IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

GARY LYNN MCDUFF	§	
	§	
v.	§	Civil No. 4:17cv391
	§	Criminal No. 4:09cr90
UNITED STATES OF AMERICA	§	

GOVERNMENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

In accordance with the Court's order, the government responds to the motion under 28 U.S.C. § 2255 filed by Gary Lynn McDuff. McDuff raises several grounds for relief, each of which are either procedurally defaulted, meritless, or unsupported. Therefore, the government respectfully urges the Court to deny the motion.

I. Facts and Procedural History

A. Facts

McDuff was allegedly working for a banking group in the United Kingdom when he met Gary Lancaster and pitched an idea for the two to create the Lancorp Financial Fund. Attachment A, Lancaster Tr. Trans., pg. 197.[1] McDuff hired a securities attorney to draft the offering documents and provided all necessary information for the investment opportunity, however McDuff was not disclosed as an official with Lancorp because he

[1] References to McDuff's §2255 motion will begin with "Motion," references to the trial transcript will be noted by the witness's name and page number of the attached trial transcript. Reference to the Presentence Report are cited as "PSR."

had a prior felony conviction for money laundering. Attachment A, Lancaster Tr. Trans., pgs. 198-99. The offering materials included statements that the investment would be protected by an insurance policy that the investment would carry a rating of A+ or A-1 by credible rating agencies, that the offering was registered, and that Lancaster had experience with this kind of investment. Attachment B, Reynolds Tr. Trans., pg. 90-92.

Although McDuff was not listed as part of Lancorp he solicited investors for it, speaking at length with several investors and providing details and assurances as to the safety and viability of the investment. Lancaster was listed as principal of the fund but he did not conduct any independent due diligence and went along with McDuff's plan to transfer the funds invested in Lancorp to other businesses, including entities called Megafund and MexBank. These businesses had accounts that were under McDuff's control. Attachment A, Lancaster Tr. Trans. pgs. 209-10.

At trial, the government presented evidence that statements in the offering documents for Lancorp were untrue and, as important, were relied upon by investors. *See*, *e.g.,* Attachment A, Lancaster Tr. Trans. 200-01, Attachment C, Benyo Tr. Trans., pgs. 101, 103-06. The evidence showed that money invested in Lancorp was diverted into account not disclosed in the offering documents and eventually made its way into the hands of McDuff and his co-conspirators. PSR ¶29. Over the course of approximately two years, McDuff and his co-conspirators solicited nearly $11 million from more than 95 investors. PSR ¶30. The resulting loss to investors was more the $6 million. *Id.*

B. Procedural History

1. The Criminal Proceedings

On June 11, 2009, a federal grand jury indicted Gary McDuff and co-defendant Robert Reese (now deceased) for conspiracy to commit wire fraud, violating 18 U.S.C. § 1349. Dkt,. 1. Reese was additionally charged with money laundering in violation of 18 U.S.C. §1956(a)(1)(B)(i). On August 13, 2009, a superseding indictment was returned against the same defendants for the same charges, but additionally charging McDuff in count two for money laundering along with Reese.[2] Dkt. 16. Each charge carried maximum sentences of twenty years imprisonment. 18 U.S.C. §§ 1343, 1349, 1956. With each filing, McDuff responded with a refusal to accept the indictment, which he referred to as an "offer" to discuss the case, but instead presented a "Firm Offer to Settle" upon receipt of an invoice from the government. Dkt. 8. Despite his demonstrated awareness of the indictment and attempts to "settle," McDuff remained at large until May 2012 when he was arrested and brought before the United States Magistrate Judge for the Eastern District of Texas on June 15, 2012. Dkt. 61. At his arraignment, McDuff refused to comply with the court's directive to answer properly and had to be gagged. Dkt. 61. The court entered a not guilty plea on McDuff's behalf and, after a detention hearing, ordered McDuff detained based on risk of flight. Dkt. 63.

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[2] Gary Lancaster, another co-defendant, was charged separately.

McDuff declined appointed counsel, instead opting to represent himself. He filed several motions prior to trial, among them motions to dismiss the indictment based on the McDuff's own claim that the case had already been settled by "private administrative judgment," and for no other reason. The tenor of the motions prompted the district court to order a mental competency evaluation on its own motion. Dkt. 73. McDuff was found to be competent and persisted in his desire to proceed *pro se*. On several occasions, the Court held hearings to address discovery issues because McDuff, in custody, refused to take delivery of discovery and refused to discuss his case with his appointed standby counsel. *See*, *e.g*., dkts. 68, 80; Attachment D, Affidavit of Christopher Smith; Attachment F, Affidavit of D. Kyle Kemp. On March 26, 2013, jury selection commenced. McDuff declined to participate in his trial in any meaningful way. Dkt. 106. On March 27, 2013, the jury found McDuff guilty on counts one and two of the superseding indictment. Dkt. 107.

The presentence report determined McDuff's total offense level to be thirty-eight with a criminal history category II, resulting in a guideline punishment range of 262-327 months. PSR ¶52. McDuff did not file objections to the report but instead filed a 202-page "PSI Report," which purportedly described the facts of his life and circumstances around the offense for which he was convicted, for which McDuff claimed actual innocence. Dkt. 114. The government responded to McDuff's claims in his PSI Report and also objected to the base offense level and the report's failure to include an adjustment for abuse of position of trust. Dkt. 120.

