**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

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| United States of America,<br><br>Plaintiff/Respondent,<br><br>v.<br><br>Michael Rocky Lane,<br><br>Defendant/Movant. | No. CV-19-05028-PHX-DGC (DMF)<br>CR-12-01419-PHX-DGC<br><br>**REPORT AND RECOMMENDATION** |

**TO THE HONORABLE DAVID G. CAMPBELL, SENIOR UNITED STATES DISTRICT JUDGE:**

This matter is on referral to the undersigned pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report and recommendation. (Doc. 26) In an order filed on August 21, 2019, the Ninth Circuit Court of Appeals granted Movant Michael Rocky Lane's application for authorization to file a second or successive Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (CR Doc. 763, Doc. 4)[1] The Ninth Circuit ordered that the proposed motion be deemed filed in the district court on February 28, 2019, the date on which it was delivered to prison authorities for forwarding to the Ninth Circuit. (CR Doc. 763 at 1, Doc.

[1] Citations to the record indicate documents as displayed in the official electronic document filing system maintained by the District of Arizona. Citations to documents within Movant's criminal case CR-12-01419-PHX-DGC are denoted "CR Doc." Citations to documents in Movant's instant § 2255 matter CV-19-05028-PHX-DGC (DMF) are denoted "Doc."

4 at 1) Movant filed an Amended Motion Under 28 U.S.C. § 2255 ("Amended Second Motion") on January 17, 2020. (Doc. 21) Respondent filed its response on June 2, 2020 (Doc. 34), and Movant filed his reply on August 7, 2020 (Doc. 39). On August 13, 2020, Respondent moved for leave to file a sur-response to Movant's reply (Doc. 43), to which Movant filed a response in opposition (Doc. 44). The motion for leave to file a sur-response was denied. (Doc. 46)

On September 13, 2019, Movant filed a "Motion for Release Pending Appeal." (Doc. 10) While the motion refers to an "appeal", it appears that Movant was referring to this habeas matter. (*Id.*) Movant argues that he provided "exceptional reasons" for his release by raising a significant challenge to his conviction. (*Id.*) Respondent filed a response (Doc. 15) and Movant filed a reply (Doc. 17). Because the issues underlying a decision on Movant's motion for release are intertwined with those raised in the Amended Second Motion, the undersigned addresses the motion for release within this report and recommendation.

Also pending is Movant's motion for discovery and request for an evidentiary hearing filed on January 17, 2020. (Doc. 24) Respondent filed its response on June 2, 2020 (Doc. 33), followed by Movant's reply filed on August 8, 2020 (Doc. 41). Movant's motion for discovery and request for evidentiary hearing (Doc. 24) is also addressed herein.

For the reasons set forth below, the undersigned recommends that each claim asserted in Movant's Amended Second Motion be denied, Movant's motion for release pending appeal be denied, Movant's motion for discovery and request for evidentiary hearing be denied, and a certificate of appealability be denied.

## I. BACKGROUND SUMMARY

On March 28, 2013, Movant, along with a number of co-defendants, was charged in a second superseding indictment on three counts. (CR Doc. 143) Count One alleged conspiracy to manufacture or distribute controlled substance analogues MDPV[2], a-PVP[3],

[2] The acronym for "3,4-Methylenedioxypyrovalerone." (CR Doc. 143 at 2)

[3] The acronym for "alpha-Pyrrolidinopentiophenone." (*Id.* at 3)

a-PBP[4], Pentedrone[5], and Pentylone[6] in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(c). (*Id.* at 2-5) Count Three alleged conspiracy to manufacture controlled substance analogues MPPP[7], a-PVP, a-PBP, Pentedrone, and Pentylone in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(c). (*Id.* at 6-9) Count Five alleged possession or aiding and abetting in the possession with intent to distribute controlled substance analogues a-PVP, Pentedrone, and MPPP, in violation of 21 U.S.C. §841(a)(1), (b)(1)(c), and 18 U.S.C. § 2. (*Id.* at 10)

In an order dated June 24, 2013, the Court provided background about the charges against Movant and noted that such charges were violations of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 ("CSA") and also of the federal Controlled Substance Analogue Enforcement Act of 1986 ("Analogue Act"):

> The CSA prohibits the manufacture, distribution and possession of controlled substances, which are drugs or other substances listed in Schedules I and II of the Act. [CR Doc. 143] at 2, ¶ 1; *see* 21 U.S.C. § 841. The Analogue Act prohibits the manufacture, distribution, and possession of controlled substance analogues. [CR] Doc. 143 at 2, ¶ 3; 21 U.S.C. § 813. These are substances that have a substantially similar chemical structure to a Schedule I or Schedule II controlled substance and that have or are represented or intended to have a substantially similar effect on the central nervous system. *Id.*, *see* 21 U.S.C. § 802(32)(A). To the extent that a controlled substance analogue is intended for human consumption, it is treated as a Schedule I controlled substance for purposes of the CSA. *Id.*, *see* 21 U.S.C. § 813.
>
> The charges in the Indictment stem from allegations that Defendants manufactured and distributed, under false and misleading labels, products such as "Eight Ballz Bath Salts" and "Eight Ballz Premium Glass Cleaner." [CR] Doc. 143 at 3-5, *passim*. The Indictment alleges that these products contained various controlled substance analogues, were sold as powder-like substances in gram and half-gram quantities, and, despite their labels, were actually intended for human consumption. *Id.* The Indictment alleges that

[4] The acronym for "alpha-Pyrrolidinobutiophenone." (*Id.*)

[5] 2-(Methylamino)-1-phenyl-pentane-1-one. (*Id.*)

[6] Beta-keto-methylbenzodioxolylpentanamine. (*Id.*)

[7] 4′-Methyl-pyrrolidinopropiophenone. (*Id.* at 7)

> prior to October 2011, Defendants used 3,4-methylenedioxypyrovalerone (MDPV) in "Eight Ballz Bath Salts" in violation of the Analogue Act, and that upon learning that the Drug Enforcement Administration ("DEA") had issued a final order temporarily scheduling mephedrone, methylone, and MDPV as Schedule I substances under the CSA ("MDPV order"), Defendants began importing and using replacement controlled substance analogues commonly known as a-PVP, a-PBP, pentylone, and pentadone in "Eight Ballz Bath Salts" and other products.

(CR Doc. 367 at 1-2)

Movant was tried and convicted in a jury trial before the Court. (CR Docs. 143, 660-676) The trial was held in June and July 2013, after which the jury found Movant guilty on all three counts. (CR Doc. 676 at 3-5) On Count One charging conspiracy to manufacture or distribute a controlled substance analogue[8] in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C), the jury found Movant guilty and identified MDPV, a-PVP, a-PBP, pentedrone, and pentylone as substances it unanimously found to be controlled substance analogues. (*Id.* at 4) On Count Three charging conspiracy to manufacture or distribute a controlled substance analogue[9], again in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C), the jury found Movant guilty and unanimously identified a-PVP, a-PBP, pentedrone, pentylone, and MPPP as substances that were controlled substance analogues. (*Id.*) On Count Five charging possession or aiding and abetting in the possession with intent to distribute a controlled substance analogue in violation of 18 U.S.C. § 2, the jury also found Movant guilty and further unanimously identified a-PVP, pentedrone, and MPPP as controlled substance analogues. (*Id.* at 4-5) On December 17, 2013, the Court sentenced Movant to 180 months' imprisonment on each of the three counts, to be served concurrently, with credit for time served. (CR Doc. 566 at 1)

[8] Count One was identified in the indictment as the "Consortium Distribution" conspiracy count, referencing products and substances associated with a business named Consortium Distribution that was owned, operated, and managed by co-defendant Nicholas Zizzo. (CR Doc. 143 at 2-5)

[9] Count Three was identified in the indictment as the "Dynamic Distribution" conspiracy count, associated with a business named Dynamic Distribution that was owned, operated, and managed by Movant. (CR Doc. 143 at 6-9)

