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DISTRICT COURT OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TOVES CABACCANG,

Defendant.

Criminal Case No. 97-00095
Civil Case No. 08-00015

**OPINION AND ORDER RE: MOTION UNDER
28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR
CORRECT SENTENCE AND ORDER RE:
CERTIFICATE OF APPEALABILITY**

Before the court is Petitioner Roy Toves Cabaccang’s 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence.¹ See Docket No. 512. He is proceeding *pro se* in this

¹ The Petitioner has requested an evidentiary hearing on his motion. Under 28 U.S.C. § 2255, an evidentiary hearing shall be held “[u]nless the motion and the files and record of the case conclusively show that the prisoner is entitled to no relief.” As stated in *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980):

The standard is essentially whether the movant has “stated a claim on which relief could be granted,” *Moore v. United States*, 571 F.2d 179, 184 (3rd Cir. 1978) – or, where affidavits have been submitted, whether summary judgment for the government is proper. See also Fed.R.Civ.P. 12(b), 56. . . .

The Ninth Circuit’s rule is that “merely conclusory statements in a §2255 motion are not enough to require a hearing.” *Wagner v. United States*, 418 F.2d 618, 621 (9th Cir. 1969).

Hearst, 638 F.2d at 1194. The Ninth Circuit described the standard as follows: “Where a prisoner’s motion presents no more than conclusory allegations, unsupported by facts and refuted by the record, an evidentiary hearing is not required.” *United States v. Quan*, 789 F.2d 711, 715 (9th Cir.

1 case. See Docket No. 512. After reviewing the parties' submissions, as well as relevant caselaw
2 and authority, the court **HEREBY DENIES** the motion and enters a final order adverse to the
3 Petitioner, and **DENIES** a certificate of appealability pursuant to Rule 11 of the Rules Governing
4 Section 2255 Proceedings for the United States District Courts.

5 **I. PROCEDURAL AND FACTUAL BACKGROUND**

6 The Petitioner Roy Toves Cabaccang ("the Petitioner"), with his brothers James Toves
7 Cabaccang and Richard Toves Cabaccang, were indicted on May 9, 1997 in the District Court of
8 Guam on numerous charges relating to a drug trafficking ring that involved the transport of
9 methamphetamine from California to Guam in the early and mid-1990s.² After a lengthy jury
10 trial, the three brothers were convicted of all the charges against them. The Petitioner was
11 sentenced to life imprisonment for Counts I, V, VI, IX, X and XI. The District Court vacated
12 the convictions related to Counts II and III as they were lesser included offenses of Count I,
13 pursuant to the United States Supreme Court's holding in *Rutledge v. United States*, 517 U.S.
14 292 (1996). See Docket No. 410.

15 Thereafter, the Petitioner and his brothers appealed their convictions. They raised
16 numerous grounds for reversal, including *inter alia*, the argument that the transport of drugs
17 from California to Guam did not constitute importation, insufficiency of evidence, ineffective

18
19 _____
20 1986) (citing *Farrow v. United States*, 580 F.2d 1339, 1360-61 (9th Cir. 1978) (en banc)).

21 Based on the analysis herein, the Petitioner's motion is "no more than conclusory allegations,
22 unsupported by facts and refuted by the record." *United States v. Quan*, 789 F.2d 711, 715.
23 Accordingly, his request for an evidentiary hearing is denied.

24 ² In a twelve-count Amended Indictment, Roy was charged with Continuing Criminal
25 Enterprise (Count I), Conspiracy to Distribute Methamphetamine (Count II), Conspiracy to Import
26 Methamphetamine (Count III), Conspiracy to Launder Money Instruments (Count IV), Importation
27 of Methamphetamine (Count V), Possession of Methamphetamine with Intent to Distribute (Count
28 VI), Possession and Receipt of a Firearm by a Felon (Counts VII, VIII and IX), and Attempted
Importation of Methamphetamine (Counts X, XI, and XII). Richard was charged with Conspiracy
to Distribute Methamphetamine (Count II), Conspiracy to Import Methamphetamine (Count III),
Conspiracy to Launder Money Instruments (Count IV), and Importation of Methamphetamine
(Count V). James was charged with Conspiracy to Distribute Methamphetamine (Count II),
Conspiracy to Import Methamphetamine (Count III), and Conspiracy to Launder Money Instruments
(Count IV).

1 assistance of counsel, and erroneous jury instructions. A three-judge panel affirmed the
2 convictions in an unpublished decision. *See United States v. Cabaccang*, 16 Fed. Appx. 566,
3 568, 2001 WL 760553 (9th Cir. 2001). The panel later issued a supplemental unpublished
4 opinion, addressing the Petitioner's and his brothers' challenges to their convictions based on
5 *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and again affirming the convictions. *See United*
6 *States v. Cabaccang*, 36 Fed. Appx. 234, 2002 WL1192886 (9th Cir. 2002).

7 The Petitioner and his brothers then sought a rehearing, which was granted by the Ninth
8 Circuit in *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003) (*Cabaccang I*). In
9 *Cabaccang I*, the Ninth Circuit examined the argument of whether the transport of drugs on a
10 nonstop flight from one location in the United States (California) to another (Guam) constituted
11 importation within the meaning of 21 U.S.C. § 952(a), when the drugs had traveled through
12 international airspace en route to Guam. *Id.* at 624. The Ninth Circuit agreed with the
13 Petitioner's argument, stating that its "holding addresses those cases in which the undisputed
14 evidence shows that the nonstop flight on which the defendant transported drugs departed and
15 landed in the United States." *Id.* at 635. As to the Petitioner, the Ninth Circuit reversed the
16 importation related-convictions; specifically, Conspiracy to Import Methamphetamine (Count
17 III), Importation of Methamphetamine (Count V), and Attempted Importation of
18 Methamphetamine (Counts X, XI, and XII). *See id.* at 637. In addition, the Ninth Circuit
19 remanded the issue of whether the Petitioner's conviction of continuing criminal enterprise
20 (Count I) could stand in light of the reversal of the importation counts. *Id.*

21 The Petitioner then requested clarification of the Ninth Circuit's remand as to his
22 conviction and sentence of Possession of Methamphetamine with Intent to Distribute (Count VI),
23 as well as his brothers' convictions and sentences of conspiracy to distribute methamphetamine.
24 In ruling on the request for clarification, the Ninth Circuit granted the remand as to the
25 Petitioner's possession charge (Count VI), but denied remand as to his brothers' charges. *See*
26 *United States v. Cabaccang*, 341 F.3d 905 (9th Cir. 2003) (*Cabaccang II*).

27 On remand, the Petitioner and his brothers were resentenced by the District Court of
28 Guam on May 6, 2005. *See* Docket Nos. 494 and 495. The court vacated the Petitioner's

1 conviction on Count I, and imposed a sentence of life imprisonment as to Count II, and twenty
2 years of imprisonment as to Count VI. *See* Docket No. 494, p. 51. The court on remand also
3 imposed a term of ten years supervised release, to follow the sentence in Count VI. *See* Docket
4 No. 494, p. 51. The Petitioner again appealed. The Ninth Circuit affirmed the Petitioner's
5 conviction on June 26, 2007. *See United States v. Cabaccang*, 481 F.3d 1176 (9th Cir. 2007)
6 (*Cabaccang III*). Docket No. 506. The Petitioner sought certiorari from the United States
7 Supreme Court. The Court denied his petition on October 1, 2007. *See* Docket No. 521, Exh. 6.

8 The Petitioner timely filed the instant § 2255 motion in this court on October 1, 2008.³
9 *See* Docket No. 512. The Government filed its response to the motion on January 29, 2009, and
10 a supplemental response on January 30, 2009. *See* Docket Nos. 521 and 522. Subsequently, the
11 Petitioner filed his memoranda of law and authorities in support of his motion on February 25,
12 2009. *See* Docket No. 525.

13 **II. DISCUSSION**

14 In his § 2255 motion, the Petitioner challenges the representation by his trial counsel,
15 resentencing counsel, and appellate counsel in his first and second appeal. The court addresses
16 the following claims of ineffective assistance of counsel:

- 17 1. Whether the failure of resentencing counsel to request dismissal of Count II
18 (Conspiracy), and the failure of appellate counsel to argue this error on appeal,
19 constitutes ineffective assistance of counsel

20 ³ The court notes that the Petitioner filed motions for extension of time to file his § 2255
21 motion, as the correctional facility was placed in "lockdown" from June 20, 2008 to September 7,
22 2008 due to an "institution emergency." *See* Docket Nos. 508 and 510.