On April 16, 2014, the Court sustained the government's objections and after the Court made other revisions to the report, the resulting total offense level remained at 38. Dkt. 153. The Court overruled McDuff's objections and sentenced McDuff to 240 months imprisonment for counts one and two, but ordered that 60 months of count two run consecutive to the punishment for count one, resulting in a total sentence of imprisonment of 300 months. Dkt. 158. The Court further ordered that McDuff was not allowed to file anything further without first obtaining leave from the court. Dkt. 156. McDuff filed his notice of appeal on July 21, 2014. Dkt. 173. On August 14, 2014, McDuff filed his motion for interlocutory appeal with respect to the district court's denial of McDuff's "Motion to Reserve Right of Colorable Showing of Factual Innocence." Dkt. 177. The Fifth Circuit Court of Appeals consolidated his two appeals. McDuff had appointed appellate counsel who filed his brief on June 3, 2015. On July 29, 2015, McDuff filed a Motion to Proceed Pro Se (granted) and Withdraw Appellant's Brief (denied). On February 3, 2016, the Fifth Circuit Court of Appeals entered its judgment affirming McDuff's conviction and sentence. The Court of Appeals further denied McDuff's repeated motions to stay and/or recall the Court's mandate. McDuff's deadline to file a petition for writ of certiorari with the United States Supreme Court expired on May 4, 2016. Sup. Ct. R. 13.

2. The Securities & Exchange Commission's Proceedings

After McDuff's criminal trial, on February 21, 2014, the U.S. Securities and Exchange Commission (SEC or Commission) issued an order instituting proceedings

against McDuff seeking his permanent disbarment from the securities industry. To sustain its burden the Commission had to prove by a preponderance of the evidence that McDuff acted as a broker during his misconduct. The facts supporting the Commission's case substantially overlapped with the criminal case. Summary judgment was initially granted to the SEC's Enforcement Division on September 5, 2014, but the Commission vacated and remanded for further development of the record and the parties eventually appeared for a hearing at FCI-Beaumont (where McDuff was incarcerated) on June 15 and 16, 2016. The Administrative Law Judge carefully considered the evidence presented and witness credibility and made the following finding:

> "[M]uch of McDuff's testimony and many of his exhibits were not believable. Indeed, the record is replete with reasons for doubting McDuff's testimony and questioning the truth and authenticity of his allegedly exculpatory exhibits."

Attachment E, In the Matter of Gary L. McDuff, Administrative Proceeding File No. 3-15764, Initial Decision Release No. 1090 at page 3 (December 16, 2016).

The Judge detailed the reasons for his conclusions including the fact that "McDuff filed multiple fraudulent documents in this proceeding and related proceedings [citing specific documents where McDuff forged the signature of then-United States Attorney General Eric Holder and other fraudulent court filings]." The Judge also stated that he "did not credit either McDuff's testimony or his exhibits to the extent they are inconsistent with the Division's evidence." *Id*. at page 4. Nevertheless, although acknowledging McDuff's fraudulent underlying conduct, the Administrate Law Judge

ultimately found that the Commission failed to prove that McDuff acted as a broker at the time of his misconduct and therefore dismissed the Commission's petition to permanently bar McDuff. Emboldened by the Administrative Law Judge's decision, McDuff renewed his attention to the criminal matter.

On March 17, 2017, McDuff filed a motion to withdraw certain documents previously filed in the criminal case, claiming he was "duped" regarding legal defense and strategy advice he received in jail. Dkt. 200. This motion was denied. McDuff filed the pending motion on June 5, 2017. Dkt. 202.

At the government's request, appellate counsel for McDuff, Daniel Kyle Kemp, provided the following information by affidavit:

> I was appointed to represent Gary Lynn McDuff on July 2, 2012. I met with him in court that day and from the outset, McDuff refused to speak with me stating he would not accept any public benefit. I attempted to confer with him on multiple occasions afterwards and McDuff continued to refuse to discuss anything with me and refused the court's directives to answer. Despite my continued attempts to go over the Indictment with him or discuss his case, McDuff refused to acknowledge the legitimacy of the proceedings.
>
> The prosecutor advised me that the discovery was voluminous and was held in two different locations: the FBI building in Dallas and the SEC Receiver's office in Dallas, with dozens of boxes at each location. The discovery was available for inspection and copying by me at any time. Prior to viewing the discovery, I made multiple attempts to visit McDuff at the Fannin County Jail, after which I was finally able to have only superficial conversations with McDuff. He still refused my legal assistance. I tried to ask McDuff questions about the case and let him know about the discovery available and inquired about any documents I should be looking for within the discovery. McDuff again refused to answer.
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> During this discovery review period, the Court held multiple pre-trial hearings including a competency hearing held on the Court's own motion.

Throughout these proceedings, McDuff persisted with his refusal to accept a public benefit and did not participate meaningfully at any pretrial proceeding. During one of these hearings, the Court removed me from my representation of McDuff and appointed me instead as standby counsel with orders to review the discovery and prepare as though I was going to try the case, however, I would not have any responsibility unless and until McDuff invoked his right to counsel.

In order to review the discovery, I made three visits to FBI-Dallas and one visit to the SEC Receiver's officer. Each visit lasted approximately one business day. I found much of the discovery in the SEC Receiver's office to be duplicative of what was at the FBI. I reviewed the discovery and spoke with the prosecutor just as I would have if I were preparing to try the case, per the Court's instructions. McDuff never requested any of the discovery. The majority of the discovery were bank records from various entities including Sardaukar Holding, Cilak, Megafund, Lancorp Fund, Cash Cards International, and Mexbank. The discovery also included offering documents and ancillary documents related to the funds themselves, in addition to dozens, possibly more than one hundred, FBI 302s. I do not recall seeing any previous testimony by Mia Flannery in the discovery, nor the transcript of Lancaster's sentencing hearing. However, I received a copy of Lancaster's sentencing hearing transcript while preparing for the appeal and I gave a copy to McDuff at that time.