Movant appealed his conviction and sentences, which the Ninth Circuit affirmed on September 17, 2015. *United States v. Lane*, 616 Fed.Appx. 328 (9th Cir. 2015). The court of appeals found the Analogue Act was not constitutionally vague as applied in Movant's case. *Id.* at 329. The Ninth Circuit also found the Court did not abuse its discretion by "allowing drug user [witnesses] to compare their experiences with the alleged analogues and common illegal stimulants" including cocaine and methamphetamine while "requiring the government to show that MDPV and methcathinone . . . [had] similar pharmacological effects." *Id.* The Ninth Circuit further rejected Movant's claim the Court abused its discretion by excluding evidence about pyrovalerone, "a Schedule V controlled substance, as irrelevant and confusing" that Movant had argued would have been "relevant on the premise that he could not be found guilty if he could prove that the alleged analogues were closer to pyrovalerone than to methcathinone or MDPV." *Id.* The Ninth Circuit concluded that Movant's claim was "not supported by the statutory language or the caselaw." *Id.* The circuit court also affirmed the Court's decision to use methcathinone to calculate Movant's base offense level for sentencing purposes. *Id.*

The United States Supreme Court denied Movant's petition for writ of certiorari on the Ninth Circuit ruling on January 19, 2016. *Lane v. United States*, 136 S.Ct. 921 (2016). On August 21, 2019, the Ninth Circuit Court of Appeals granted Movant's application for authorization to file the Amended Second Motion. (Doc. 4)

## II. MOVANT'S HABEAS CLAIMS

Movant asserts four grounds for relief. (Doc. 21 at 16-34) Movant first argues he is entitled to relief because Respondent violated its duty of disclosure pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) when it withheld material, exculpatory evidence relating to opinions by Drug Enforcement Agency ("DEA") chemists who expressed dissenting views on analogue drug determinations made within the DEA. (Doc. 21 at 16-25) Next, Movant contends Respondent violated its obligation pursuant to *Giglio v. United States*, 405 U.S. 150 (1972) by intentionally suppressing exculpatory impeachment evidence relating to Respondent's trial witness Dr. Thomas DiBerardino, a DEA chemist. (*Id.* at 25-31) Movant

also asserts his conviction was obtained by means of false testimony offered by Dr. DiBerardino in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). (*Id.* at 31-33) Movant further alleges Respondent violated the provisions of the Jencks Act by failing to disclose Dr. DiBerardino's prior statements, emails, or statements regarding disagreements with other chemists within the DEA. (*Id.* at 33-34)

Respondent counters that the issues raised in the Amended Second Motion are procedurally defaulted and argues Movant could have raised his discovery allegations in his motion for a new trial, on direct appeal, or in his initial § 2255 action. (Doc. 34 at 28-35) Respondent further contends that Movant's allegations are untimely pursuant to 28 U.S.C. § 2255(f)(1). (*Id.* at 35-40) Respondent also asserts that Movant's claims fail on the merits. (*Id.* at 40-81) Finally, Respondent argues Movant is not entitled to an evidentiary hearing on his claims. (*Id.* at 83)

## III. STANDARDS OF REVIEW

### A. Section 2255 motion to vacate, set aside, or correct sentence

A federal prisoner is entitled to relief from his sentence if it was "imposed in violation of the United States Constitution or the laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). The Ninth Circuit determined summarily that the Motion qualifies as a second or successive 28 U.S.C. § 2255 motion. (Doc. 4 at 1) Title 28 U.S.C. § 2255(h)(1) requires that:

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain— (1) newly discovered evidence that, if proven and viewed in light of evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense[.]

28 U.S.C. § 2255(h)(1). Pursuant to 28 U.S.C. § 2244(b)(2)(B):

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—(B)(i) the factual predicate for the claim could not have been

> discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B).

Section 2244 further provides that the appropriate court of appeals "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(C). "By '*prima facie* showing' we understand simply a sufficient showing of *possible* merit to warrant a fuller exploration by the district court." *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)) (emphasis added in *Woratzeck*). The Ninth Circuit has assumed that the United States Supreme Court's interpretation of "second or successive" for the purposes of § 2244(b)(2) applies as well to § 2255(h). *United States v. Buenrostro*, 638 F.3d 720, 724 (9th Cir. 2011).

Movant must "do more than simply satisfy the standard for prevailing on the underlying" claims alleging violation of *Brady*, *Giglio*, *Napue*, and the Jencks Act. *Brown v. Muniz*, 889 F.3d 661, 675 (9th Cir. 2018). Instead, § 2244(b)(2) "elevates the 'reasonable probability' standard for *Brady* materiality to a more demanding 'clear and convincing evidence' standard." *Id.* "'Few applications to file second or successive petitions are likely to survive these substantive and procedural barriers.'" *King v. Trujillo*, 638 F.3d 726, 730 (9th Cir. 2011) (quoting 17B C. Wright, et al., Fed. Prac. & Proc. § 4267, at 434-35 (3d ed. 2007)).

**B. Statute of limitations**

The Anti–Terrorism and Effective Death Penalty Act ("AEDPA") provides a one-year statute of limitations for filing a motion pursuant to 28 U.S.C. § 2255. Section 2255(f) provides that the one-year limitations period runs from the latest of the dates determined by applying §§ 2255(f)(1) through (f)(4). These dates include "the date on which the

judgment of conviction becomes final," "the date on which the impediment to making a motion created by government action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action," "the date on which the right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review," or "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(1)-(4).

**C. Procedural default**

Movant concedes that he did not raise the claims asserted in this Amended Second Motion on direct appeal or in his initial § 2255 motion. Generally, a section 2255 movant raising a claim for the first time in post-conviction proceedings is in procedural default and is precluded from asserting the claim. *Bousley v. U.S.*, 523 U.S. 614, 621 (1998) (finding default where petitioner challenging his guilty plea did not raise claim in direct appeal); *U.S. v. Frady*, 456 U.S. 152, 165 (1982) (noting that a motion to vacate or modify a sentence under 28 U.S.C. § 2255 cannot be used as a substitute for a direct appeal). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent'." *Bousley*, 523 U.S at 622 (citations omitted).

"Cause" under the cause and prejudice test must be something that cannot be fairly attributed to the movant, something that is external to the movant. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). Examples of external factors that constitute cause include "interference by officials," or "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To show prejudice, Movant must demonstrate that the disclosure allegedly withheld by Respondent "worked to his *actual* and substantial disadvantage, infecting his entire trial with error." *Frady*, 456 U.S. at 170 (emphasis in original). If a defendant cannot satisfy this test, he may raise his claim in a Section 2255 motion only in the extraordinary case where he can

prove a "fundamental miscarriage of justice" when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 495 (1986).

**D. Standard for warranting evidentiary hearing**

Under 28 U.S.C. § 2255, a court shall grant an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief ...." 28 U.S.C. § 2255(b). To show that he is entitled to an evidentiary hearing, a movant must allege "specific factual allegations that, if true, state a claim on which relief could be granted." *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (internal quotations and citations omitted). In determining whether to grant an evidentiary hearing, a court must consider whether, accepting the truth of a movant's factual assertions that are not directly and conclusively refuted by the record, the movant could prevail on his claims. *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002).

**IV. DISCUSSION**

**A. Additional factual background**

*1. Relevant offices within DEA*

As relevant to Movant's claims, two offices within DEA played prominent roles: the Office of Diversion Control, Drug and Chemical Evaluation Section ("DCE"); and the Operational Support Division, Office of Forensic Sciences ("FS")[10]. *United States v. Galecki*, No. 2:15-cr-00285-APG-PAL, 2018 WL 3340872, at *5 (D. Nev. July 6, 2018). DCE employees provided determinations based on scientific criteria about whether a substance qualifies as an analogue drug. *Id.* FS employees specialized in identifying unknown substances. *Id.*

. . .

. . .