23 An extension of time however, is not necessary and the court finds these motions to be moot.
24 Because the Petitioner sought certiorari review from the United States Supreme Court, the § 2255
25 petition had to be filed within one year of either "the conclusion of direct review by the highest
26 court, including the United States Supreme Court, to review the judgment" or "the expiration of the
27 time to seek such review." *Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001); *see also*
28 *United States v. Garcia*, 210 F.3d 1058 (9th Cir. 2000). The United States Supreme Court denied
the Petitioner's petition for certiorari on October 1, 2007. His § 2255 motion needed to be filed
within one year of this date. Although his motion herein was received by the court on October 1,
2008, it is clear this motion was given to prison officials for mailing, and thus, under *Houston v.*
Lack, 487 U.S. 266 (1988), his motion is presumed to be filed when given to prison officials for
mailing.

- 1 2. Whether trial counsel's failure to challenge the jury instruction relating to Count I
2 was ineffective assistance of counsel
- 3 3. Whether trial counsel's failure to request a change of venue amounts to
4 ineffective assistance of counsel
- 5 4. Whether trial counsel's failure to challenge the amount of drugs and drug
6 proceeds established ineffective assistance of counsel
- 7 5. Whether trial counsel's failure to present witnesses constituted ineffective
8 assistance of counsel
- 9 6. Whether trial counsel's failure to request dismissal of one charge was ineffective
10 assistance of counsel
- 11 7. Whether trial counsel's failure to explore the possibility of a plea agreement
12 established ineffective assistance of counsel
- 13 8. Whether trial counsel's failure to request jury sequestration amounts to ineffective
14 assistance of counsel
- 15 9. Whether trial counsel's failure to object to the prosecutor's statements to the jury
16 regarding the special allegations constitutes ineffective assistance of counsel
- 17 10. Whether trial counsel's failure to elicit certain testimony from a Government
18 witness amounts to ineffective assistance of counsel
- 19 11. Whether trial counsel's failure to request a mistrial after certain media reports
20 constitutes ineffective assistance of counsel
- 21 12. Whether trial counsel's failure to investigate and properly prepare for trial
22 amounts to ineffective assistance of counsel
- 23 13. Whether counsels' failure to argue that the original sentence was unconstitutional
24 proved to be ineffective assistance of counsel

25 *See* Docket No. 525.

26 In its response, the Government contends dismissal of grounds 1, 2, 6, 7, 9, 10, and 13
27 because they are meritless in light of the law and the record. *See* Docket No. 521. The
28 Government suggested that the Petitioner be required to state with particularity any facts that
29 support grounds 3, 4, 5, 8, 11 and 12, and if he is unable to do so, then the court should dismiss
30 these grounds as well. *See id.*

31 **A. The law on ineffective assistance of counsel**

32 The Petitioner argues that the performance of his counsel during the trial, resentencing,
33 and first and second appeal were so ineffective that, in essence, he was denied his constitutional
34 right to counsel. The law regarding ineffective assistance of counsel is well settled. A two-

1 prong test has been articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), which states
2 that to establish a claim of ineffective assistance of counsel, a petitioner must show both
3 deficient performance by counsel (the “incompetence prong”), and that such deficient
4 performance prejudiced his defense (the “prejudice prong”). *Id.* at 687.

5 To demonstrate deficient performance by his counsel, or the incompetence prong, the
6 Petitioner must show his counsel’s performance was “outside the wide range of professional
7 competent assistance.” *Id.* at 690. “A convicted defendant making a claim of ineffective
8 assistance must identify the acts or omissions of counsel that are alleged not to have been the
9 result of reasonable professional judgment.” *Id.* at 690. He must show that his counsel’s
10 performance failed to meet an objective standard of reasonableness. *Id.* at 689.

11 Under the prejudice prong, the Petitioner “must show that there is a reasonable
12 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
13 been different.” *Id.* at 694. That is, he must demonstrate “that counsel’s errors were so serious as
14 to deprive [him] of a fair trial.” *Id.* at 687. “An error by counsel, even if professionally
15 unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error
16 had no effect on the judgment.” *Id.* at 691.

17 To succeed on a claim of ineffective assistance of counsel, a petitioner must satisfy both
18 prongs of the *Strickland* test. *See id.* at 700. However, the court’s analysis of an ineffective
19 assistance of counsel claim does not require the mechanical application of the standards
20 articulated in *Strickland*. *Id.* at 696. The *Strickland* Court explained:

21 [T]here is no reason for a court deciding an ineffective assistance claim to
22 approach the inquiry in the same order or even to address both components of the
23 inquiry if the defendant makes an insufficient showing on one. In particular, a
24 court need not determine whether counsel’s performance was deficient before
25 examining the prejudice suffered by the defendant as a result of the alleged
26 deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground
27 of lack of sufficient prejudice, which we expect will often be so, that course
28 should be followed. Courts should strive to ensure that ineffectiveness claims not
become so burdensome to defense counsel that the entire criminal justice system
suffers as a result.

Id. at 697. Furthermore, in evaluating a claim of ineffective assistance of counsel, the court
“should recognize that counsel is strongly presumed to have rendered adequate assistance and

1 made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690.
2 As stated by the Ninth Circuit, “we ‘indulge a strong presumption that counsel’s conduct falls
3 within the wide range of reasonable professional assistance; that is, the defendant must overcome
4 the presumption that, under the circumstances, the challenged action might be considered sound
5 trial strategy.’” *Jones v. Ryan*, 583 F.3d 626, 636-37 (9th Cir. 2009) (quoting *Strickland*, 466
6 U.S. at 689 (citation and quotation marks omitted)). “A fair assessment of attorney performance
7 requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct
8 the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s
9 perspective at the time.” *Strickland*, 466 U.S. at 689.

10 Thus, the court must examine the merits of each of the Petitioner’s claims of ineffective
11 assistance of counsel to determine whether he has made a showing of deficient performance and
12 prejudice, and whether he has overcome the “strong presumption” that counsel has provided him
13 with “adequate assistance.”

14 **1. Whether the failure of resentencing counsel to request dismissal of Count**
15 **II (Conspiracy), and the failure of appellate counsel to argue this error on appeal,**
16 **constitutes ineffective assistance of counsel**

17 The District Court appointed counsel to represent the Petitioner during his resentencing
18 proceeding (“resentencing counsel”). *See* Docket No. 445. Subsequently, the Ninth Circuit
19 appointed another attorney to represent the Petitioner in his second appeal (“appellate counsel”).
20 *See* Docket No. 503. The Petitioner challenges the performance of both these attorneys, arguing
21 they were ineffective. First, he contends resentencing counsel should have requested dismissal
22 of Count II (Conspiracy) after the Ninth Circuit vacated Count I (Continuing Criminal
23 Enterprise), and should have objected to the court’s use of its findings of quantity arising from
24 Count I during the resentencing on Count II. Second, he argues that his appellate counsel was
25 ineffective in failing to raise these arguments. According to the Government, resentencing
26 counsel was not incompetent in not making this request, as the motion to dismiss would have
27 been denied. The Government does not address the Petitioner’s contention as to the failure of
28 appellate counsel to make this argument in the second appeal.

1 **a. Whether the performance of resentencing counsel was ineffective**

2 Contrary to the Petitioner’s contention, it is undisputed that the Ninth Circuit did not
3 vacate his conviction on Count I. Rather, the Ninth Circuit in *Cabaccang I* remanded the case to
4 the District Court for a determination of whether the conviction of Count I could stand in light of
5 the reversal of the importation counts. *See Cabaccang I*, 332 F.3d 622. On remand, it was the
6 District Court that vacated his conviction on Count I during the resentencing hearing. *See*
7 Docket No. 495, Transcript of Proceedings, May 6, 2005, p. 27. While his arguments are
8 confusing, this court must interpret the Petitioner’s *pro se* pleadings liberally. *See Boag v.*
9 *MacDougall*, 454 U.S. 364, 365 (1982) (per curiam). Therefore, this argument will be
10 construed as a claim of ineffective assistance of resentencing counsel for failing to seek
11 dismissal of Count II after the resentencing court had vacated the conviction of Count I, and for
12 failing to object to the use of drug quantity findings relating to Count I during the resentencing
13 hearing on Count II.