After McDuff was convicted at trial, McDuff immediately began having substantive conversations with me. He let me know that certain individuals had been helping him through the trial process but ultimately conned McDuff into believing that if he maintained his "UCC theory" that the judge would overturn the jury's verdict. He told me he wanted to work on his appeal together. We exchanged numerous phone calls and emails and I visited him twice at the BOP facility in Beaumont. I noticed McDuff had a microwave-sized box full of documents from the discovery and pretrial process. McDuff told me that his daughter was typing the appeal he had been writing and that the entire appeal would be handled and all I would have to do was put my name on it. I advised McDuff that I was not comfortable proceeding in that manner but that I would review any product he provided to me. At one point McDuff told me he hired a "think tank of appellate lawyers" on the west coast to assist him with the brief and that is where much of the preparation of his appeal brief was coming from. When I received McDuff's initial version of his appeal that he claimed was ready to file it was almost three times the allowable length. On two separate occasions, I filed motions to file a brief

in excess of the page limit. Both were denied. I informed McDuff that the brief would have to be culled down and did so by removing arguments I believed were frivolous. I made significant formatting revisions and attempted to streamline the arguments as much as possible. I still maintained regular contact with McDuff and let him know the arguments that were frivolous and other changes made. McDuff was not in agreement with all of the arguments that I felt needed to be removed but I advised that I had the responsibility to author the brief but still wanted his input. I had further contact with the Clerk's office for the Fifth Circuit Court of Appeals expressing my concern about McDuff's behavior and the fact that McDuff was trying to order me to file his version of the brief with certain issues included that I felt were frivolous. In trying to take into account McDuff's wishes, I was unable to file a brief that complied with the Court's requirements. At the direction of the Clerk, I filed a letter with the Court memorializing my issues with McDuff.

I filed the brief on June 2, 2015, and have had no further contact with McDuff. I reviewed the brief McDuff filed on his own on January 2, 2016, and it is a substantially similar but abridged version of the initial brief McDuff submitted to me that I had to revise. Throughout the case, both while I represented McDuff and while I was standby counsel, McDuff made numerous filings that I believed were meritless. His motions followed a general pattern of the UCC governing disputes and amounts in controversy and were not applicable to the criminal proceedings.

The government asked me to review McDuff's §2255 motion and related attachments. I reviewed the list of allegedly withheld evidence listed on Civ. Dkt. 1-1, page 5, Section B. Although I cannot recall each and every item listed, I do recall seeing several of these documents during my discovery review. Specifically, I recall seeing the following: Norman Reynolds emails, Lancaster's 2015 Deposition, the entire Desist and Refrain Order, copies of ACE and Nationwide Insurance policies covering Lancorp Fund I, Cadle's letter to Quilling regarding 1318 Michen Dr, Final Judgment of Lancaster and Reese in the SEC case, Lancaster's letter to Megafund to pay Lancorp Group, Wire transfers to Megafund and CIG, Ltd, faxes from Secured Clearing to Mia Flannery, client lists of Megafund, MexBank SAT registration certificate to do business in Mexico, Megafund ledgers reflecting commission payments to multiple inducers, Inbound and Outbound flow of money into and out of Megafund, July 14, 2005 deposition of Stanley Leitner, financial records relating to Sardauker, and Reese's Factual

> Statement. Any statement that these documents were not previously disclosed and/or made available to McDuff is untrue.

Attachment F, Affidavit of D. Kyle Kemp at 1-4.

II. Response in Opposition to Motion

McDuff's Grounds for Relief are meritless, procedurally barred, or unsupported in his motion and by the record.

As an initial matter, McDuff's motion consistently misstates the facts and evidence supporting his conviction and is replete with pejorative remarks about the government attorneys, agents, and witnesses. Although the specific grounds are not always clearly articulated, the government will endeavor to identify the legal challenges McDuff may be attempting to raise in his motion. It appears McDuff alleges nine separate grounds for a new trial including newly discovered exculpatory evidence, errors in the jury charge, judicial prejudice, ineffective assistance of counsel, improper merger of charged conduct, wrongdoing on the part of Bureau of Prisons personnel, violations of McDuff's constitutional 9th Amendment rights, and a constitutional challenge alleging statutory vagueness. The government will address each of these grounds separately.

A. Ground 1, Newly Discovered Evidence

McDuff alleges that newly discovered evidence demonstrated that several witnesses and the government's attorneys lied at trial. However, McDuff does not clearly state how the "new evidence" supports his accusation. As a matter of fact, much of the evidence McDuff lists as "new" was previously made available during discovery to his

standby counsel, Daniel Kyle Kemp, as attested to in Kemp's affidavit. *See* Attachment F, Affidavit of D. Kyle Kemp. McDuff's arguments are misleading and full of half-truths. For example, McDuff alleges that the government withheld evidence that victim Frances Benyo was aware there was no insurance coverage to protect her investment while also accusing Ms. Benyo of falsely testifying at the criminal trial about the insurance. The government can only assume McDuff is alleging he learned about this during the SEC proceedings. However, at the criminal trial, the government offered documentary evidence and testimony that proved that McDuff offered Ms. Benyo insurance and she elected to purchase it. Attachment C, Benyo Tr. Trans., pg. 106, 115-16. Then, additional testimony from Benyo and a letter from McDuff to Benyo was offered to show that insurance was no longer going to be offered but the investments would be held by a bank "with the same level of protection," to which Benyo agreed. *Id.*, pgs. 125-26. Benyo's knowledge and testimony about her insurance coverage, or lack thereof, has been consistent for years as has the other victims' testimonies and evidence about the insurance issue. McDuff's claims that the government withheld this evidence is patently and knowingly false.