[10] Movant states that review of analogue substances could be conducted by the Office of Forensic Sciences or by the DEA's Special Testing and Research Laboratory ("SFL1"). (Doc. 21 at 9)

*2. Movant's newly discovered evidence*

Movant asserts he received newly discovered evidence that he argues give rise the claims in the Amended Second Motion. (Doc. 21 at 8-16) Movant advises that after July 20, 2018, he first learned via his previous § 2255 motion attorney about documents produced by the United States in an analogue drug case, *United States v. Gas Pipe, Inc., et al.*, in the Northern District of Texas ("*Gas Pipe"*). (*Id.* at 9-10) Movant concludes the documents are exculpatory and also impeach prosecution expert witness Dr. DiBerardino's testimony concerning the substantial similarity of chemical structures of analogue substances involved in his conviction. (*Id.*) Based on the documents obtained, Movant indicates that Dr. DiBerardino potentially misled the jury in Movant's trial on issues including: (1) who within DEA determines that chemicals are substantially similar to listed substances and qualify as analogues; (2) that DCE made determinations about analogue substances without consensus by FS; (3) that even where FS disagreed that a substance was substantially similar, DCE unilaterally decided that a substance was an analogue based on the exigency of a pending trial; (4) that FS chemists opined that Dr. DiBerardino's two-dimensional overlay used to determine substantial similarity in chemical structure was not scientifically sound; (5) that Dr. DiBerardino's testimony omitted any mention that DCE had drafted a monograph proposing that MDPV, a substance Movant had been charged on, was an analogue of the controlled substance MDEA[11] and that FS employees had refuted DCE's conclusion in written opinions; and (6) that neither FS dissenting opinions nor the draft monograph were disclosed to Movant. (*Id.* at 9-10)

Movant contends the prosecution was required to disclose email communications relating to the draft monograph in which DCE and specifically Dr. DiBerardino had proposed that MDPV was an analogue of the Schedule I drug MDEA. (*Id.* at 19) Movant explains that FS scientists disagreed that MDPV's chemical structure was substantially similar to that of MDEA and criticized Dr. DiBerardino's approach of showing chemical

[11] Methylenedioxyethylamphetamine. *Steinbach v. Branson*, No. 1:05-cv-101, 2007 WL 2985571, at *2 (D.N.D. Oct. 9, 2007).

structure similarity by superimposing two-dimensional depictions of the chemical structure of the substances being compared. (*Id.*)

Movant explains he first learned of these internal DEA email communications in July 2018 in relation to the *Gas Pipe* drug analogue case. (Doc. 21 at 9-10, referencing *United States v. Gas Pipe, Inc.*, No. 3:14-cr-298-M (N.D. Tex.)) Movant states that on July 20, 2018, defense counsel in *Gas Pipe*, Marlo Cadeddu, emailed Linda Sheffield, Movant's counsel in his initial § 2255 action. (Doc. 21-1 at 2) Ms. Cadeddu advised Ms. Sheffield that she was representing a defendant in a federal drug analogue case and had received from the United States what she believed might be *Brady* material in Movant's case relating to MDPV that Cadeddu suspected had been "withheld from [Movant's trial counsel] by the government." (*Id.*) Ms. Sheffield immediately responded, stating that while she was no longer representing Movant, she remained in touch with Movant and his family and would like to receive the information. (*Id.* at 3) Ms. Cadeddu responded and apparently attached copies of exhibits filed at Docs. 867-1 and 876 in the *Gas Pipe* case. (*Id.* at 3-5)

Ms. Cadeddu stated that the defense in *Gas Pipe* had learned that the FS and DCE offices within DEA "have sometimes had differing opinions about whether certain substances were in fact analogues of controlled substances." (*Id.* at 3) Ms. Cadeddu remarked that such dissenting opinions must be exculpatory because "if the DEA itself can't agree on whether a substance is substantially similar to a listed chemical, how on earth can a defendant know whether it is?" (*Id.*) Ms. Cadeddu informed Ms. Sheffield that Respondent had been "resisting" providing information regarding: (1) dissenting opinions within DEA; (2) DEA's internal lists of analogue and non-analogue substances; and documentation indicating that at some point, DEA had avoided putting evidence of internal disagreements in writing. (*Id.*) Ms. Cadeddu noted that one of the documents obtained from the DEA was a dissenting opinion by a "set of chemists within DEA" opining "that MDPV is not an analogue." (*Id.*)

Among the documents Movant obtained from defense counsel in *Gas Pipe* were a series of email messages between DEA employees within the DCE and FS offices during

2011. On April 4, 2011, DCE employee Liqun Wong emailed FS employees Lance Kvetko and David Rees requesting review and comment on a draft monograph prepared by DCE regarding the analogue status of MDPV. (*Id.* at 124) In the subject line, Ms. Wong indicated the review was for purposes of the DEA Analogue Committee and that finalization of the monograph would ensure a "uniform and consistent position from DEA" to law enforcement and prosecutors. (*Id.*) The draft MDPV monograph was dated March 2011 and concluded that MDPV was structurally substantially similar to the Schedule I controlled substance MDEA, suggested that MDPV and MDMA[12] (Ecstasy) "may share pharmacological effects," and indicated that sellers of MDPV may represent that MDPV has a substantially similar pharmacological effect to controlled substances MDEA, MDMA, or methcathinone. (*Id.* at 126-129)

In response, on April 8, 2011, FS employee Mr. Rees emailed Ms. Wong, advising that it was FS's opinion that MDEA and MDPV were "not substantially similar in structure" and provided reasons for this conclusion. (*Id.* at 136-137) Ms. Wong emailed Mr. Rees back on April 12, 2011, stating that DCE would like to schedule a meeting with FS staff to "discuss the chemistry structure comparison between MDPV and MDEA." (*Id.* at 138) Next, on April 14, 2011, Dr. Terrence Boos of DCE emailed Mr. Rees and Mr. Kvetko, among other recipients, advising them that it was DCE's intention to post the MDPV monograph despite FS's challenge to the conclusion on substantially similar structure but that DCE nevertheless intended to inform federal prosecutors of FS's position. (*Id.* at 140) Mr. Kvetko responded to Dr. Boos the same day clarifying that SF's position had not changed, and explained that he was concerned:

> that the AUSA will be provided a position from the [DEA] when no consensus has actually been reached. I cannot imagine that this is an ideal situation for the agency . . . . In the end, federal prosecutors will be left with weighing the implications and potential fallout of DEA chemists' split opinion on this matter. [FS] recommends that the monograph not be posted until consensus is reached by the committee on the issue of structural

[12] 3,4-Methylenedioxymethamphetamine. *United States v. Carlson*, 87 F.3d 440, 442 (11th Cir. 1996).

> similarity. Perhaps we can investigate whether it is structurally similar to a more appropriate substance.[13]

(*Id.*) The next day, on April 15, 2011, Dr. Boos emailed Mr. Kvetko and advised Kvetko that "[r]espectful of your opinion, [DCE] will not go forward in posting the analogue comparison at this juncture and will wait for consensus to be reached by the analogue committee with possible options." (*Id.* at 142) The DEA eventually finalized and posted a monograph concluding that MDPV was substantially similar in chemical structure and pharmacological effects to the Schedule I stimulant methcathinone. (*Id.* at 154-162) DEA listed MDPV as a Schedule I controlled substance on October 21, 2011, which meant that after that date MDPV could no longer be considered an analogue substance under the Analogue Act, but rather was a scheduled substance under the CSA. (CR Docs. 439 at 53, 455 at 21) The monograph concluding that MDPV had been considered an analogue substance to methcathinone before MDPV was listed as a Schedule I controlled substance appears to have been issued in January 2012. (Doc. 21-1 at 154-162)

Movant also includes as exhibits emails dated between July and November 2011 indicating that DCE chemists had expected challenges from FS on DCE's analogue comparisons involving synthetic cannabinoid substances that were not at issue in Movant's case. (*Id.* at 150-153)

**B. The Amended Second Motion claims are not time barred**

Respondent argues that Movant's claims are untimely under each of 28 U.S.C. § 2255(f)(1) and (f)(4). (Doc. 34 at 35-40) Under § 2255(f)(1), the one-year limitations period runs from the "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). Section 2255 does not define the term "final." The Supreme Court, however, has held that a conviction is final in the context of habeas review when "a

[13] In an online news article posted on August 2, 2019, the reporting strongly suggested that an FS chemist, Arthur Berrier, proposed that methcathinone was a more similar Schedule I controlled substance comparator to MDPV than MDEA and that DCE "apparently came around to [his] view." (Doc. 21-2 at 40)

judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Pursuant to section 2255(f)(1), the one-year statute of limitations period applicable to Movant's claims would have commenced on January 20, 2016, the day after the United States Supreme Court issued its ruling denying Movant's petition for writ of certiorari on the Ninth Circuit's adverse decision on his direct appeal, *Lane*, 136 S.Ct. at 921, and expired a year later, on January 20, 2017. If § 2255(f)(1) applies to determine the limitations period, the Amended Second Motion is untimely because it was not filed until February 28, 2019. (Doc. 4 at 1)

Under § 2255(f)(4), "[t]ime begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (discussing § 2244(d)(1)(D) and quoting *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000)).

