 5-15.

To establish a *Brady* violation, the defendant must show that the evidence at issue is
“favorable to the accused, either because it is exculpatory, or because it is impeaching;” this
evidence “must have been suppressed by the State, either willfully or inadvertently;” and the

1 defendant must demonstrate “prejudice” from the non-disclosure. *Strickler v. Greene*, 527 U.S.
2 263, 281-82 (1999).

3 The Government argues that it did not fail to disclose anything because this information
4 was evident from what was produced in discovery. Dkt. #11 at 23. However, as discussed
5 above, the Government also argues that the location of the victim-merchants’ accounts was
6 irrelevant to establishing Mr. Wells’s guilt of the crime charged. The Court agrees. Mr. Wells
7 therefore cannot show prejudice. Mr. Wells does not demonstrate any other basis for relief
8 under this claim.
9

10 **2. Government Misconduct at the Grand Jury**

11 Mr. Wells claims that outrageous governmental misconduct occurred at the grand jury,
12 while also stating that this claim is not a freestanding claim for relief, but rather “turns on what
13 is the appropriate remedy” for his *Brady* claim. Dkt. #1 at 16, 21. Because there is no valid
14 *Brady* claim, relief will not be granted under this claim. Mr. Wells also alleges under this claim
15 that the Government committed misconduct by allowing an FBI agent to testify falsely before
16 the grand jury that three banks were defrauded. Dkt. #1 at 17–20. The Government argues that
17 the record shows these banks were “induced to turn over money in their custody by false
18 pretenses” and that it is immaterial that they themselves did not suffer losses. Dkt. #11 at 25–
19 26. Again, Mr. Wells’s claim is built on an incorrect reading of the law and is properly
20 dismissed.
21
22

23 **3. Guilty Plea not Supported by Sufficient Facts**

24 Wells contends his guilty plea is not supported by legally sufficient evidence. Dkt. #1.
25 at 22-25. This type of claim was waived by Mr. Wells’s guilty plea. *See United States v. Cruz-*
26 *Rivera*, 357 F.3d 10, 14 (1st Cir. 2004); *Nobles v. Beto*, 439 F.2d 1001, 1002 n.1 (5th Cir.
27
28

1 1971); *cf. Brady v. United States*, 397 U.S. 742, 757 (1970) (“[a] defendant is not entitled to
2 withdraw his plea merely because he discovers long after the plea has been accepted that his
3 calculus misapprehended the quality of the State’s case”).

4 **4. Ineffective Assistance of Counsel**

5 Mr. Wells argues his guilty plea was unknowing and involuntary due to ineffective
6 assistance of counsel. *See* Dkt. #1 at 22. Specifically, he claims he “was unaware of the
7 standard required to prove I committed the offense for which I was charged...” Dkt. #1 at 25.
8 He also argues that his counsel was ineffective because he failed to investigate where the
9 victim-merchants actually held their deposit accounts, demonstrating that his counsel “did not
10 understand the case.” *Id.* at 28-29. According to Mr. Wells, had his counsel conducted
11 adequate investigation and research, he would have concluded that none of the victim-
12 merchants held accounts at the banks named in the indictment, and thus that Mr. Wells was
13 innocent of the crime as charged. *See id.* at 31-37.

14 The standards to be applied to ineffective assistance claims are those defined in
15 *Strickland v. Washington*, 466 U.S. 668 (1984). Such a claim has two components: inadequate
16 performance by counsel, and prejudice resulting from that inadequate performance. To prevail,
17 a defendant first must show that “in light of all the circumstances, the identified acts or
18 omissions were outside the wide range of professionally competent assistance.” *Strickland*,
19 466 U.S. at 690. “This requires showing that counsel made errors so serious that counsel was
20 not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at
21 687. However, “[a] fair assessment of attorney performance requires that every effort be made
22 to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s
23 challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.* at
24
25
26
27
28

1 688 (citation omitted). The presumption is that counsel was competent. *Id.* Even if the first
2 part of the Strickland test is satisfied, a defendant is not entitled to relief unless he can show
3 prejudice. *Id.* at 687. Here, Wells “must show that there is a reasonable probability that, but
4 for counsel's errors, he would not have pleaded guilty and would have insisted on going to
5 trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).
6

7 For the reasons stated above, Mr. Wells’s analysis of the elements necessary to prove
8 conspiracy to commit bank fraud is incorrect. His claim that counsel allowed him to plead
9 guilty when he was actually innocent of the crime is, for the reasons above, factually and
10 legally wrong. He repeatedly argues that his counsel did not understand the case, *see, e.g.*, Dkt.
11 #13 at 2, but has failed to show that his counsel committed any error, and thus he has failed to
12 show that he would not have pleaded guilty or that his counsel otherwise “made errors so
13 serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth
14 Amendment.” *Strickland* at 687.
15

16 **5. Actual Innocence**

17 Mr. Wells claims actual innocence, but has misinterpreted the facts and law of this case
18 and thus for the reasons stated above has failed to demonstrate actual innocence.
19

20 **6. Constructive Amendment of Indictment from the Presentencing Hearing**

21 A constructive amendment occurs when the evidence presented at trial proves “a
22 complex set of facts distinctly different from those set forth in the charging instrument’ such
23 that the defendant lacked notice,” or “when the crime charged was substantially altered at trial,
24 so that it was impossible to know whether the grand jury would have indicted for the crime
25 actually proved.” *United States v. Lopez*, 4 F.4th 706, 727-28 (9th Cir. 2021) (citation
26 omitted).
27
28

1 Mr. Wells's claim again rests on the same incorrect understanding of the facts and law.
2 He has failed to demonstrate that his indictment was constructively amended.