14 As noted above, the Petitioner must satisfy both the incompetence prong and the
15 prejudice prong to succeed on his claim of ineffective assistance of counsel. In this case, he
16 argues that resentencing counsel was ineffective in failing to seek dismissal of Count II. The
17 Petitioner does not discuss the grounds resentencing counsel failed to raise during the
18 resentencing hearing in support of dismissal of Count II. Indeed, there are no such grounds that
19 would warrant dismissal of Count II. The Petitioner was convicted of Count II, but because
20 Count II is a lesser included offense of Count I, the District Court entered final judgment only on
21 the greater offense (Count I) and vacated the lesser included offense (Count II) as instructed
22 by the United States Supreme Court in *Rutledge*, 517 U.S. 292.

23 The Ninth Circuit in *Cabaccang III* held that it was proper for the court on remand to
24 reinstate the Petitioner’s conviction as to Count II and to sentence him on that count: “[T]he
25 district court correctly reinstated Roy’s previously-vacated conspiracy conviction [on Count II]
26 after vacating his CCE conviction [on Count I] on grounds that did not affect the lesser-included
27 conspiracy conviction.” *Cabaccang III*, 481 F.3d at 1184. Because there were no grounds to
28 support an argument by Petitioner’s counsel that the jury’s conviction of Count II should be

1 dismissed, resentencing counsel’s performance was not deficient when he did not request
2 dismissal. The Petitioner has not overcome the “strong presumption that counsel’s conduct falls
3 within the wide range of reasonable professional assistance,” *Strickland*, 466 U.S. at 689, and
4 consequently, he fails to satisfy the “incompetence prong” of the *Strickland* test.

5 Furthermore, even assuming *arguendo* that counsel requested dismissal of Count II
6 during the resentencing hearing, the outcome of the resentencing hearing would not have been
7 different. The Ninth Circuit did not conclude that when a conviction on a greater offense is
8 reversed, the district court on remand is to dismiss the lesser included offense. Rather, the Ninth
9 Circuit held it was “the correct outcome” for the district court to reinstate the conviction of the
10 lesser included offense. *See Cabaccang III*, 481 F.3d at 1183. This is precisely what the
11 resentencing court did. Therefore, the Petitioner is also unable to satisfy the “prejudice prong”
12 because the outcome of the resentencing hearing would not have been different.

13 Next, the Petitioner argues that resentencing counsel’s performance was deficient
14 because he failed to object to the resentencing court’s use of its findings of drug quantity arising
15 from Count I when the court imposed his sentence in Count II. He argues that “the finding [of
16 drug quantity] on Count I is specific to that count” and that “the findings from Count I should
17 not have been allowed to form the basis for the life sentence on Counts II and VI.” *See* Docket
18 No. 525, p. 22. The Petitioner had already raised this precise argument, without success, in his
19 second appeal. The Petitioner had argued that the District Court “erroneously relied on jury
20 findings relating to Count I in imposing his Count II sentence.” *Cabaccang III*, 481 F.3d at
21 1184. The Ninth Circuit rejected his argument, stating:

22 When the jury found Roy guilty of Count I, CCE, the jury also found that “the
23 violations referred to in Count I involved at least 3,000 grams of
24 methamphetamine, or at least 30,000 grams of mixture or substance containing a
25 detectable amount of methamphetamine.” Count II was alleged in the indictment
to be one of the violations constituting the CCE [in Count I]. The jury verdict
form therefore provides on its face that the drug quantity finding in Count I
applies to each of the other counts.

26 We agree with the careful reasoning of the district court in concluding that the
27 special allegation findings were not tainted by the importation offenses. . . .

28

1 Petitioner has not demonstrated ineffective assistance of counsel.

2 **2. Whether trial counsel's failure to challenge the jury instruction relating to**
3 **Count I was ineffective assistance of counsel**

4 Petitioner next argues trial counsel was ineffective when he did not challenge the jury
5 instruction relating to Count I, specifically, the instruction that stated in order to find him guilty
6 of the offense in Count I, the jury was required to make a finding that the defendant committed
7 three other drug-related crimes. In analyzing this argument, the court "must indulge a strong
8 presumption that counsel's conduct falls within the wide range of reasonable professional
9 assistance." *Strickland*, 466 U.S. at 689. The Petitioner "bears the heavy burden of proving that
10 counsel's assistance was neither reasonable nor the result of sound trial strategy." *Matylinsky v.*
11 *Budge*, 577 F.3d 1083, 1091 (9th Cir. 2009) (quoting *Murtishaw v. Woodford*, 255 F.3d 926, 939
12 (9th Cir. 2001)). The Government asks the court to reject this claim, and points out that the
13 instruction was approved by the Ninth Circuit as Model Criminal Jury Instruction 9.26. Indeed,
14 this instruction is still in use as the Ninth Circuit's model criminal jury instruction for
15 Continuing Criminal Enterprise. *See* 9th Cir. Model Criminal Jury Instructions.

16 "An ineffective assistance of counsel claim based on counsel's failure to object to a jury
17 instruction requires a showing of prejudice." *James*, 24 F.3d at 27. On remand, the District
18 Court vacated the conviction on Count I, and the Judgment ultimately entered against the
19 Petitioner does not reflect that he was convicted or sentenced on Count I. Therefore, because the
20 Judgment makes no reference to Count I at all, the Petitioner cannot demonstrate that he was
21 prejudiced when trial counsel failed to object to the use of the jury instruction on Count I. As set
22 forth by the Ninth Circuit in *James*, because the Petitioner makes no showing of prejudice, he
23 cannot show that trial counsel was ineffective in failing to object to the jury instruction on Count I.
24 *See id.* Accordingly, the court finds there was no ineffective assistance of counsel in this regard.

25 **3. Whether trial counsel's failure to request a change of venue amounts to**
26 **ineffective assistance of counsel**

27 The Petitioner contends that it was error for trial counsel to fail to request a change of
28 venue based on the media coverage of the case, because it was impossible to seat an impartial

1 jury and the jury was biased against him. The Government argues that the Petitioner has not met
2 his burden of proving that a change of venue was justified, and requests that this ground for
3 relief be denied.

4 Due process requires a change of venue be granted when a trial court cannot seat an
5 impartial jury because of “prejudicial pretrial publicity or an inflamed community atmosphere.”
6 *Turner v. Calderon*, 281 F.3d 851, 865 (9th Cir. 2002). The Ninth Circuit “require[s] a
7 petitioner to show that prejudice should be presumed or that actual prejudice existed.” *Id.*
8 Further, the court has held that: “Prejudice is presumed only in extreme instances ‘when the
9 record demonstrates that the community where the trial was held was saturated with prejudicial
10 and inflammatory media publicity about the crime.’” *Daniels v. Woodford*, 428 F.3d 1181, 1211
11 (9th Cir. 2005) (quoting *Ainswoth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998) *as amended*
12 152 F.3d 1223). The court articulated the following test:

13 Three factors should be considered in determining presumed prejudice: (1)
14 whether there was a “barrage of inflammatory publicity immediately prior to trial,
15 amounting to a huge ... wave of public passion”; (2) whether the news accounts
16 were primarily factual because such accounts tend to be less inflammatory than
17 editorials or cartoons; and (3) whether the media accounts contained
18 inflammatory or prejudicial material not admissible at trial.

19 *Id.* The Petitioner does not show any specific facts for this court to conclude that prejudice
20 should be presumed, yet he urges this court to apply the presumption. Applying these factors
21 here reveals that the Petitioner cannot satisfy the test for presuming prejudice. First, nothing in
22 the record supports a finding that there was a “barrage of inflammatory publicity” that amounted
23 to a “huge . . . wave of public passion.” *Id.* The Petitioner includes what appears to be a partial
24 transcription of one news media report. In this transcription, the news reporter summarizes the
25 allegations of the charges that there was a “drug ring,” and discusses the trial schedule and
26 security concerns raised. Docket No. 525, p. 34. The Petitioner also refers to a statement made
27 by the presiding judge as to the “alleged drug ring” and the potential harm to witnesses. Docket
28 No. 525, p. 34-35. He offers only conclusory statements alleging a “firestorm” of media
coverage, but makes no showing of a “wave of public passion.” Second, and significantly, the
Petitioner himself concedes that “many of the articles” about the Petitioner “were factual.”