Respondent argues that the factual predicate of Movant's claims was available to Movant no later than April 22, 2013, when the United States filed its response to a discovery motion prior to the *Daubert* hearing and trial in Movant's case. (Doc. 34 at 39, Doc. 34-2 at 2-12) Respondent asserts it disclosed to Movant that before MDPV was listed as a Schedule I controlled substance in October 2011, "DEA had opined that MDPV was both an analogue of MDEA as well as methcathinone. In light of additional information subsequently received by DEA, DEA then revised its position and opined that MDPV was an analogue of methcathinone before MDPV became a Schedule I controlled substance." (Doc. 34-2 at 7) Additionally, Respondent declares that after receiving this disclosure, Movant failed to move to compel additional materials, did not raise issues related to the disclosure in his motion for a new trial, or on appeal, or in his first § 2255 motion, and did not question Dr. DiBerardino about the proposed finding that MDPV was an analogue to MDEA either at the *Daubert* hearing or at trial. (Doc. 34 at 39)

Respondent states that near the end of trial, Movant notified the prosecution that he had become aware of a case in the Middle District of Florida in which Movant reported

there had been a dissenting opinion between DEA chemists over "whether certain synthetic cannabinoids not charged in [Movant's] case were structurally similar to a controlled substance in that case." (*Id.* at 39-40, citing *United States v. Fedida,* No. 6:12-cr-209-Orl-37DAB (M.D. Fla. May 1, 2013)) Respondent acknowledges that Movant immediately requested the prosecution via email to disclose "whether there were any dissenting assertions in [Movant's case], from either [DCE] or [FS]." (Doc. 34-19 at 2) Respondent further states that the prosecution reminded the Court that Dr. DiBerardino had testified that Analogue Committee members would "kick around ideas back and forth. And sometimes some were found not to be analogues, and other times they were." (Doc. 34 at 40, referring to Doc. 34-24 at 21, (R.T. July 18, 2013)) The prosecutor also advised the Court that it had provided Movant with "the only known information to the United States relative to this inquiry," and that after asking DEA about the existence of dissenting opinions in Movant's case, had "not learned that there is any other dissenting assertions with regard to the substances charged in our case other than that which was previously disclosed." (*Id.*, referring to Doc. 34-24 at 22) Based on these circumstances, Respondent argues that Movant's claims are time barred under § 2255(f)(4) because Movant had been "appraised of the factual predicate of his current claims in early 2013, and simply chose not to follow up . . . ." (*Id.*)

Movant contends the newly discovered evidence shows that DEA never adopted the opinion that MDPV was an analogue of MDEA, and accordingly Respondent's statement included in disclosures in January and April 2013 that DEA had opined MDPV was an analogue of both MDEA and methcathinone was false. (Doc. 39 at 3-4) Movant further declares that Respondent's representation that DEA had concluded MDPV was an analogue substance compared to MDEA, paired with Dr. DiBerardino's testimony that DEA decisions on analogue substance status were arrived at through consensus, was misleading and obscured the fact that there had been dissenting opinions within DEA about the analogue status of MDPV. (*Id.* at 4)

Movant indicates that Respondent neither disclosed nor acknowledged the existence of the internal 2011 DEA emails detailing the differing opinions within DEA regarding the draft monograph proposing MDEA as a comparator to MDPV as an analogue substance, despite Movant's specific request for such documents. Moreover, Movant urges that he had no reason after his trial to investigate for such documents because he had already requested them and the prosecution had told him on the record that it had disclosed all of the dissenting assertions regarding the substances charged in Movant's case. Accordingly, Movant argues his Amended Second Motion is timely, because he first learned of the dissenting opinions regarding the proposed analogue status of MDPV to MDEA in July 2018 and that this circumstance would require extension of the deadline to file his Motion to July 2019. (*Id.* at 7-8) Movant's second or successive § 2255 Motion was deemed filed in February 2019, within the extended deadline period. (Doc. 4 at 1)

The due diligence required under § 2255(f)(4) to discover facts supporting a claim is "reasonable diligence in the circumstances," not maximum feasible diligence. *United States v. Ndiagu*, 591 Fed.Appx. 632, 633-34 (9th Cir. 2015) (quoting *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012)). For the reasons explained below, undersigned concludes that § 2255(f)(4) applies to toll the AEDPA limitations period on Movant's claims from July 2018, when Movant first learned about the dissenting opinions within DEA specifically regarding the analogue status of MDPV.

First, Respondent's argument that it had disclosed to Movant sufficient information about dissenting opinions within DEA lacks support. Respondent's bare statements in January and April 2013 that before October 2011 DEA had opined MDPV was an analogue to both MDEA and methcathinone did not alert Movant to the existence of disagreements within DEA over whether MDPV had a substantially similar chemical structure to MDEA. (Doc. 34-1 at 13, Doc. 34-2 at 7) The additional statement disclosing that "[i]n light of additional information subsequently received by DEA, DEA then revised its position and opined that MDPV was an analogue of methcathinone[]" (*Id.*) was vague and cannot reasonably be construed to have alerted Movant to the existence of disagreements within

DEA about the proposed use of MDEA as a comparator to MDPV. Respondent has failed to show that at the time of trial and sentencing Movant knew about the conflicting DEA opinions or that he could have discovered the opinions with reasonable diligence.

Second, there is no disagreement that DEA did not disclose to Movant the DEA emails Movant eventually received from defense counsel in the *Gas Pipe* case in July 2018, after the defense in that case issued a subpoena to DEA. (Doc. 21-1 at 3)

Third, Respondent has not articulated a reason for the Court to conclude that between the time he was convicted and sentenced in 2013 to July 2018, Movant could have discovered the DEA emails through reasonable diligence under the circumstances in his case.

Instructive is a report and recommendation very recently issued in the Western District of Texas analogue drug case *United States v. Sohani*, A-19-CV-200-LY (W.D. Tex.), in which the United States asserted a time bar defense based on § 2255(f)(4). The defendants argued that Respondent had concealed for years "facts concerning the dispute within DEA about the analogue status of UR-144 and XLR-11[] [synthetic cannabinoids][] . . . concerning the chemical structure of those substances as compared to [Schedule I controlled substance] JWH-018[.]"[14] *United States v. Sohani*, A-19-CV-200-LY, 2020 WL 4704952, at **3, 5 (W.D. Tex. Aug. 12, 2020). The defendants had filed documentation of disagreements between FS and DCE in 2012 regarding the analogue status of UR-144 and XLR-11 and alleged their trial counsel were ineffective by not investigating the question of whether the substances on which they had been charged were analogue drugs. *Id.* at *2. The magistrate judge found determinative that despite the Government's failure to disclose the DEA's intra-agency analogue status dispute, prior to the defendants' guilty pleas and sentencing, there existed "publicly available [court] decisions that openly discussed all of the facts and law on which the [defendants] base their claim[.]" *Id.* at *5.