3 **7-9. Guideline Enhancements violate Double Jeopardy, Preponderance of the**
4 **Evidence standard and Enhancements, and Relevant Conduct and**
5 **Guideline Enhancements**

6 Mr. Wells claims that the Court based Guidelines sentence enhancements on events that
7 were not part of his crime in violation of the Double Jeopardy Clause. Dkt. #1 at 39, 45-46.
8 Mr. Wells further claims the Court erred in applying the preponderance-of-the-evidence
9 standard, rather than the clear-and-convincing-evidence standard, in determining whether
10 various Guidelines enhancements applied.
11

12 The Government asserts that these claims are foreclosed by *Witte v. United States*, 515
13 U.S. 389 (1995), which held that where the defendant's Guidelines range was within the
14 statutory maximum for the crime, the Guidelines relevant conduct provision does not violate
15 the Double Jeopardy Clause, even where the relevant conduct is uncharged crimes. Dkt. #11 at
16 28 (citing 515 U.S. at 395-402). The Government points out that the Ninth Circuit rejected the
17 clear-and convincing standard claim on Wells's direct appeal. Dkt. #11 at 30 (citing *Wells*, 804
18 F. App'x at 518). The Government cites to, *inter alia*, *United States v. Treadwell*, 593 F.3d
19 990, 1001 (9th Cir. 2010) for the proposition that "the rule in the Ninth Circuit is that when a
20 defendant is charged with a fraud-based conspiracy, the preponderance-of-the-evidence
21 standard applies even where a Guidelines enhancement—namely loss amount—results in a
22 dramatic increase in the Guidelines range due to the defendant's being liable not just for the
23 losses he caused, but for all losses caused by the conspiracy." *Id.* The Court has reviewed Mr.
24
25
26
27
28

1 Wells's many arguments about losses charged versus losses presented at sentencing and finds
2 no error in the Court's prior analysis.

3 **10. Challenge to 3-year Supervision-Revocation Sentence**

4 Mr. Wells also attempts to challenge his 3-year sentence. When Mr. Wells committed
5 the offense at issue in Case No. 2:16-cr-0007-RSM, he was on supervised release following a
6 prior conviction for Access Device Fraud, in violation of 18 U.S.C. §1029(a)(1). *See* Case No.
7 12-cr-0339-RSM, Dkt. #22. The statutory maximum for this offense is 10 years' imprisonment.
8 18 U.S.C. § 1029(c)(1)(A)(i). Because Mr. Wells's access-device-fraud conviction is a Class C
9 felony, *see* 18 U.S.C. § 3559(a)(3), the statutory maximum for Wells's supervision revocation
10 was two years. *See* 18 U.S.C. §3583(e)(3). The Court, in error, imposed a three-year sentence.
11 Given that the sentencing for the two crimes occurred at one hearing, Mr. Wells understandably
12 challenges these sentences at the same time when he is in fact required to file a separate § 2255
13 Motion.
14

15
16 The Government argues that Mr. Wells has in any event procedurally defaulted on this
17 claim and that he cannot show actual prejudice because the three-year sentence was ordered to
18 run concurrently with the 134-month sentence, *i.e.* his overall term of incarceration is
19 unaffected. Dkt. #11 at 34–35. The Ninth Circuit has held that where there is error in a
20 sentence that runs concurrently with a valid sentence of equal or longer length, the defendant's
21 substantial rights are unaffected by the error. *See, e.g., United States v. Mitchell*, 502 F.3d 931,
22 996-97 (9th Cir. 2007); *United States v. Ramos-Godinez*, 273 F.3d 820, 825 (9th Cir. 2001).
23 The Court agrees on both points and finds that, because he cannot overcome his procedural
24 default, correction of this sentencing error is not available. Furthermore, Mr. Wells has not
25 demonstrated that this error has extended his release date or otherwise caused prejudice.
26
27
28

1 **D. Certificate of Appealability**

2 A petitioner seeking post-conviction relief under § 2255 may appeal this Court's
3 dismissal of his petition only after obtaining a Certificate of Appealability ("COA") from a
4 district or circuit judge. A COA may issue only where a petitioner has made "a substantial
5 showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(3). A petitioner
6 satisfies this standard "by demonstrating that jurists of reason could disagree with the district
7 court's resolution of [her] constitutional claims or that jurists could conclude the issues
8 presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*,
9 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). The Court finds that the law
10 above is clear and there is no basis to issue a COA.
11

12 **IV. CONCLUSION**

13
14 Having considered Petitioner's motion, Respondent's answer thereto, and the remainder
15 of the record, the Court hereby finds and ORDERS:

- 16 1. Petitioner's Motion under § 2255 (Dkt. #1) is DENIED. No COA shall be issued.
17
18 2. Petitioner's Motion for Reconsideration re: Order on Motion for Discovery and
19 Appointment of Counsel, Dkt. #12, is DENIED AS MOOT.
20
21 3. This matter is now CLOSED.
22
23 4. The Clerk of the Court is directed to forward a copy of this Order to Petitioner and
24 all counsel of record.

25 DATED this 4th day of November, 2021.

26 

27 RICARDO S. MARTINEZ
28 CHIEF UNITED STATES DISTRICT JUDGE