McDuff then complains that the government acted improperly at trial when it discussed certain victims' investments into a subsequent fund called Lancorp II in which McDuff claims he was not involved. Not only was this evidence relevant and admissible in the government's case as intrinsic to the conspiracy, it was also admissible, in the

alternative, pursuant to FRE 404(b). McDuff did not object at trial and an appeal on this point would have been frivolous. McDuff's claims of wrongdoing here are misinformed.

McDuff's further alleges he was prejudiced at trial by references to a "Cease and Desist Order" when the actual order was to "Desist and Refrain." This Order was directed to a co-conspirator, Robert Reese, not McDuff. The government provided McDuff with a copy of the Order prior to trial (Gov't Trial Exhibit 33) and McDuff never objected to its characterization. No matter what the correct title, either way it reflected an order to stop doing something illegal. There was no difference to investors or the jury about the title of this Order, and McDuff does not explain how this title correction would have changed his outcome. The testimony was that its omission to investors was material, and the Court took judicial notice of the Order without finding it necessary to admit the Order into evidence. *See* Attachment K, Loecker Tr. Trans. pg. 351. These rantings do not demonstrate that McDuff suffered "actual prejudice," or that he is "actually innocent," as required. *Bousley v. United States*, 523 U.S. 614, 622 (1998).

McDuff further attempts to mislead this Court with another long-held allegation: that the government lied when it alleged and proved that the Lancorp Fund was unregistered. McDuff directs the Court's attention to his attached "registered filing" in an attempt to prove Lancorp was in fact registered. See Attachment G, SEC Filing. However, the filing was only a 2003 Notice of intent to offer *unregistered* securities and this document has been in McDuff's possession for years. This document only confirms the testimony that Lancorp was unregistered. Furthermore, even if his argument on this

point had any merit, McDuff failed once again to demonstrate how there was cause for his failure to raise this on direct appeal or that he suffered actual prejudice. McDuff offers nothing to rebut the government's proof that he and his co-conspirators falsely represented that the investments were risk-free and only made in A-rated bonds, and did not disclose to investors the material facts that McDuff had been previously convicted of a felony, or even that Reese had been barred from soliciting investments with false information under an order from the state of California. Accordingly, McDuff cannot show that the evidence he calls "newly discovered" would have resulted in his acquittal.

The bottom line is that McDuff's claims of newly discovered evidence are untrue and he has raised them many times in the past. The government first responded to these claims in its Response to [McDuff's] Motion for Reconsideration (dkt. 168):

> "Newly discovered evidence is evidence that could not have been discovered with due diligence at the time of trial." *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir. 1978). Prior to trial of this case, the government provided between 17 and 30 boxes of evidence in discovery. And, although McDuff's court appointed counsel, Daniel Kyle Kemp, reviewed the evidence, McDuff declined to do so. The records that McDuff characterizes as newly discovered and in the possession of the SEC-appointed receiver, as the government indicated in its pretrial discovery conference, were actually made available to McDuff in discovery and part of Kemp's review. McDuff's declination to review them was part of his strategic decision to contest the authority of the government to bring the indictment against him and this Court's authority to conduct proceedings ancillary to it. And, while McDuff implicitly asserts that he did not understand the charges against him, *e.g.* dkt. 168, ¶33, the Court reviewed the indictment with McDuff and conducted a *Garcia* hearing twice to ensure that McDuff's waiver of his Sixth Amendment right to counsel was valid. Consequently, because the motion was untimely and the evidence in question is not newly discovered, the government urges the Court to deny McDuff's motion for reconsideration and petition for rehearing."

The Court subsequently denied McDuff's motion.

A defendant can challenge his conviction or sentence after it is presumed final on issues of constitutional or jurisdictional magnitude only, and may not raise an issue for the first time on collateral review without showing both "cause" for his procedural default and "actual prejudice" resulting from the errors. *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir. 1991). Section 2255 does not offer recourse to all who suffer trial errors. It is reserved for transgressions of constitutional rights and other narrow injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981). In other words, a §2255 motion will not be allowed to do service for an appeal. *See, e.g., Davis v. United States*, 417 U.S. 333, 345 (1974). Further, if issues "are raised and considered on direct appeal, a defendant is thereafter precluded from urging the same issues in a later collateral attack." *Moore v. United States*, 598 F.2d 439, 441 (5th Cir. 1979). McDuff wholly failed to demonstrate any injustice occurred, and the government respectfully urges the Court to once again deny McDuff's claims as meritless.

B. Ground 2, The Jury Charge Constructively Amended the Indictment.

As stated earlier, a defendant who raises a constitutional or jurisdictional issue for the first time on collateral review must show "both 'cause' for his procedural default and 'actual prejudice' resulting from the error." *Shaid,* 937 F.2d. at 232. Prejudice requires a petitioner to show that "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his

entire trial with error of constitutional dimensions." *United States. v. Frady*, 456 U.S. 152, 170 (1982)(emphasis in original). In addition to cause, a petitioner must show actual prejudice to overcome the procedural bar. *See Shaid*, 937 F.2d at 232. Furthermore, "the movant makes this showing where he demonstrates that, but for the error, he might not have been convicted." *See United States v. Guerra*, 94 F.3d 989, 994 (5th Cir. 1996).