The court recognized that while "[u]nder *Brady*, prosecutors must disclose material, favorable evidence 'even if no request is made' by the defense, *United States v. Agurs*, 427

[14] None of the substances at issue in the *Sohani* matter were involved in Movant's case.

U.S. 97, 107 (1976)," *Brady* "'does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence.'" *Id.* at *5 (citing *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002)). The court allowed that although there "was much to criticize with regard to the DEA's disclosures (or lack thereof) of the disagreement between [DCE] and [FS] regarding UR-1[4]4 or XLR-11[,]" the defendants could have discovered the basis for their claims well before they entered their guilty pleas from numerous published court decisions which involved the internal DEA dispute about the analogue status of UR-144 and XLR-11. *Id.* at 6.

Circumstances similar to those presented in *Sohani* are not present in Movant's case. Undersigned has not identified any federal court decision that involves or includes any mention of the DCE and FS dispute regarding DEA's proposed finding that MDPV was an analogue to MDEA or discussion of internal dissent in DEA involving any of the substances at issue in Movant's case. Significantly, even though Respondent states that through the exercise of reasonable diligence Movant could have learned of and obtained the internal DEA emails at issue, Respondent does not suggest how Movant would have done so. Accordingly, Respondent fails to establish that Movant could have known, or through the exercise of reasonable diligence could have discovered, the DEA emails Movant ultimately received after DEA disclosed them in 2018 in an unrelated prosecution.

**C. Movant's claims are procedurally defaulted for failure to establish prejudice**

Respondent argues that Movant's failure to raise the Amended Second Motion claims in his motion for a new trial, on direct appeal, or in his initial § 2255 action bars him from raising such claims now. (Doc. 34 at 28-29) Respondent asserts that Movant has not established cause and prejudice for not raising these allegations earlier. (*Id.* at 29-30) Respondent further argues, as it does in support to a time bar above in Section IV.B, that it provided Movant with the discovery he sought before trial in the form of documents found in Respondent's Exhibits 1, 2, 4, 19, and 24, described below. (Doc. 34 at 28)

Exhibit 1 to Respondent's response is a copy of Respondent's January 8, 2013, discovery letter to defense counsel which includes the statement that "with respect to MDPV prior to October of 2011[15], DEA had opined that MDPV was both an analogue of MDEA as well as methcathinone." (Doc. 34-1 at 13) The January 2013 letter further explained that "[i]n light of additional information subsequently received by DEA, DEA then revised its position and opined that MDPV was an analogue of methcathinone before MDPV became a Schedule I controlled substance." (Doc. 34-1 at 13)

Exhibit 2 to the Government's response is its discovery letter dated April 19, 2013, in which Respondent disclosed to the defense that while DEA had for a time opined that MDPV was an analogue of both MDEA and methcathinone, it had revised its position and concluded MDPV was instead an analogue of methcathinone. (Doc. 34-2 at 7)

Exhibit 4 to the Government's response consists of material provided to Movant and his co-defendants on May 30, 2013, under its *Brady*, *Giglio*, and Jencks Act obligations. (Doc. 34-4) Among the documents included were "curriculum vitae, monographs, and declarations" associated with Dr. DiBerardino, who was the prosecution's sole expert witness on chemical structural similarity of alleged analogue substances. (Doc. 34-4 at 18)

Exhibit 19 to the Government's response is a copy of an email dated July 13, 2013, from Movant's trial counsel to the prosecutors near the end of trial stating that trial counsel had been informed:

> that in the Fedida case in Florida federal district court, the USA disclosed there was a dissenting assertion that UR-144 and JWH-018 were not substantially similar in structure. Pursuant to Brady, please disclose whether there were any dissenting assertions in [Movant's] case, either from the DEA

[15] The DEA scheduled MDPV as a controlled substance as of October 21, 2011. (CR Doc. 455 at 21)

> Office of Diversion Control, including the Drug and Chemical Evaluation Section or the Office of Forensic Science[.]

(Doc. 34-19 at 2) The next day, the prosecution emailed DEA counsel and prosecution witnesses Dr. DiBerardino and Dr. Prioleau, asking them to review defense counsel's request and to advise whether there was "such a 'dissenting assertion' with regard to the substances charged in our case (MDPV, APVP, APBP, Pentylone, Pentedrone, and MPPP/MePPP)." (Doc. 34-22 at 2) Responding to the prosecution, counsel for DEA did not address the question about the existence of any "dissenting assertion" and instead asked that defense counsel oppose the request on grounds of the deliberative process privilege. (*Id.*, Doc. 34-23 at 2)

Exhibit 24 to the Government's response is a transcript of Movant's trial day 11, just prior to closing argument. (Doc. 34-24, RT July 18, 2013) As noted, the prosecutor advised the Court of Movant's July 13, 2013, emailed disclosure request and stated that the prosecution had not "learned that there is any other dissenting assertions with regard to the substances charged in our case other than that which was previously disclosed," and that in any case the DEA had informed him "they would intend to invoke some sort of deliberative process privilege." (*Id.* at 21-22)

Movant explains that his trial counsel filed requests for disclosure and discovery as to: (1) "all reports authored by the government's experts in any analogue cases, and any input or suggested input from other persons in the DEA and/or DOJ[]"; (2) "[a]ny and all testing, raw data, charts, diagrams, reports or anything else that the experts relied on in forming the opinions and conclusions expressed in the case, including anything in these categories that was inconsistent with the relevant opinions and conclusions[]"; and (3) "[t]he personnel file and any other exculpatory or explanatory evidence regarding the two DEA experts because the information would 'assist in the cross-examination and impeachment of the government's primary witnesses,' given the importance of the credibility of their testimony." (Doc. 21 at 3-4) Movant contends that these requests and Respondent's duty pursuant to *Brady* and *United States v. Bagley*, 473 U.S. 667, 682

(1985) to disclose material favorable information would have required the disclosure of DEA emails revealing differences of opinion between DCE and FS regarding whether MDPV was an analogue of MDEA.

Movant contends that some of the testimony provided by Dr. DiBerardino, a DCE employee and prosecution witness at the *Daubert* hearing and trial in Movant's case, would have been subject to impeachment by the undisclosed April 2011 emails between DCE and FS. (Doc. 21 at 4-6, 10-16) Among Dr. DiBerardino's statements at the *Daubert* hearing cited by Movant are statements that substance analogue determinations were "highly scrutinized" within the DEA and were made "in unity," that a "monograph is the DEA's completed document identifying that a particular substance 'can be treated as a scheduled and controlled substance analogue,'" and that "when a substance is published as a monograph, [the DEA and its Analogue Committee[16]] are all in agreement." (*Id.* at 5-6)

As noted, "[w]here a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent'." *Bousley*, 523 U.S at 622 (citations omitted).