1 Docket No. 525, p. 35. Third, the Petitioner has not shown media accounts containing
2 inflammatory or prejudicial material not admissible at trial. Clearly, this is not an instance
3 where prejudice could be presumed.

4 Furthermore, the Petitioner has not shown the existence of actual prejudice that
5 influenced the jury. “To demonstrate actual prejudice, [a petitioner] must show that ‘the jurors
6 demonstrated actual partiality or hostility that could not be laid aside.’” *Daniels*, 428 F.3d at
7 1211 (quoting *Harris v. Pulley*, 885 F.2d 1354, 1363 (9th Cir. 1988)). The Petitioner seemingly
8 argues that the media coverage influenced the jurors to convict him; he offers nothing as to
9 whether the jurors showed actual partiality or hostility. Notably, the Petitioner ignores the
10 substantial evidence against him, including the testimony of 22 informants who testified to his
11 drug trafficking scheme, that led to his conviction.

12 The court is not persuaded by the Petitioner’s argument. As discussed above, the court
13 finds that the Petitioner has failed to demonstrate that prejudice should be presumed or that
14 actual prejudice existed to support a request for a change in venue. Therefore, trial counsel
15 provided adequate assistance when he did not make a motion for a change of venue, because
16 there were no grounds to support such a request. In sum, such failure to satisfy both the
17 incompetence prong and prejudice prong of *Strickland* defeats the ineffectiveness claim.

18 **4. Whether trial counsel’s failure to challenge the amount of drugs and drug**
19 **proceeds established ineffective assistance of counsel**

20 The court next examines the Petitioner’s allegations that his trial counsel failed to
21 challenge or object to the drug quantity and the amount of drug proceeds alleged by the
22 Government and the Government witnesses. The Government objects to the Petitioner’s vague
23 statements, and contends that the Petitioner should be required to make more specific arguments.

24 In evaluating a claim of ineffective assistance of counsel, the court keeps in mind that the
25 Petitioner must overcome the “strong presumption that counsel’s conduct falls within the wide
26 range of reasonable professional assistance; that is, the defendant must overcome the
27 presumption that, under the circumstances, the challenged action might be considered sound trial
28 strategy.” *Jones v. Ryan*, 583 F.3d 626, 636-37 (9th Cir. 2009) (quoting *Strickland*, 466 U.S. at

1 689 (citation and quotation marks omitted)). The court remains mindful that deference must be
2 granted to counsel's decisions. "Because advocacy is an art and not a science, and because the
3 adversary system requires deference to counsel's informed decisions, strategic choices must be
4 respected in these circumstances if they are based on professional judgment." *Strickland*, 466
5 U.S. at 681.

6 The Petitioner contends that he should not have been sentenced on the basis of all the
7 drugs involved in the conspiracy. He argues that there should have been an individual
8 determination of the specific amounts for which he was accountable. He contends that his trial
9 counsel erred in failing to object to the court holding the Petitioner accountable for all the sales
10 made a result of the conspiracy.

11 The Petitioner relies on *United States v. Petty*, 992 F.2d 887 (9th Cir. 1993), wherein the
12 Ninth Circuit addressed the issue of the quantity of drugs that is to be attributed to a conspirator
13 in a drug conspiracy. One appellant, Jordan Quintal, was involved in a single sale of three
14 kilograms of cocaine to Donald Kessack that occurred in the last three months of the five-year
15 conspiracy. *Id.* at 888. However, Quintal's sentence was based on a conspiracy involving
16 distribution of 15 to 49 kilograms of cocaine. *Id.* at 888. The other appellant Robert M. Petty
17 was a "founding member of the conspiracy," and argued that he should not have been sentenced
18 on the basis of the cocaine Kessack had obtained from another drug dealer, who was Petty's
19 direct competitor. *Id.* at 888. The Ninth Circuit vacated the conviction, stating: "Under the
20 Guidelines each conspirator, for sentencing purposes, is to be judged not on the distribution
21 made by the entire conspiracy but on the basis of the quantity of drugs which he reasonably
22 foresaw or which fell within 'the scope' of his particular agreement with the conspirators." *Id.* at
23 890. The court remanded, noting that Quintal may not have foreseen the drugs distributed before
24 he joined the conspiracy, and the scope of his agreement in the conspiracy may or may not have
25 been retrospective. *Id.* at 891. The court further noted that Petty may or may not have foreseen
26 the drug transactions between Kessack and the competing drug dealer, and these drug
27 transactions may or may not have been within the scope of his agreement. *Id.*

28 The court finds *Petty* inapposite. The allegations in the Superseding Indictment do not

1 allege that the Petitioner was involved in a single transaction (like Quintal), or that the amount of
2 drugs stem from sales involving a competing drug dealer (like Petty). Here, 24 volumes of trial
3 transcripts memorializes the testimony of the 44 Government witnesses and the hundreds of
4 exhibits that were used during the course of the eight-week trial. There was both live and
5 stipulated testimony from law enforcement officers. The testimony of 22 informant witnesses, as
6 well as the voluminous documentary evidence, revealed that the Petitioner had virtually total
7 control of the drug transactions in the conspiracy, including but not limited to the transactions
8 alleged in the Superseding Indictment. Thus, the ruling in *Petty* does not control this case, and
9 the court rejects the Petitioner's contention that there should have been an individual
10 determination of the specific amounts of drugs for which he was accountable.

11 The court therefore evaluates the Petitioner's argument in light of the strong presumption
12 that counsel was relying on sound trial strategy in making his decisions as to evidence of the
13 quantity of the drugs and drug proceeds. The court is aware that "[t]here are countless ways to
14 provide effective assistance in any given case. Even the best criminal defense attorneys would
15 not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Here, the Petitioner
16 fails to explain how counsel could have better challenged the overwhelming evidence against
17 him. The Government presented informant witnesses who testified, *inter alia*, that they had
18 body-carried methamphetamine from California for the Petitioner, had received drugs in the
19 mail, had sent Western Union transfers, and obtained cashier's checks, and had been instructed
20 by the Petitioner to say the money was related to cockfighting or other gambling. In addition,
21 the Government introduced as exhibits the 1,326 grams of methamphetamine analyzed by the
22 Drug Enforcement Agency crime lab. *See* Docket No. 521. Furthermore, the amount of money
23 alleged by the Government was based on documentary evidence, including cash, more than 300
24 Western Union money transfer receipts that totaled more than \$1 million dollars, and \$274,000
25 in cashier's checks. *See* Docket No. 412, Trial Transcript Volume XXI, p. 3753. The Petitioner
26 does not argue how his trial counsel could have better challenged the testimony of the witnesses,
27 or the amount of methamphetamine that had been seized during the course of the investigation
28 and admitted as evidence, or the documentary evidence presented by the Government during the

1 course of the lengthy trial.

2 A thorough review of the record reveals that counsel made decisions based on sound trial
3 strategy. He conducted cross-examination of nearly all the 22 informant witnesses, and where
4 relevant, he challenged their testimony regarding the drugs and the drug proceeds. The
5 Petitioner has not shown that his trial counsel's performance was "outside the wide range of
6 professional competent assistance." *Strickland*, 466 U.S. at 690. Accordingly, the court finds
7 there was not ineffective assistance of counsel when Petitioner has failed to make the required
8 showing of deficient performance.

9 **5. Whether trial counsel's failure to present witnesses constituted ineffective**
10 **assistance of counsel**

11 The Petitioner next argues that his trial counsel's performance was deficient because he
12 did not present any witnesses during the trial. The Petitioner simply asserts that there were many
13 witnesses available who should have been interviewed and who should have been called to
14 testify on his behalf. The Government contends that without any specific information about the
15 witnesses or their testimony, this ground should be denied.