McDuff never objected at trial or on appeal about flaws in the jury charge. McDuff has also failed to show that the jury charge was in fact constructively amended, failed to show cause for this procedural default, and further failed to demonstrate how he was this was an error that "worked to his actual and substantial disadvantage." *See Frady*, 456 U.S. at 170. His motion must be denied.

Although ineffective assistance of counsel satisfies the cause and prejudice standard, (*see*, *e.g*., *United States v. Garza*, 176 F.3d 479 (5th Cir. 1999)), McDuff's appellate counsel's failure to raise the issue on appeal does not constitute ineffective assistance of counsel because the issue would have been unlikely to succeed on appeal. Constructive amendment of an indictment occurs when the trial court "through its instructions and facts it permits in evidence, allows proof of an essential element of the crime on an alternative basis provided by the statute but not charged in the indictment." *United States v. Phillips*, 477 F.3d 215, 222 (5th Cir. 2007). In evaluating whether constructive amendment has occurred, courts consider "whether the jury instruction, taken as a whole, is a correct statement of the law and whether it clearly instructs jurors

as to the principles of law applicable to the factual issues confronting them." *Id*., citing *United States v. Guidry*, 406 F.3d 314, 321 (5th Cir.2005) (internal quotation marks omitted).

Here, the jury instructions supported the language of the superseding indictment charging McDuff in Counts One and Two and also provided a correct recitation of the elements for each offense and applicable definitions. The indictment tracked the plain language of the statutes.

The jury was not instructed to convict McDuff on a basis not charged in the indictment –or in other words – McDuff was convicted on the same basis for which he was charged. Accordingly, no constructive amendment occurred, and McDuff's appellate counsel was not ineffective for failing to raise the issue on appeal.

In addition to the charge-specific language in the indictment, the district court employed many of the curative measures recognized by courts to protect against a constructive amendment of the indictment, such as: instructing the jury to only consider the crimes charged in the superseding indictment and instructing the jury that the McDuff was not on trial for any offense not alleged in the indictment; including the language from the Superseding Indictment in the jury charge; and providing the jury with a copy of the indictment for their deliberations. *United States v. Leahy*, 82 F.3d 624, 631–32 (5th Cir.1996); *see also United States v. Holley*, 23 F.3d 902, 912 (5th Cir.1994) ("All of [the defendant's] contentions must fail because the district court instructed the jury that it was to consider only the crime that was charged in the indictment.") Because jurors are

presumed to follow the court's instructions, *see United States v. Bieganowski*, 313 F.3d 264, 288 (5th Cir.2002), and the district court properly instructed the jury, it can be concluded that the jury convicted McDuff based on the fraud alleged in the Superseding Indictment. Thus, any appeal on this issue would have been unlikely to succeed.

C. Ground 3, Judicial Bias.

McDuff claims the Court was biased against investment fraud defendants because, at a co-defendant's (Lancaster's) sentencing hearing, the Court suggested that certain types of fraud cases should get more time then the U.S. Sentencing Commission Guideline's suggest. McDuff also complains of bias because the Court pronounced that McDuff would be jointly and severally liable for restitution at Lancaster's sentencing hearing, which took place before McDuff's trial.

In order to advance a claim of judicial bias in a § 2255 motion, the level of misconduct must have produced a "fundamental defect resulting in a miscarriage of justice." *United States v. Couch*, 896 F.2d 78, 81 (5th Cir. 1990). In his motion, McDuff demonstrated no such defect or result, and mere claims of appearances of impropriety are not cognizable under 28 U.S.C. § 2255. *Id.* Accordingly, McDuff's claims of judicial bias do not merit consideration.

Should the Court choose to hear the merits of the judicial bias claim, the standard for bias is objective, not subjective, and the comments or action should be reviewed in context of the entire judicial proceedings rather than isolated incidents. *Andrade v. Chojnacki, et. al*, 338 F.3d 448, 454–55 (5th Cir. 2003). The Supreme Court in *Liteky v.*

United States, 510 U.S. 540 (1994) articulated the following standards in the context of a recusal request:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.,* apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id. at 555 (internal citations and footnotes omitted).

McDuff has not shown that the District Court displayed any bias against him. While the Court's comment may express an opinion about sentences for fraud cases, it in no way suggests a favoritism that would make fair judgment impossible. Additionally, the Court was obligated pursuant to 18 U.S.C. §3663(A) to order that a defendant to make restitution to the victim(s) of the offense. Co-conspirators subject to criminal forfeiture are held jointly and severally liable for the full amount of the proceeds of the conspiracy. *United States v. Nagin*, 810 F.3d 348, 353 (5th Cir. 2016) (*cert. denied*). Here, McDuff was an alleged co-conspirator at the time Lancaster was sentenced.

Therefore, the Court properly ordered all possible defendants jointly and severally liable at the hearing. The Court's remarks do not show bias.

D. Ground 4, Government Withheld Brady/Giglio/Jencks Materials.

In his motion, McDuff listed a number of documents that he claims he was entitled to but the government failed to produce. Motion 1-1, pg. 5. Aside from the fact that the government did make available dozens of boxes in discovery and his attorney recalls seeing many of these documents in the discovery, (*see* Attachment F, Affidavit of D. Kyle Kemp), McDuff refused to review any evidence prior to his trial. *Id*. Furthermore, McDuff fails to demonstrate how these documents may have been exculpatory or even relevant to his trial. In addition, McDuff appropriately raised the *Brady* issue on appeal and the Fifth Circuit found no error. Because petitioners may not raise on collateral review a claim previously litigated on direct appeal, McDuff's motion must fail. *See United States v. Fields*, 761 F.3d 443, 466 (5th Cir. 2014).