*1. Movant has established cause for not earlier raising his claims*

"[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). External factors that constitute cause include "interference by officials," or "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Id.*

[16] The DEA Analogue Committee is composed of representatives from DCE, SF, the DEA Office of Chief Counsel, and the DEA Office of Domestic Operations and "has provided coordination, support and information in investigations or cases involving potential analogues." (Doc. 33-1 at 6, Declaration of Terrence L. Boos, Section Chief of DCE) The Analogue Committee also "has shared information regarding emerging drug trends, including information that would assist DCE in prioritizing substances for scheduling, in addition to keeping abreast of developments related to analogue prosecutions and expert support offered for same." (*Id.*)

Respondent asserts that Exhibits 1, 2, 4, 19, and 24 to its response represent discovery providing notice to Movant at the time of trial of the issues he now raises. (Doc. 34 at 28) Consequently, Respondent contends that Movant's failure to raise the issues on direct appeal or in his first § 2255 habeas motion prevents Movant from establishing cause and bars him from arguing those issues now. (*Id.*) Respondent states that in January 2013, it advised defense counsel about an internal discussion within DEA over the analogue status of MDPV before MDPV was listed as a Schedule I substance. (*Id.* at 30) Notice provided to Movant, however, was merely that DEA had proposed that MDPV was an analogue of both MDEA and methcathinone and that DEA had later revised this position after receiving unspecified "additional information" and DEA subsequently opined that MDPV was an analogue of methcathinone only. (*Id.* at 31) Respondent states that despite being aware of this internal DEA decision, Movant did not cross-examine Dr. DiBerardino about the DEA's decision to change its position and drop MDEA as a listed Schedule I drug to which it had previously opined MDPV was an analogue drug. (*Id.* at 31) Respondent further declares that Movant was aware there had been dissenting opinions within DEA about the analog status of synthetic cannabinoids not involved in Movant's case that had come to light in the *Fedida* case, and heard Dr. DiBerardino's testimony that the DEA's analogue committee would "kick ideas back and forth" and that sometimes the committee would find a substance to be an analogue and other times find a substance was not an analogue. (*Id.* at 32-33)

Movant responds that while the prosecution falsely advised Movant that at some point DEA had believed that MDPV was an analogue of *both* methcathinone and MDEA, it failed to indicate there was any disagreement within DEA or to disclose any of the FS dissenting opinions on whether MDPV was an analogue of MDEA. (Doc. 39 at 1-2) Further, Movant asserts that Dr. DiBerardino inaccurately testified at the *Daubert* hearing that DEA analogue determinations required DEA-wide consensus and approval by the Analogue Committee, and that such review was supported by a very

high degree of certainty. (*Id.* at 3-4) Additionally, Movant emphasizes that during trial, he "made a specific and pointed *Brady* request" for any dissenting opinions in his case from either DCE or FS, but did not receive any of the FS opinions related to the analogue status of MDPV that were later disclosed by the United States in the *Gas Pipe* case. (*Id.* at 5)

In an email dated March 19, 2013, from Movant's trial counsel to the federal prosecutors, Movant requested disclosure related to expert witnesses disclosed by Respondent, including "all reports authored by these experts in any 'analogue' cases, and any input from other persons in the DEA and/or DOJ[.]" (CR Doc. 141-1 at 1) Movant made the same request in a discovery motion dated June 12, 2013. (CR Doc. 325 at 1) Movant states that these requests should have encompassed the draft monograph Dr. DiBerardino authored for MDPV as an analogue substance to MDEA. (Doc. 39 at 6) Movant argues that "instead of truthfully responding that . . . dissenting assertions did exist as to MDPV, but that the United States was objecting to disclosure of the documents on the grounds of deliberative process privilege, the United States affirmatively misrepresented on the record that no such documents existed (i.e., even if there were, DEA would object)." (*Id.* at 7) Movant contends that his claims cannot be subject to a procedural bar because he did not know about the DEA dissenting opinions until he obtained information from Ms. Cadeddu in July 2018 and because the United States misrepresented the existence of such dissenting opinions when responding to his requests for disclosure before and during his 2013 trial. (*Id.*) Movant asserts that his claims should not be procedurally barred merely because the United States succeeded "in hiding and misleading [him] about the existence of *Brady* evidence in his case." (*Id.* at 8)

Undersigned finds Respondent's failure to disclose the DEA emails related to the internal disagreement over whether MDPV could be an analogue to MDEA establishes cause for Movant's failure to raise a *Brady* claim before he ultimately received the documents from defense counsel in *Gas Pipe* in July 2018. *See Strickler*

*v. Greene*, 527 U.S. 263, 283-89 (1999). Despite the prosecution's statement to the Court at the conclusion of evidence in Movant's trial that the prosecution had "previously disclosed" dissenting opinions in January 2013 (Doc. 34-24 at 21-22), that disclosure in fact consisted of nothing more than the unsubstantiated statement that DEA had at some point considered MDPV as an analogue of both MDEA and methcathinone but had decided to recognize only methcathinone as the comparator to MDPV as an analogue after DEA received "additional information" (Doc. 34-2 at 7). This notice was clearly insufficient to alert Movant to the availability of the factual basis for his claims, that is, dissenting opinions within DEA regarding MDPV. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

*2. Movant has failed to establish prejudice*

To establish prejudice, Movant must "show that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Strickler*, 527 U.S. at 289. Put another way, Movant is required to "demonstrate that the disclosure withheld by the government worked to his *actual* and substantial disadvantage, infecting his entire trial with error." *Frady*, 456 U.S. at 170 (emphasis in original). "[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

Movant contends that the withheld DEA emails would have allowed important impeachment of Dr. DiBerardino's testimony at both the *Daubert* hearing and at trial. (Doc. 21 at 9-10) Movant argues that the withholding of FS's dissenting opinions on the proposal that MDEA was the comparator Schedule I controlled substance to MDPV as an analogue substance deprived him of material, exculpatory evidence prior to and during his trial. (Doc. 21 at 18) Movant further contends that the evidence withheld establishes he was imprisoned "for that which is not unlawful, while concealing voluminous evidence that two entire divisions of the DEA – [FS] and the Special Testing and Research Laboratory ["SFL1"] – dissent both from the incorrect

substance of [DCE's] analogue determinations and from [DCE's] exclusion of [FS] and SFL1 from participation in those determinations." (*Id.*) Movant asserts that the newly discovered material establishes that FS criticized DCE's use of two-dimensional diagram comparisons between unlisted substances and listed controlled substances to determine substantial structural similarity. (*Id.* at 19)

At the *Daubert* hearing, Dr. DiBerardino testified that after analogue determinations were made by the DCE group, DCE would obtain feedback from FS chemists "so that we're in unity and there's a clear decision." (CR Doc. 264 at 24 (R.T. May 14, 2013)) On cross-examination at the *Daubert* hearing, Dr. DiBerardino explained that prior to review and approval of a final monograph, he would prepare a draft document by gathering necessary information, drawing chemical structures, and performing an evaluation, after which he would have the document critiqued. (*Id.* at 45) He clarified that final posted monographs have been evaluated DEA-wide, approved by the Analogue Committee, and "we all agree that it can be treated as a scheduled and controlled substance analogue." (*Id.*) Also on cross-examination the doctor explained that feedback from FS chemists could be provided in person, email, or by phone. (*Id.* at 75) He described the process of determining that MDPV was an analogue as a decision provisionally made by DCE staff that was then considered by the Analogue Committee, which would involve consideration by FS chemists. (*Id.* at 76) Addressing errors in making analogue determinations, the doctor responded that he did not wish to say DEA never made mistakes on analogue determinations but opined there was a very high degree of certainty in such decisions. (*Id.* at 79)

Subsequently at trial, Dr. DiBerardino testified further that the process observed by DEA in deciding whether an unlisted substance is structurally substantially similar to a listed substance included "discussions and comparisons and debates, not only within our immediate section, but then we go to [FS] chemists . . . and have them also weigh in." (CR Doc. 439 at 8 (R.T. July 9, 2013)) The doctor stated that if DCE staff determined that the substance had a chemical structure substantially similar to a

Schedule I or II listed substance, they would write up a monograph for evaluation and feedback from FS chemists. (*Id.*) He explained that FS chemists may think the substance "should be compared to something else" or that "there's a problem with [the proposed] comparison." (*Id.*) Dr. DiBerardino stated that "whatever the case may be, we take their feedback and ultimately determine whether or not something is substantially similar." (*Id.*)

When asked whether during review of DCE's write up of their proposed analog substance a reviewer would disagree, the doctor responded, "Oh, yeah." (*Id.* at 13) He further related that sometimes a reviewer's opinion could be swayed and other times not. (*Id.*) He stated that generally the decisionmakers were open to other viewpoints about chemical structure similarity. (*Id.*) Dr. DiBerardino stated that "almost all the time" an unlisted substance is substantially similar in structure to more than one Schedule I or II controlled substance, but that through discussion and feedback, DEA is able to agree on a best fit. (*Id.* at 15-16)

Movant contends that the withheld internal DEA emails contradict Dr. DiBerardino's testimony at the May 14, 2013, *Daubert* hearing that a monograph is a completed document that has been "evaluated DEA-wide and approved by our Analogue Committee in that we all agree that it can be treated as a scheduled and controlled substance analogue." (CR Doc. 264 at 45) However, the only monograph involving a substance at issue at Movant's trial was the proposed monograph comparing MDPV to MDEA. The internal DEA emails demonstrate that after discussion and debate between DCE and FS chemists, DCE in fact agreed not to go forward with that proposed monograph. (Doc. 21-1 at 142) Thereafter, DEA issued a monograph comparing MDPV as an analogue substance to methcathinone and also listed MDPV as a Schedule I controlled substance in October 2011.