16 "The United States Supreme Court has said that counsel need not undertake exhaustive
17 witness investigation. The question is not 'what is prudent or appropriate, but only what is
18 constitutionally compelled.'" *Matylinsky*, 577 F.3d at 1092 (quoting *Burger v. Kemp*, 483 U.S.
19 776, 794 (1987)). Furthermore, the Ninth Circuit has held that "counsel need not interview
20 every possible witness to have performed proficiently." *See Riley v. Payne*, 352 F.3d 1313, 1318
21 (9th Cir. 2003).

22 The Petitioner challenges his trial counsel's decision not to call witnesses, and makes
23 vague assertions about potential witnesses who should have been investigated or called in his
24 defense. He states that there were "disinterested" witnesses whose names could have been found
25 in police reports, and whose "testimony was not repetitive" or cumulative, and was "potentially
26 exculpatory." *See* Docket No. 511.

27 Under *Strickland*, "[a] convicted defendant making a claim of ineffective assistance must
28 identify the acts or omissions of counsel that are alleged not to have been the result of reasonable

1 professional judgment. The court must then determine whether, in light of all the circumstances,
2 the identified acts or omissions were outside the wide range of professionally competent
3 assistance.” 488 U.S. at 690. Here, the Petitioner does not name these witnesses that should
4 have been called and does not articulate the testimony they would have presented. His
5 arguments are “mere conclusory statements” which do not satisfy the standard under *Strickland*.
6 *See Jones v. Gomez*, 66 F.3d 199, 204-205 (9th Cir. 1995) (stating that conclusory allegations of
7 ineffective assistance of counsel are insufficient to support a valid constitutional violation).

8 Courts are to give “deference to counsel’s informed decisions.” *Strickland*, 466 U.S. at
9 681. Here, trial counsel made a strategic decision, and the Petitioner makes no showing this
10 decision was “outside the wide range of professional competent assistance.” *Id.* at 689. The
11 Petitioner has not overcome the strong presumption that counsel was relying on sound trial
12 strategy in this regard. Therefore, the court finds there was not ineffective assistance of counsel.

13 **6. Whether trial counsel’s failure to request dismissal of one charge was**
14 **ineffective assistance of counsel**

15 The Petitioner next contends that his trial counsel was incompetent in failing to request
16 dismissal of one of the charges, Possession of Methamphetamine with Intent to Distribute (Count
17 VI), which arises from the discovery of 21.19 grams of methamphetamine in the Petitioner’s
18 briefcase that was recovered from a vehicle driven by Government witness Doris Cruz (“Cruz”),
19 who was one of the Petitioner’s girlfriends. *See* Trial Transcript Volume V, pp. 1015, 1044,
20 1048-49.

21 The Petitioner argues that his trial counsel should have requested dismissal of Count VI
22 because he had only constructive possession of the drugs, and because Government witness
23 Doris Cruz had “declared” the drugs were hers for her personal use.

24 As to the first argument, the Government asserts that the Petitioner would not have
25 succeeded under the theory of constructive possession. If trial counsel had argued that the
26 Petitioner constructively possessed the drugs, such evidence would have been inculpatory. “A
27 person has constructive possession when he or she knowingly holds ownership, dominion, or
28 control over the object and the premises where it is found.” *United States v. Thongsy*, 577 F.3d

1 1036, 1041 (9th Cir. 2009) (quotation marks and citations omitted). Whether a person has actual
2 or constructive possession is irrelevant. “[C]ourts for the purposes of defining possession of
3 contraband do not distinguish between actual and constructive possession.” *United States v.*
4 *Wright*, 593 F.2d 105, 108 (9th Cir. 1979); *see also Nat’l Safe Deposit Co. v. Stead*, 232 U.S.
5 58, 67 (1914) (“[A]ctual possession and constructive possession . . . often so shade into one
6 another that it is difficult to say where one ends and the other begins.”). Had trial counsel made
7 this argument, he would have inculcated the Petitioner.

8 As to the second argument, the Petitioner contends that dismissal should have been
9 requested based on Cruz’s testimony. However, the Government correctly argues that this
10 assertion is contradicted by the record. As discussed *infra*, Cruz and other witnesses testified
11 that the briefcase belonged to the Petitioner. *See infra* at pages 22-23. Cruz specifically testified
12 that she only saw the Petitioner, never anyone else, put things inside the briefcase. *See* Docket
13 No. 413, Trial Transcript Volume XIV, p. 2539. She did not testify that the methamphetamine
14 belonged to her.

15 A review of the record reveals that trial counsel made strategic decisions not to seek
16 dismissal on the basis of constructive possession or on the basis of Cruz’s testimony, theories
17 which would have inculcated the Petitioner. “Strategic choices made after thorough
18 investigation of law and facts relevant to plausible options are virtually unchallengeable.”
19 *Strickland*, 466 U.S. at 690. Both of the Petitioner’s assertions are unsupported by the law and
20 the facts of the case. The Petitioner cannot show defective performance under *Strickland*, as he
21 has not overcome the strong presumption that trial counsel provided “reasonable professional
22 assistance.” 466 U.S. at 689. Furthermore, the Petitioner cannot show prejudice, as he has not
23 demonstrated that even if trial counsel made these arguments, “there is a reasonable probability
24 that . . . the result of the proceeding would have been different.” *Id.* at 694. Both contentions are
25 meritless, and “[t]he failure to raise a meritless legal argument does not constitute ineffective
26 assistance of counsel.” *Bauman*, 692 F.2d at 572.

27 The Petitioner has failed to demonstrate both deficient performance and prejudice.
28 Accordingly, the court finds that there was not ineffective assistance of counsel.

1 **7. Whether trial counsel’s failure to explore the possibility of a plea**
2 **agreement established ineffective assistance of counsel**

3 The Petitioner challenges his trial counsel’s failure to initiate plea negotiations with the
4 Government prosecutor. The Government contends that the Petitioner had no right to a plea
5 agreement, and thus, his trial counsel could not be ineffective in failing to obtain one.

6 The United States Supreme Court has long recognized that “there is no constitutional
7 right to plea bargain; the prosecutor need not do so if he prefers to go to trial.” *Weatherford v.*
8 *Bursey*, 429 U.S. 545, 561 (1977). Accordingly, the Ninth Circuit has held that “a defendant
9 does not have a constitutional right to a plea bargain.” *United States v. Osif*, 789 F.2d 1404, 1405
10 (9th Cir. 1986) (citing *Weatherford*, 429 U.S. at 561). The Petitioner cites no authority that a
11 defense attorney has a duty to initiate plea negotiations. Federal circuits have not found that
12 such duty exists. *See e.g., Welch v. United States*, Docket No. 09-2873, 2010 WL 1538866, at
13 *3 (3rd Cir. April 19, 2010) (unpublished) (“It is well-established . . . that counsel does not have
14 an absolute obligation to pursue plea negotiations in every case.”); *United States v. Huddy*, 184
15 Fed. Appx. 765, *767 (10th Cir. June 19, 2006) (unpublished) (rejecting the defendant’s
16 argument that her counsel was ineffective for failing to initiate plea negotiations).

17 Because trial counsel was under no duty to initiate plea negotiations, he was not required
18 to request a plea agreement from the Government prosecutor. Moreover, even if trial counsel
19 had made this request, the prosecutor is not obligated to offer a plea bargain if he prefers to go to
20 trial. *See Weatherford*, 429 U.S. at 561. Such was the case here. The prosecutor did not make a
21 plea offer to the Petitioner and apparently preferred to go to trial. Thus, trial counsel’s failure to
22 initiate or explore the possibility of a plea agreement from the Government does not constitute
23 deficient performance. The court finds that the Petitioner has not met the prong of deficient
24 performance under *Strickland*, and accordingly, concludes that there was not ineffective
25 assistance of counsel.

26 **8. Whether trial counsel’s failure to request jury sequestration amounts to**
27 **ineffective assistance of counsel**

28 The Petitioner next asserts that trial counsel was ineffective because counsel should have

1 filed a motion to sequester the jury, arguing that there was a “massive amount of pretrial
2 publicity.” He contends that his attorney should have anticipated that in Guam’s small
3 community, there would have been considerable negative publicity. Although not articulated by
4 the Petitioner, he appears to argue that the news media reports give rise to a presumption of
5 prejudice or demonstrate actual prejudice. He suggests that if the jury had been sequestered,
6 then he would not have been convicted.