As for the *Jencks* issue, for a defendant to receive relief for a violation of the Jencks Act he must demonstrate that he was prejudiced by the failure to disclose. *United States v. Maloof*, 205 F.3d 819, 825 (5th Cir. 2000). If a court finds that there has been a violation of the Jencks Act the violation is subject to the harmless error analysis. *See United States v. Ramirez*, 174 F.3d 584, 587 (5th Cir. 1999). The harmless error analysis is strictly applied to *Jencks* violations to determine whether the failure to produce the witnesses' statement had a *substantial* influence on the outcome of the case. *United States v. Montgomery*, 210 F.3d 446, 451 (5th Cir. 2000) (emphasis supplied). If the

statement would not have had a substantial influence relief will not be granted. *Id*. A failure to produce a witnesses' statement is considered harmless when there is no substantial inconsistency, contradiction or variation between the prior statements and current trial testimony. *Maloof,* 205 F.3d at 827 (*quoting United States v. Keller*, 14 F.3d 1051, 1055 (5th Cir. 1994)).

Two of McDuff's associates were criminally prosecuted in the Northern District of Texas.[3] In January 2008, Stanley Leitner was tried for fraud in connection with his company, Megafund, and in January 2012, Bradley Stark was tried fraud in connection with his company Sardaukar Holdings. McDuff was connected to Megafund and fraudulently transferred some of Lancorp's proceeds there. *See* Attachment A, Lancaster Tr. Trans. 208-10. Sardaukar Holdings also eventually received some of Megafund's/Lancorp's proceeds. Three government witnesses from McDuff's trial, specifically, Michael Quilling, Mia Flannery, and IRS Special Agent Ronald Loecker, also previously testified for the government in Leitner's and Stark's respective trials. At McDuff's trial, Quilling's and Flannery's testimonies were very limited. Quilling was an SEC-appointed receiver whose responsibility was to take over the business affairs of Lancorp, Megafund, and Sardaukar Holdings, among others. His testimony at McDuff's trial lasted a mere six minutes in which he stated that funds received by Lancorp did not remain on deposit as promised to investors in the prospectus and that no insurance

[3] *See United States v. Stanley Leitner*, 3:07CR261, and *United States v. Bradley Stark*, 3:08CR258.

payments were made. *See* Attachment H, Quilling Tr. Trans. 224-26. He also testified that McDuff, Lancaster, and Reese each profited from Lancorp's fundraising. *Id.* At Leitner's trial, Quilling testified about how Megafund's assets were spent and recovered, only once referring to Lancorp, during cross-examination when he stated generally that he "had not recovered very much" yet from the Lancorp receivership.[4] Attachment N, Quilling Tr. Trans (Leitner), pg. 158. Quilling made no mention of McDuff, Lancaster, or Lancorp in Stark's trial. *See* Attachments O and P, Quilling Tr. Trans (Stark).

Flannery's testimony at McDuff's trial was very brief. In her four minutes on the witness stand, she testified that she worked as an office assistant for Megafund and recalled receiving a fax from McDuff (admitted into evidence as Government Trial Exhibit 17) that contained wiring instructions from Lancorp to various other accounts controlled by McDuff. *See* Attachment I, Flannery Tr. Trans. pgs. 179-82. Flannery's testimony at Leitner's trial was not related to McDuff or Lancorp in any way. *See* Attachment M, Flannery Tr. Trans. (Leitner). She did not testify at Stark's trial.

At McDuff's trial, Loecker testifed as a summary witness for approximately thirty minutes. He explained his role in the investigation and summarized each victim's total loss and the general cash flow of Lancorp's proceeds. *See* Attachment K, Loecker Tr. Trans. He ascertained from bank records in evidence and interviews that investors sent approximately $11 million to Lancorp, but the majority of the proceeds (more than $9

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[4] Leitner's trial took place in January 2008, approximately 5 years prior to McDuff's trial.

million) were then transferred to Megafund and other accounts controlled by McDuff, and ultimately to Sardaukar Holdings. *Id*., pgs. 333-36. At Leitner's trial, Loecker described Megafund's receipts and disbursements and his interview with Mr. Leitner. *See* Attachment Q, Loecker Tr. Trans.1 (Leitner) pgs. 349 et seq. Loecker described that Megafund received money from Lancorp, and that Lancorp was "an aggregator of funds. 'Landcorp' was made up of well over a hundred investors who deposited their money to 'Landcorp' who transferred it to Megafund. … The individual responsible for Landcorp is Gary Lancaster." *Id*. at 358-59. It is a fact that Lancaster was named as Lancorp's principal in its prospectus. This testimony is consistent with the evidence presented at McDuff's trial. Loecker made no other mention of McDuff, Lancaster, or Lancorp in his otherwise extensive testimony during Leitner's trial. At Stark's trial, Loecker similarly testified about Stark and Sardaukar Holdings' financial summaries. There was no mention of McDuff, Lancaster, or Lancorp during Loecker's testimony at Stark's trial. *See* Attachments S and T, Loecker Tr. Trans. (Stark).

The government has been unable to confirm whether the transcripts from previous trials were made available to the defendant or Mr. Kemp, however the transcripts were publicly available at the time of McDuff's trial. As previously stated, the record shows that McDuff refused to participate in his trial in any meaningful way, refused assistance of counsel, and refused to review or discuss discovery. The FBI agent who handled the discovery stated he attempted to deliver certain records, including *Jencks* material, to McDuff at the jail, but McDuff refused to accept them. *See* Attachment D, Affidavit of

Christopher M. Smith. Nonetheless, and assuming the government failed to produce the prior trial testimony of certain witnesses at trial, McDuff has not demonstrated how the production of the documents would have had any influence on the outcome of the case, let alone a substantial one. *See Montgomery*, 210 F.3d at 451.