Movant further argues that DCE attempted to pressure FS to agree to the proposed monograph comparing MDPV to MDEA by emphasizing that there were pending MDPV cases that were scheduled to go to court soon and argues this was an

improper attempt to force FS to change its position based on prosecutorial expediency rather than on science. (Doc. 21 at 22-23, citing Doc. 21-1 at 22-26) Even assuming this evidence has any relevance to Movant's claims, the evidence is rendered irrelevant by the fact that DCE abandoned the proposed monograph comparing MDPV to MDEA and finalized a monograph indicating that MDPV, before it became a Schedule I controlled substance, was an analogue of methcathinone, which was the comparator to MDPV used by the prosecution in Movant's case.

Movant contends that Dr. DiBerardino falsely testified that an analogue determination had to be unanimous between FS and DCE. (Doc. 39 at 24) Movant indicates that evidence associated with the *Gas Pipe* case litigated in 2018 included testimony by FS staff that analogue determinations did not always require agreement between FS and DCE, and that with regard to some substances not at issue in Movant's case, DCE made analogue listing decisions that FS disagreed with or did not seek FS input. (*Id.* at 24-25)

However, Dr. DiBerardino's trial testimony revealed that DEA decisions on analogue substances in fact involved differences of opinion. He explained that in making determinations about substantially similar chemical structure between an analogue substance and a controlled substance: (1) DCE engaged in "discussions and comparisons and debates" both within DCE and with input from FS; (2) DCE would draft a monograph and send it to FS for evaluation and feedback; (3) FS may conclude that the analogue substance should be compared to a different controlled substance or that there was a problem with DCE's comparison; and (4) "whatever the case may be," DCE would take the FS feedback and "ultimately determine whether or not something is substantially similar." (Doc. 34-18 at 9)

During the following colloquy, Dr. DiBerardino described essentially the kind of disagreement between DCE and FS that occurred respecting consideration of the MDPV/MDEA proposed monograph:

> Q So you talked about doing your write-up and then getting a review. Are there times during the review process that somebody disagrees?
>
> A Oh, yeah.
>
> Q And what happens?
>
> A Well, then we discuss it. And, I mean, sometimes a disagreement may be based on -- well, it's an opinion. So the disagreement may be that the person is -- had -- could be swayed, let's say, or the person cannot be.
>
> But usually what happens, if there's one person who disagrees, we're all kind of in a -- on the fence. It's not like everybody is sure this is absolutely substantially similar and then one person thinks it's not. That's not how it usually works. So I think I'm exaggerating this scenario right now.
>
> But what happened is that we may be on the fence and then somebody will push us over and say, no, and then we will agree. Maybe not. And we will step back from that.

(*Id.* at 14)

Undersigned concludes that Movant is unable to establish prejudice arising from his claims of withholding of evidence. Any internal debate or discussion within the DEA on whether MDPV was an analogue of MDEA is not relevant to Movant's verdict because there was no dispute in Movant's case about whether MDPV was an analogue of methcathinone, which was the only Schedule I comparator to MDPV alleged in Movant's case.[17] Further, DEA's internal discussion addressing MDEA as a

[17] Movant notes that the finalized monograph opining that MDPV was an analogue to the Schedule I controlled substance methcathinone was issued in January 2012, which was after the October 2011 listing of MDPV as a Schedule I controlled substance. (Doc. 21 at 25) Movant suggests that the newly discovered emails support a "reasonable probability" that FS or other DEA chemists also could have "disagreed with the analysis in the January 2012 monograph claiming that MDPV is substantially similar in chemical structure to methcathinone." (*Id.* at 24-25) Movant offers no evidentiary support for this speculation. Additionally, Movant's own filing significantly undermines this supposition. Movant attaches to the Amended Second Motion an online news article posted in August 2019 reporting that the FS chemist identified as the expert opposing a finding that MDEA and MDPV shared a substantially similar chemical structure, Arthur Berrier, had proposed that the Schedule I controlled substance methcathinone was a more similar substance to MDPV

comparator to MDPV before MDPV became a listed Schedule I controlled substance is also not relevant on the question of whether a-PVP, a-PBP, or MPPP were analogues of MDPV after it became a listed Schedule I controlled substance in October 2011. In addition, DEA internal debates or discussions on the comparator status of synthetic cannabinoids in the *Fedida* or other cases lacks relevance in Movant's case because the internal disagreement detailed in the withheld DEA emails addressed a proposed monograph that DEA did not implement and the monograph involved the comparator Schedule I controlled substance MDEA, which was never charged in Movant's case.

Movant was charged in Count One on alleged substance analogues a-PVP, a-PBP, Pentedrone, and Pentylone in addition to MDPV. (CR Doc. 143 at 2-5) Since Movant could have been convicted on just one of the charged substances under each count but was convicted on all of the charged substances, prior internal DEA debate or discussion on whether MDPV had been an analogue of MDEA before MDPV was listed as a Schedule I controlled substance and before the DEA issued a final MDPV/methcathinone monograph is not relevant to his convictions on the other charged substances.

*3. Actual innocence*

A section 2255 movant who fails to show cause and prejudice may still obtain review of a claim on collateral attack by demonstrating the likelihood of his "actual," i.e., factual, innocence. *See Bousley*, 523 U.S. at 623; *United States v. Braswell*, 501 F.3d 1147, 1150 (9th Cir. 2007). To establish actual innocence the movant must demonstrate that, in light of all the evidence, including new evidence that might be introduced by both sides, it is more likely than not that no reasonable juror would have convicted him. *See United States v. Ratigan*, 351 F.3d 957, 964 (9th Cir. 2003) (quoting *Bousley*, 523 U.S. at 623). Movant does not argue he is factually innocent as a defense to procedural default. Moreover, for the reasons set forth above, it cannot reasonably be concluded that the evidence withheld in Movant's case would have caused a different trial result, *Strickler*,

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than MDEA was and that DCE "apparently came around to [his] view." (Doc. 21-2 at 40)

527 U.S. at 289, or infected his "entire trial with error," *Frady*, 456 U.S. at 170, or that absent the withheld evidence he failed to obtain a fair trial and a verdict worthy of confidence, *Strickler*, 527 U.S. at 290.

Because Movant has failed to establish prejudice resulting from the United States' withholding of evidence and Movant has failed to establish his actual innocence, undersigned recommends the Court find his claims are procedurally defaulted.

**D. Movant's *Brady* claims fail on the merits**

Respondent alternatively argues that Movant's claims fail on the merits. In the event the Court decides that Movant's claims are not procedurally defaulted, undersigned addresses the merits of the claims.

*Brady* imposes an obligation on the government to provide exculpatory evidence to a defendant in a criminal case. *United States v. Blanco*, 392 F.3d 382, 387 (9th Cir. 2004). Pursuant to *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment; irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. To establish a *Brady* claim, Movant must establish three elements: (1) the evidence is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the prosecutor, either willfully or inadvertently, suppressed the evidence; and (3) the accused suffered prejudice. *Strickler*, 527 U.S. at 281-82. The obligation to disclose favorable evidence to the accused extends not merely to the prosecutor, but also to government investigating agencies. *Blanco*, 392 F.3d at 393-94. "Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does." *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995).