7 The Government argues that the record reveals that the jury had been instructed each day
8 not to read or watch news stories concerning the trial, and it is presumed that the jury obeyed the
9 court’s instruction. *See* Docket No. 521. The Government also asserts that the Petitioner has
10 failed to allege any facts to support this argument that there was prejudice, and contends that the
11 Petitioner has not established fundamental unfairness in the decision not to sequester, which is
12 the standard for jury sequestration adopted by the Ninth Circuit in *Powell v. Spalding*, 679 F.2d
13 163, 166 (9th Cir. 1982).

14 To evaluate the Petitioner’s argument for sequestration, the court first addresses the
15 Petitioner’s contention that he had been prejudiced by the news reports. As discussed *supra*, at
16 pages 12-13, the Petitioner must “show that prejudice should be presumed or that actual
17 prejudice existed.” *Turner*, 281 F.3d at 865. This court previously concluded that the Petitioner
18 not only failed to satisfy the three-factor test in *Daniels v. Woodford*, 428 F.3d 1181, for
19 application of the presumption of prejudice, but he also failed to demonstrate actual prejudice as
20 a result of the news coverage.

21 The court next recognizes that, first and foremost, a criminal defendant does not have the
22 right to a sequestered jury. *See id.* at 166 n.3. The decision to sequester a jury is within the trial
23 court’s discretion. *See United States v. Dufur*, 648 F.2d 512, 513 (9th Cir. 1980) (citing *Frame*
24 *v. United States*, 444 F.2d 71, 72 (9th Cir.), cert. denied, 404 U.S. 942 (1971)). Even assuming
25 *arguendo* that counsel had in fact sought, but was denied sequestration, the Petitioner has not
26 demonstrated that the decision not to sequester the jury resulted in fundamental unfairness, in
27 accordance with *Powell*, 679 F.2d 163, or in actual prejudice to his right to a fair trial. *See*
28 *United States v. Floyd*, 81 F.3d 1517, 1528 (10th Cir.1996). His arguments seems to be that if

1 the jurors had been sequestered, they would not have been prejudiced against him and would not
2 have convicted him. The Petitioner does not acknowledge the mountain of evidence presented
3 during the trial that resulted in his conviction. In addition, he does not discuss the court's
4 frequent admonitions to the jury not to read or watch news reports about the trial. He cannot
5 overcome the strong presumption that he received effective assistance from trial counsel, and he
6 does not demonstrate that the outcome would have been different. The Petitioner fails to prove
7 both deficient performance and prejudice required under the two-prong test set forth in
8 *Strickland*. Accordingly, the court finds there was not ineffective assistance of counsel.

9 **9. Whether trial counsel's failure to object to the prosecutor's statements to**
10 **the jury regarding the special allegations constitutes ineffective assistance of counsel**

11 The Petitioner next argues that his trial counsel was ineffective when he failed to object
12 or move for a mistrial because of statements made by the Government prosecutor regarding the
13 special allegations. He contends it was unfair for the prosecutor to present argument as to the
14 special allegations. The Government counters that it was proper for the prosecutor to argue an
15 issue which had been charged in the indictment.

16 To succeed on this claim, the Petitioner must show both deficient performance by his trial
17 counsel and that such deficient performance prejudiced his defense. *See Strickland*, 466 U.S.
18 668. Furthermore, the Petitioner must overcome the strong "presumption that, under the
19 circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689
20 (citation and quotation marks omitted).

21 The Petitioner seemingly contends that in making these statements, the prosecutor
22 attempted to influence the jurors' mind set, and therefore, the jury *may* have been influenced by
23 these statements to convict him. "Such speculation is plainly insufficient to establish prejudice."
24 *Gonzalez v. Knowles*, 515 F.3d 1006, 1016 (9th Cir. 2008). In arguing that his trial counsel erred
25 in failing to challenge the facts of the case as argued by the prosecutor, the Petitioner does not
26 make any reference to the overwhelming evidence presented against him that was considered by
27 the jury. Again, he offers mere speculation. The court finds such speculation does not overcome
28 the strong presumption that Petitioner's trial counsel "rendered adequate assistance," *Strickland*,

1 466 U.S. at 690, and thus, the court finds the Petitioner has not demonstrated deficient
2 performance. Accordingly, the court finds that the Petitioner has not shown he received
3 ineffective assistance of counsel in this regard.

4 **10. Whether trial counsel’s failure to elicit certain testimony from a**
5 **Government witness amounts to ineffective assistance of counsel**

6 The Petitioner next asserts that trial counsel failed to “bring” testimony from Government
7 witness Doris Cruz (“Cruz”) that 21 grams of methamphetamine seized from her was for her
8 personal consumption. Specifically, he argues that evidence from the trial showed that Cruz’s
9 testimony reveals that she “took responsibility” for the 21 grams of methamphetamine, and that
10 she “declared the drug belong[ed] to her and that was for her personal consumption.” Docket
11 No. 510. The Government points out that Cruz never testified the methamphetamine was hers
12 for her personal use.

13 Trial counsel is “strongly presumed to have rendered adequate assistance and made all
14 significant decisions in the exercise of reasonable professional judgment.” *Strickland*, 466 U.S.
15 at 690. Thus, the Petitioner must overcome the “heavy burden of proving that counsel’s
16 assistance was neither reasonable nor the result of sound trial strategy.” *Matylinsky*, 577 F.3d at
17 1091 (quoting *Murtishaw*, 255 F.3d at 939).

18 The trial record does not support the Petitioner’s contention. Cruz testified that the
19 Petitioner was at a church for his cousin’s wedding, and “[the Petitioner] had those guys tell me
20 to get his briefcase, his cell phones, and his clothes” from his home in Yona. Docket No. 413,
21 Trial Transcript Volume XIV, p. 2538. The police were conducting a raid on the Petitioner’s
22 home and had conducted a roadblock of the street to prevent vehicles from entering or leaving
23 the area during the execution of the raid. *See* Trial Transcript Volume V, pp. 1003-06; Docket
24 No. 413, Trial Transcript Volume XIV, p. 2541. Cruz testified that she allowed the police to
25 search the car, and they found drugs and drug paraphernalia in the briefcase and on her person.⁴

26 _____
27 ⁴ Although Cruz stated that the drugs were “[i]n my briefcase” and “on myself,” Docket No.
28 413, Trial Transcript Volume XIV, p. 2542, a closer look at Cruz’s testimony reveals that she is
referring to the briefcase that belonged to the Petitioner, which was Government Exhibit 38 during

1 See Docket No. 413, Trial Transcript Volume XIV, p. 2542. Guam Police Department Officer
2 Raymond Terlaje testified that he retrieved a purse, toiletry bag and briefcase from inside the car
3 Cruz was driving. See Trial Transcript Volume V, pp.1011-12, 1015. Contained inside the
4 purse and the toiletry bag were drugs (cocaine and methamphetamine), drug paraphernalia and a
5 firearm and ammunition. See Transcript Volume V, pp. 1013-23; Transcript Volume XII, pp.
6 2277-2278. Officer Barbara Benavente testified that upon conducting a patdown of Cruz, she
7 recovered drug paraphernalia. Trial Transcript Volume V, pp. 1031-34. Cruz admitted to
8 owning the drug paraphernalia, as well as the purse and toiletry bag. See Docket No. 413, Trial
9 Transcript Volume XIV, p. 2544-47; Docket No. 411, Trial Transcript Volume XII, p. 2277

10 The Petitioner's specific claim, however, relates to the briefcase, which contained, *inter*
11 *alia*, \$9,100 cash, two .22 caliber handguns and a ziplock bag of 21.19 grams of
12 methamphetamine that was 96 percent pure. Trial Transcript Volume V, pp. 1015, 1044, 1048-
13 49. Contrary to the Petitioner's argument, Cruz did not testify that she owned the drugs in the
14 briefcase. Rather, Cruz testified it belonged to the Petitioner and that she never saw anyone
15 other than the Petitioner put anything inside the briefcase. See Docket No. 413, Trial Transcript
16 Volume XIV, p. 2539. She also testified that she did not have the combination to the briefcase
17 and never put anything inside the briefcase. See Docket No. 413, Trial Transcript Volume XIV,
18 p. 2539. Nothing in Cruz's testimony supports the Petitioner's argument that Cruz "declared"
19 the drugs in the Petitioner's briefcase were hers and for her personal use.