IRS SA Loecker confirmed that he was present for the previous trials and no testimony conflicted with the testimony presented at McDuff's trial by any common witnesses. *See* Attachment J, Affidavit of Ronald Loecker. In the course of preparing for its response, the government obtained copies, via PACER, of the witnesses' prior trial testimonies. After comparing the previous testimonies with testimony given at McDuff's trial, the government confirms that no substantial inconsistency existed, and a majority of the testimony did not concern McDuff, Lancaster, or Lancorp. *Compare* Attachment I *with* Attachment M (Flannery); *Compare* Attachment H *with* Attachments N, O, and P (Quilling); *Compare* Attachment K *with* Attachments Q, R, S, and T (Loecker). Because there was no substantial inconsistency, contradiction, or variation among the prior and current testimonies, any failure to produce the statement was harmless. *Maloof*, 205 F.3d at 827. McDuff has failed to demonstrate how the prior trial testimony is even relevant to the fraud committed by the Lancorp Fund, that the previous testimony by any common witness had any impeachment value, or that having the prior testimony would have changed McDuff's trial strategy or caused the outcome to be different in any way. Accordingly, his motion should be denied.

E. Ground 5, Ineffective Assistance of Counsel.

McDuff claims that his appointed appellate counsel was ineffective because he failed to raise certain points of error on direct appeal. Although the decision whether to appeal rests solely with a criminal defendant, subsequent decisions about which issues to raise on appeal rest with counsel, who is better suited to estimate the probability of success on any given argument. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show that the performance was deficient and that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for judging the performance of an attorney is that of reasonably effective assistance considering all of the circumstances. *Id*. at 688. When a convicted defendant complains of ineffective of assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id*. at 688. Judicial scrutiny of counsel's assistance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. *Id*. at 689. A court must employ a strong presumption that counsel's conduct falls within a wide range of reasonably professional assistance. *Id*. at 690. The proper standard for the showing of prejudice requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional performance, the result of the proceedings would have been different. *Id*. at 694.

Counsel is not deficient for failing to raise every meritorious claim that may be pressed on appeal. *See Ellis v. Lynaugh*, 873 F.2d 830, 840 (5th Cir. 1989); *Green v. Johnson,* 116 F.3d 1115, 1125-26 (5th Cir. 1997). Also, counsel cannot be held to be ineffective for failing to press a frivolous point. *Sones v. Hatchett*, 61 F.3d 410, 415 (5th Cir. 1995). Here, McDuff does not state what his appellate counsel could have done differently that would have convinced the Fifth Circuit that the trial court committed reversible error. *See United States States v. Rodden*, 2013 WL 2933046 (N.D. Tex. June 12, 2013). Like in *Rodden*, McDuff makes no such showing that his outcome would have been different had his attorney filed a different brief. Unusually, we have the benefit of seeing what that different brief may have looked like because McDuff did file his own *pro se* brief with the Fifth Circuit.[5] Although the Fifth Circuit did not accept it, a cursory review of McDuff's *pro se* brief demonstrates that he would have been unlikely to succeed, nevertheless.

What we have left are McDuff's own conclusory statements, which are not enough to sustain a claim of ineffective assistance of counsel. *See Sayre v. Anderson*, 238 F.3d 631, 635-36 (5th Cir. 2001). His allegations of ineffective assistance must be supported by the record. *United States v. Johnson*, 679 F.2d 54, 58-59 (5th Cir. 1982). In fact

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[5] McDuff's *pro se* brief was docketed by the Fifth Circuit in Case number 14-40905 as a "Restricted Document, doc. Number 00513335358." Accordingly, the government did not attach it here
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merely stating that a violation has been committed is not sufficient to warrant a hearing, let alone relief. *O'Malley v. United States*, 285 F.2d 733, 735 (6th Cir. 1961).

Finally, McDuff fails to demonstrate merit to his arguments. Assuming his arguments had any possible merit, McDuff cannot demonstrate that his counsel was ineffective for failing to assert every potentially meritorious issue on appeal. *See United States v. Garza*, 176 F.3d 479 (5th Cir. 1999) (unpublished).

F. Ground 6, "The Three Conspiracies."

McDuff's sixth ground for review is described in a section called "The Three Conspiracies" in which he seems to claim the government somehow improperly charged him in the indictment. McDuff based his argument on his co-defendant's sentencing hearing transcript. *See* Motion at 1-7, pg. 2. However, McDuff's reasoning is confusing and the only identifiable claim he articulates is more akin to a sufficiency of the evidence argument, which was properly addressed by the parties on appeal. As a general rule, § 2255 petitioners may not raise on collateral review a claim previously litigated on direct appeal. *Fields*, 761 F.3d at 466; *Moore*, 598 F.2d at 441. Accordingly, the issue is not reviewable here.

Focusing on the indictment for argument's sake, Fed. R. Crim. P. 12(b)(3)(B) states that defenses and objections based on defects in indictment other than absence of jurisdiction or failure to charge offense must be raised raised prior to trial. As with most *pro se* trial defendants, McDuff was repeatedly warned by the Court against proceeding *pro se* at trial. Moreover, McDuff outright refused to accept any assistance from any

counsel. His trial strategy failed him, and McDuff does not get a second "bite at the apple" in remorse.

G. Ground 7, Bureau of Prisons Impeded Access to Evidence

In his motion, McDuff claims that the Bureau of Prisons intentionally obstructed justice by interfering with his legal materials during his appeal and McDuff was therefore unable to properly communicate with his attorney and the Court and also unable to present a "properly briefed appellate brief or *pro se* brief." This claim is without merit.