20 It is not ineffective assistance of counsel if an attorney fails to raise a meritless argument.
21 See *Bauman*, 692 F.2d at 572. Cruz's testimony directly contradicts the Petitioner's argument.
22 The Petitioner fails to overcome the strong presumption that he received adequate assistance
23 from trial counsel. See *Strickland*, 466 U.S. at 689. The court finds that trial counsel's
24 performance was not deficient, and accordingly, concludes there was not ineffective assistance of

25 _____
26 the trial. Other witnesses testified that the briefcase belonged to the Petitioner, including his wife
27 Katrina Cabaccang. See Trial Transcript Volume II, pp. 334-35. Witness Franklin Alcantara
28 testified that the briefcase (Government Exhibit 38) was the kind of briefcase he had seen in the
Petitioner's residence, and that he saw the Petitioner remove money from it. See Docket No. 411,
Trial Transcript Volume XII, p. 2160.

1 counsel.

2 **11. Whether trial counsel’s failure to request a mistrial after certain media**
3 **reports constitutes ineffective assistance of counsel**

4 The Petitioner next argues that trial counsel was ineffective when he did not request a
5 mistrial after a television station reported that the drugs and drug proceeds stemming from the
6 case were the Petitioner’s property, and that the Petitioner was involved in two unsolved
7 murders. He also refers to a newspaper article on drug distribution activity on island that
8 mentioned the Petitioner as being responsible for murders and identified him as being an alleged
9 leader and organizer of the drug conspiracy. *See* Docket No. 525. The Petitioner contends these
10 news reports, published before the start of the trial, may have influenced the jury. Although not
11 precisely articulated, the Petitioner argues that the news reports prejudiced his case. The
12 Government concedes that one news report covering the trial was discussed by the court and
13 counsel outside of the jury, but that the trial judge determined that the news coverage had no
14 direct correlation to the trial. *See* Docket No. 522; Trial Transcript XVI, pp. 2844-2852.

15 The court recognizes the strong presumption that must be afforded to trial counsel’s
16 conduct, and that “[j]udicial scrutiny of counsel’s performance must be highly deferential.”
17 *Strickland*, 466 U.S. 689. Here, the Petitioner contends that his trial counsel’s performance was
18 deficient because he did not request that the court inquire into whether the jurors were aware of
19 these news stories, and thus whether the publicity had prejudiced the case. “The prejudicial
20 effect of pervasive publicity is tested under the presumed prejudice or the actual prejudice
21 standards.” *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988).

22 The court finds no grounds to warrant a presumption of prejudice. As discussed above,
23 the Ninth Circuit has stated that: “[t]hree factors should be considered in determining presumed
24 prejudice: (1) whether there was a ‘barrage of inflammatory publicity immediately prior to trial,
25 amounting to a huge ... wave of public passion’; (2) whether the news accounts were primarily
26 factual because such accounts tend to be less inflammatory than editorials or cartoons; and (3)
27 whether the media accounts contained inflammatory or prejudicial material not admissible at
28 trial.” *Daniels*, 428 F.3d at 1211 (quoting *Ainswoth*, 138 F.3d at 795). Applying these factors

1 to the news accounts relied upon by the Petitioner reveal that the accounts do not appear to be
2 such “inflammatory” publicity amounting to a “wave of public passion.” Further, the Petitioner
3 himself conceded they were primarily factual news reports. Lastly, nothing in the record
4 indicates that the accounts contained inflammatory material that was inadmissible. The Ninth
5 Circuit has held that: “Prejudice is presumed when the record demonstrates that the community
6 where the trial was held was saturated with prejudicial and inflammatory media publicity about
7 the crime.” *Harris*, 885 F.2d at 1361. On the basis of the news reports cited by the Petitioner,
8 the record in this case does not reveal a community that was “saturated” with prejudicial and
9 inflammatory publicity. *Id.* Therefore, this case is not that “extreme instance” where prejudice
10 should be presumed. *Daniels*, 428 F.3d at 1211.

11 Further, the court finds that the Petitioner has not shown actual prejudice. The Petitioner
12 contends that his trial counsel should have made a motion for mistrial to determine whether the
13 publicity affected the jurors. This is not the standard to be applied here. “To determine whether
14 actual prejudice existed to deny defendant his right to a panel of impartial, indifferent jurors, a
15 court must determine if the jurors demonstrated actual partiality or hostility that could not be laid
16 aside.” *Harris*, 885 F.2d at 1363 (citation and quotation marks omitted). Here, the Petitioner
17 does not present any evidence of actual partiality or hostility. In fact, he concedes that “it was
18 never established” that there was actual prejudice. Docket No. 525, p. 84.

19 The Petitioner has not overcome the “strong presumption that counsel’s conduct falls
20 within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689.
21 Furthermore, he does not show that the outcome of his trial would have been different, and thus
22 he cannot satisfy the “prejudice prong” under *Strickland*. *See id.* at 697. The court finds that the
23 Petitioner has not demonstrated deficient performance and prejudice and thus has not proved that
24 he received ineffective assistance of counsel.

25 **12. Whether trial counsel’s failure to investigate and properly prepare for**
26 **trial amounts to ineffective assistance of counsel**

27 The Petitioner argues that in general, his trial counsel failed to investigate the case and
28 prepare for the trial. More specifically, he asserts that trial counsel did not present a credible

1 defense, such as evidence of the Petitioner’s substance abuse problem; did not hire an investigator;
2 and did not personally review all the evidence the Government was going to present.

3 The Government requests the court reject this argument, because, *inter alia*, the
4 Petitioner has not stated with particularity the further investigation that should have been
5 conducted, the evidence his trial counsel failed to discover, and the effect of such evidence on
6 the outcome of the trial.

7 In analyzing trial counsel’s performance, this court recognizes that “[t]here are countless
8 ways to provide effective assistance in any given case. Even the best criminal defense attorneys
9 would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. A close look
10 at the record reveals that trial counsel had prepared for the trial, and reviewed the evidence the
11 Government was going to present. He conducted cross-examination of witnesses, including the
12 Government informants, and challenged their testimony and evidence. Trial counsel made a
13 two-and-a-half hour long closing argument that demonstrated his knowledge of the case, his
14 familiarity with the witnesses’ testimony, the evidence, and the theory advanced by the
15 Government. Contrary to the Petitioner’s assertion, the record reveals that trial counsel had
16 prepared for the trial and provided the Petitioner with adequate representation. *See Matylinsky*,
17 577 F.3d at 1092 (stating that conduct expected of counsel is “only what is constitutionally
18 compelled.”) (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)). The Petitioner also
19 disagreed with the theory advanced by trial counsel, and believes it would have been a better
20 defense to present mitigating evidence of a drug abuse problem. This is clearly a strategic
21 decision made by trial counsel, and the court acknowledges the “strong presumption that
22 counsel’s conduct . . . might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689. As
23 guided by *Strickland*, the court defers to trial counsel’s strategic decisions.

24 Upon review of the record, the court finds that the Petitioner has not shown that his trial
25 counsel’s actions “fell below the wide range of professional competent assistance.” *Id.* The
26 Petitioner has not overcome the presumption that his counsel provided adequate representation.
27 Accordingly, the court finds there was not ineffective assistance of counsel.

28 ///

1 **13. Whether counsels’ failure to argue that the original sentence was**
2 **unconstitutional proved to be ineffective assistance of counsel**

3 The Petitioner contends that his counsel in his trial and later, his counsel in his first
4 appeal, were ineffective because they did not argue that his original sentence was
5 unconstitutional as a result of the trial judge’s failure to impose the mandatory term of
6 supervised release. The Government points out that the Judgment entered after the resentencing
7 reflects the ten-year term of supervised release. A review of the sentencing hearing by the trial
8 judge reveals that after sentencing the Petitioner to a term of life imprisonment, the judge did not
9 impose a term supervised release.⁵

10 Because he raises this issue in an ineffective assistance of counsel claim, the Petitioner
11 must demonstrate that his counsels’ performance was deficient and, and that such performance
12 resulted in prejudice to his defense. *See id.* at 687. With regard to this specific argument,
13 however, the court examines only whether there was prejudice caused by the alleged error by
14 counsel. The court in *Strickland* recognized: “If it is easier to dispose of an ineffectiveness
15 claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course
16 should be followed.” *Id.* at 697.