First, in his affidavit Kemp detailed his access to all of the discovery pre-trial and the post-trial appellate briefing process. *See* Attachment F, Affidavit of D. Kyle Kemp. Kemp was able to prepare an adequate appellate brief and McDuff has not shown how his own *pro se* brief or Kemp's appellate brief was inadequate or how the briefs would have differed had his access to evidence not been allegedly "impeded."

Secondly, McDuff previously raised this claim during the SEC's administrative hearing process. In response to his previous identical claim, SEC senior trial attorney Janie Frank provided a written Declaration detailing all of the accommodations requested by and made for McDuff in addition to responding to the allegations he has levied against the Bureau of Prisons. *See* Attachment L, Declaration of Janie Frank. Because the SEC fully described the true circumstances surrounding McDuff's allegation in Ground 7, the government rests its response here on Frank's attached Declaration. *See* Attachment L. McDuff has failed to show the BOP was responsible for obstructing his access to any documents and a new trial is not warranted.

H. Ground 8, McDuff's Ninth Amendment Rights Were Violated

The Ninth Amendment does not confer substantive rights. *See Johnson v. Texas Bd. Of Criminal Justice*, 281 Fed. Appx. 319, 320 (5th Cir. 2008). In fact, the Ninth Amendment is treated as a rule of interpretation whose purpose is to make clear that the specified enumerated rights in the Bill of Rights do not act as a basis to deny the existence of unenumerated rights. *Froehlich v. Wisconsin Dept. of Corr.*, 196 F.3d 800, 801 (7th Cir. 1999); *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991). In other words, the protections derived from the Ninth Amendment are narrow and are restricted to protecting the penumbras of constitutional rights. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Here, McDuff fails to explain how any of his constitutional rights, enumerated or otherwise, were violated by the competing rights of others, including the government. He stated that he was denied his fundamental right to a fair trial but gave no enumerated constitutional right to be interpreted, no enumerated right to be expanded, nor any basis for the Court to hold that any constitutional right was violated. Because McDuff has not satisfied his burden of raising adequate facts to support his argument, the Court must deny his motion. *See Barnes v. United States*, 579 F.2d 364, 366 (5th Cir. 1971) ("Under Section 2255, [petitioner] has the burden of showing he was entitled to relief.")

I. Ground 9, The Statutory Language Charged is Unconstitutionally Vague

The Fifth Circuit has allowed for vagueness challenges during a 28 U.S.C. § 2255 proceeding but only if the petitioner can prove there was actual innocence or cause and

prejudice for failing to raise the claim on direct appeal. *See United States v. Scruggs*, 714 F.3d 258, 267 (5th Cir. 2013). If not, the petitioner has procedurally defaulted the claim. *Id*. Here, McDuff has demonstrated neither actual innocence, cause, nor prejudice.

Setting aside the procedural default, in *United States v. Kirkham* the Fifth Circuit addressed a constitutionality question in the context of 18 U.S.C. § 1347, which has similar "scheme to defraud" language as 18 U.S.C. § 1343. The *Kirkham* court found that "[d]efendants do not advance that they did not understand what it meant to execute the scheme to defraud and therefore could not have intentionally violated the statute," and held that the defendant's vagueness challenge to the statute's constitutionality should fail. *United States v. Kirkham*, 129 F. App'x 61, 71 (5th Cir. 2005). As in *Kirkham*, McDuff does not allege that he did not understand what it meant to execute a "scheme to defraud." He may not have liked what he was charged with, but a plain reading of the indictment leaves no guessing as to what conduct the government alleged was fraudulent, whom McDuff defrauded, or how. *See Kirkham*, 129 F. App'x at 71. Furthermore, McDuff actually listed in his motion various legal citations defining "scheme to defraud," undercutting his own vagueness claim. Motion 1-10, pgs. 2-4. Accordingly, McDuff's challenge must fail notwithstanding the procedural default.

III. Conclusion

Although McDuff raised several bases for granting his §2255 motion, each time he failed to demonstrate either the harm actually occurred or otherwise failed to demonstrate how the outcome of his trial, conviction, sentence, or appeal would have

been different had the harm not occurred. Plainly, McDuff has not demonstrated that any "newly discovered" evidence was not previously provided. To the contrary, his own attorney stated much of it was provided in discovery. McDuff also failed to demonstrate how any documents not provided would have been relevant or helpful to him during a trial for which he refused to prepare or in which he refused to participate. He failed to demonstrate that any witness committed perjury or what evidence allegedly withheld constituted *Brady* or *Giglio* material. McDuff has not demonstrated that his appellate counsel was ineffective, that the district judge was biased, that his charged offenses were improperly merged (notwithstanding his procedural default of the issue), that the Bureau of Prisons obstructed justice, or that the time-tested wire fraud statute is unconstitutional. Instead, McDuff only supports his largely conclusory statements with incomplete and misleading factual citations. He rests his entire argument on the court's duty to ensure fundamental fairness, yet he provides no basis for the alleged violations of fundamental fairness in the judicial process. It is true that it is the duty of the judiciary to guarantee the integrity of our justice system, however where there is no violation the court has nothing to correct.

Based on the foregoing, the government respectfully urges the Court to deny McDuff's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 4th day of August 2017, I certify that a true and correct copy of the government's response to motion was mailed from Plano, Texas, to: Gary Lynn McDuff, Reg. #59934-079, FCI Beaumont Low, P.O. Box 26020, Beaumont, TX 77720.

/s/
Camelia Lopez
Assistant United States Attorney