17 A review of the facts of the case reveals that even if these issues had been raised, the
18 outcome would not have been different. The Petitioner appealed his conviction, and his case
19 was remanded for resentencing. At the resentencing, the court imposed a ten-year term of
20 supervised release: “A ten-year term of supervised release shall follow the sentence on Count
21 Six.” *See* Transcript of May 6, 2005, p. 51. After the first appeal and upon resentencing, the
22 Judgment entered reflected the imposition of supervised release. Thus, because the Judgment
23 entered reflected the ten-year term of supervised release, the Petitioner cannot demonstrate
24 prejudice. “An error by counsel, even if professionally unreasonable, does not warrant setting

25
26 ⁵ As a practical matter, it may appear unnecessary to sentence a defendant to a term of
27 supervised release following the imposition of a life sentence, but such has been done in other cases.
28 *See e.g., United States v. Ennis*, No. 92-30218, 1993 WL 272472, 1 (9th Cir. 1993) (unpublished)
(district court sentenced defendant to life imprisonment, followed by a consecutive term of five
years imprisonment and five years supervised release).

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

2 *Strickland*, 466 U.S. at 691.

3 Therefore, not only has the Petitioner failed to demonstrate prejudice, but this argument
4 is without merit. “The failure to raise a meritless legal argument does not constitute ineffective
5 assistance of counsel.” *Bauman*, 692 F.2d at 572. Accordingly, the court finds there was not
6 ineffective assistance of counsel in this regard.

7 **B. The law regarding procedural default**

8 In addition to challenging the claims of ineffective assistance of counsel made by the
9 Petitioner, the Government also contends that the Petitioner procedurally defaulted the following
10 two claims by failing to raise them on direct appeal: 1) trial counsel’s failure to challenge or
11 object to the prosecutor’s statements regarding the special allegations; and 2) trial counsel’s
12 failure to make a motion for mistrial on the basis of certain news media reports.

13 “Where a defendant has procedurally defaulted a claim by failing to raise it on direct
14 review, the claim may be raised in habeas only if the defendant can first demonstrate ‘cause’ and
15 ‘actual prejudice,’ or that he is ‘actually innocent.’” *Bousley v. United States*, 523 U.S.614, 622
16 (1998) (citations omitted). *See also United States v. Skurdal*, 341 F.3d 921, 925 (9th Cir. 2003)
17 (“If a criminal defendant could have raised a claim of error on direct appeal but nonetheless
18 failed to do so, he must demonstrate both cause excusing his procedural default, and actual
19 prejudice resulting from the claim of error.”) (quoting *United States v. Johnson*, 988 F.2d 941,
20 945 (9th Cir. 1993)). Therefore, the court examines whether the Petitioner has demonstrated
21 cause and actual prejudice, or whether he is actually innocent.

22 **1. Failure to object to statements made by the prosecutor regarding the**
23 **special allegations**

24 The Petitioner first argues that the Government prosecutor erred when he made
25 statements regarding the special allegations. Because he failed to raise this issue in his direct
26 appeal, the Petitioner procedurally defaulted this claim.

27 Upon examination of the case, the Petitioner has not demonstrated cause excusing the
28 default or actual prejudice. “Generally, to demonstrate ‘cause’ for procedural default, an

1 appellant must show that ‘some objective factor external to the defense’ impeded his adherence
2 to the procedural rule.” *Skurdal*, 341 F.2d at 925. The Petitioner does not explain the cause, that
3 is, the “objective factor,” that prevented him from raising this argument on direct appeal. The
4 argument was not raised in his direct appeal. The court is cognizant that “the mere fact that
5 counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim
6 despite recognizing it, does not constitute cause for a procedural default.” *Murray v. Carrier*,
7 477 U.S. 478, 486 (1986). Furthermore, Petitioner’s argument regarding “actual prejudice” is
8 based solely on his speculation that the jury “may have been influenced by the prosecutor’s
9 statements.” Docket No. 525, p. 69. However, the possibility of influence on the jury does not
10 amount to “actual prejudice.” In sum, the Petitioner has not demonstrated cause or actual
11 prejudice.

12 In addition, the Petitioner fails to discuss the alternative method of excusing procedural
13 default, which is demonstrating that he is “actually innocent” of the offense. *See Bousley*, 523
14 U.S. at 622. The Petitioner bears the burden of showing that “in light of all the evidence, . . . the
15 trier of the facts would have entertained a reasonable doubt of his guilt.” *Id.* at 624. The
16 Petitioner has not shown that the trier of fact would have entertained reasonable doubt. Here, the
17 jury heard from 44 Government witnesses, saw exhibits and written stipulations as well as other
18 documentary evidence, and ultimately returned a unanimous verdict finding the Petitioner guilty
19 on all counts. The Petitioner does not argue, and the court does not find, that he is “actually
20 innocent.” *See Bousley*, 523 U.S. at 622. Accordingly, the court finds that the Petitioner has
21 procedurally defaulted this claim.

22 **2. Motion for mistrial**

23 Next, the Government asserts that the Petitioner procedurally defaulted his argument as
24 to the motion for mistrial by failing to raise it in his direct appeal. As discussed above, a
25 defendant procedurally defaults a claim by failing to raise it on direct review, and such claim
26 may be raised in habeas only if the defendant can first demonstrate cause and actual prejudice, or
27 that he is actually innocent.” *Bousley*, 523 U.S. at 622. Therefore, the court examines whether
28 the Petitioner has demonstrated cause and actual prejudice, or whether he is actually innocent.

1 The Petitioner has not shown cause to excuse his default; he offers no “objective factor”
2 that “impeded his adherence to the procedural rule.” *Skurdal*, 341 F.2d at 925. This argument
3 was simply not raised in the appeal. Again, the fact that counsel did not “recognize the factual or
4 legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute
5 cause for a procedural default.” *Murray*, 477 U.S. at 486. Further, there is no evidence of
6 “actual prejudice.” The Petitioner speculates that the jury may have heard or been exposed to
7 the media coverage. Speculation, however, is insufficient to overcome the presumption that the
8 jury complied with the court’s daily admonitions not to listen or read or view any media
9 coverage of the trial. *See Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963).

10 The Petitioner does not discuss the alternative method of excusing procedural default;
11 that is, he does not argue he is “actually innocent” of the offense. *See Bousley*, 523 U.S. at 622.
12 He has not shown that the trier of fact would have entertained reasonable doubt. Again, the
13 Government’s case against the Petitioner consisted of days of trial testimony by witnesses, and
14 documentary evidence including, *inter alia*, laboratory reports, stipulations, receipts, cash and
15 cashier’s checks. At the conclusion of the trial, the jury returned a unanimous verdict finding the
16 Petitioner guilty of all counts. The Petitioner has not argued, and the court does not find, that he
17 is “actually innocent.” *See id.* The court finds that the Petitioner has procedurally defaulted on
18 this claim as well.

19 **III. CONCLUSION**

20 For the foregoing reasons, the court finds that the Petitioner has failed to overcome the
21 “strong presumption” that the conduct of his trial, resentencing and appellate counsel “falls
22 within the wide range of reasonable professional assistance,” *Strickland*, 466 U.S. at 689, and
23 has failed to demonstrate that the outcome of his trial would have been different. *See id.* at 697.
24 Consequently, as to each of the grounds argued by the Petitioner, the court concludes that he has
25 not demonstrated deficient performance and prejudice and thus has not proved that he received
26 ineffective assistance of counsel. The court further finds that the Petitioner procedurally
27 defaulted two of these claims.

28 ///

1 Accordingly, the Petitioner’s Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or
2 Correct Sentence is **HEREBY DENIED**. Furthermore, the court does not find that the Petitioner
3 “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).
4 Therefore, the court will **NOT** issue a certificate of appealability. *See* Rule 11 of the Rules
5 Governing Section 2255 Proceedings for the United States District Courts.

6 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Jul 28, 2010