To reiterate, before trial, Movant requested documents related to expert witnesses disclosed by Respondent, including "all reports authored by these experts in any 'analogue' cases, and any input from other persons in the DEA and/or DOJ[.]" (CR

Doc. 141-1 at 1) Movant asserts that this request should have encompassed the draft MDPV/MDEA monograph Dr. DiBerardino authored. (Doc. 39 at 6) At the end of trial, Movant requested the prosecution to disclose whether there were any dissenting opinions involving DCE or FS regarding substantial similarity in chemical structure in Movant's case. (Doc. 34-19 at 2) Because the United States did not disclose either the draft monograph or the internal DEA emails Movant has now obtained, Movant claims his due process rights under *Brady* were violated. For the reasons set forth below, undersigned finds that Movant has not established a *Brady* claim.

*1. Favorability*

Pursuant to *Brady*, evidence is favorable to an accused if it is either exculpatory or impeaching. *Strickler*, 527 U.S. at 281-82. "[E]vidence that might tend to impeach a government witness[] must be disclosed to the defense prior to trial." *United States v. Price*, 566 F.3d 900, 903 (9th Cir. 2009). It appears that the undisclosed draft MDPV-MDEA monograph that was drafted by DCE and considered by FS and the DEA Analogue Committee may have been used to impeach parts of Dr. DiBerardino's testimony, particularly to specifically address any conflict between his statements regarding a policy of agreement on decisions of substantial chemical structural similarity of substances and his testimony that DCE would consider feedback but ultimately decide the issue. The newly discovered DEA emails addressing disagreement between DCE and FS as to the draft monograph also should be considered as evidence that might tend to impeach the testimony of Dr. DiBerardino. The defense request for disclosure of any such dissenting opinions within DEA regarding any of the substances at issue in Movant's case came late in the trial. Nevertheless, if the emails had been disclosed, Dr. DiBerardino could have been recalled to address questioning arising from the emails. Because the withheld evidence may have been used to impeach Dr. DiBerardino's trial testimony, it would be considered to be favorable evidence.

. . .

. . .

*2. Suppression*

In *Brady*, the Supreme Court held that the prosecution's suppression of favorable, material evidence requested by an accused violates due process. *Brady*, 373 U.S. at 87. The prosecution's duty to disclose favorable evidence is not dependent upon a request from the accused, and even an inadvertent failure to disclose may constitute a violation. *See United States v. Agurs*, 427 U.S. 97, 107, 110 (1976). "The term 'suppression' does not describe merely overt or purposeful acts on the part of the prosecutor; sins of omission are equally within *Brady's* scope." *Price*, 566 F.3d at 907. A defendant has the "initial burden of producing some evidence to support an inference that the government possessed or knew about material favorable to the defense and failed to disclose it." *Price*, 566 F.3d at 910. The burden then shifts to Respondent to establish the prosecution "satisfied its duty to disclose all favorable evidence known to him or that he could have learned from 'others acting on the government's behalf.'" *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

Here, based on the material Movant obtained from defense counsel in *Gas Pipe*, it is apparent that DEA was aware of both the draft MDPV/MDEA monograph and the DEA emails between DCE and FS about disagreement over the chemical structural similarity. Respondent has attached the email correspondence between the prosecution and counsel for DEA after the prosecution received Movant's Saturday, July 13, 2013, emailed inquiry about whether there had been any dissent within DEA regarding Movant's case similar to the dissenting opinions involving synthetic cannabinoids UR-144 and JWH-018 recently revealed in the *Fedida* case. (Doc. 34-23 at 2-3) The next day, the prosecution forwarded the emailed request to counsel for DEA, to Dr. DiBerardino, and to the other DEA expert witness for the prosecution, Dr. Prioleau, and asked them to advise whether there was such a dissenting opinion "with regard to the substances charged in our case (MDPV, APVP, APBP, Pentylone, Pentedrone, and MPPP/MePPP)." (*Id.*) Counsel for DEA responded to the prosecution on Monday, July 15, 2013, stating: "DEA asks that you oppose this defense request. In an effort to assist, I am providing the attached memo on deliberative process

privilege for your use in responding. I have also attached a portion of the DOJ Criminal Discovery Blue Book pertaining to deliberative process privilege." (*Id.* at 2) On Wednesday, July 17, 2013, DEA counsel again emailed the prosecutor advising him that DEA continued to ask that the prosecution oppose the defense request and stated that in Movant's case "the facts upon which DEA's opinions are based have been provided to the government and the defense. The information the defense seeks goes beyond that information and impinges on the deliberative process. It is critical for agencies to have the ability to fully discuss issues as part of their deliberative processes." (*Id.*)

Also on July 17, 2013, the prosecution advised the Court at the close of evidence as follows:

> Your honor, on Saturday afternoon, [defense counsel] sent the government an e-mail asking for information related to our experts, and whether or not there are any dissenting assertions within DEA about the substances in our case. I do recall that Mr. – Dr. DiBerardino did testify that as part of the analogue committee, they'd kick around ideas back and forth. And sometimes some were found not to be analogues, and other times they were.
>
> That said, Your Honor, I do recall providing the defense in this case with the only known information to the United States relative to this inquiry back in January. That said, Your Honor, and notwithstanding the prior discovery that was provided back in January relative to [defense counsel's] request, I forwarded on Sunday the request to DEA. We have been following up on that information to that request with DEA. We have not learned that there is any other dissenting assertions with regard to the substances charged in our case other than that which was previously disclosed, and even if there were, Your Honor, DEA has informed us that they would intend to invoke some sort of deliberate process privilege.
>
> I just wanted to make that part of the record because [defense counsel's] request was not filed, it was something that he e-mailed to me over the weekend and I responded to.

(Doc. 34-24 at 21-22, CR Doc. 675 (R.T. July 18, 2013)) Based on the email correspondence between the prosecution and DEA counsel, it is unclear what the prosecution knew about the existence of the DEA emails and the draft MDPV-MDEA

analogue monogram. However, it is apparent that these documents existed at the time Movant requested them and, at a minimum, DEA, including Dr. DiBerardino, was aware of them. The Ninth Circuit instructs that the Supreme Court has been clear that suppression occurs when the government fails to disclose evidence that is "'known only to police investigators and not to the prosecutor.'" *Price,* 566 F.3d at 908 (quoting *Kyles,* 514 U.S. at 438) (additional citation and internal quotation marks omitted). Undersigned therefore concludes that the requested evidence was suppressed for the purposes of *Brady*.

*3. Prejudice/Materiality*

Although undersigned concludes that Movant has established the first two *Brady* elements regarding favorability and suppression of the evidence, he fails to establish the prejudice element, as is discussed below.

a. The parties' arguments

Movant argues that despite Respondent's affirmative duty to under *Brady* to disclose favorable material evidence, Respondent failed to disclose DEA internal email evidence that Movant has now been made aware of. Movant declares that had the newly discovered evidence been available to him before trial there is a reasonable probability that the trial results would have been favorable to him. (Doc. 21 at 34) Movant urges that the "reasons [FS] disagreed with [DCE] even on substances *not* at issue in [Movant's] case directly implicates [DCE's] analogue determinations for the substances involved in [Movant's] case." (*Id.* at 37 (emphasis in original)) Movant states that the DEA emails demonstrate that Dr. DiBerardino gave false testimony regarding whether DCE and FS chemists were in agreement about the analogue determinations of substances in his case and that he improperly used two-dimensional ("2D") instead of three-dimensional ("3D") structural comparisons to make conclusions about chemical structural similarity. (*Id.* at 38) Movant contends that had he known about the dispute within DEA involving DCE's use of 2D chemical structure comparisons and FS's use of 3D comparisons, his expert could have used such evidence to discredit Dr. DiBerardino's testimony. (*Id.*)

Movant further asserts that the fact that the undisclosed emails addressed a difference of opinion about the chemical structural similarity between MDPV and MDEA – which was not used as a Schedule I controlled substance comparator in Movant's case – does not matter because it is "the methodology used to make that determination that would have been material." (*Id.* at 39) In his reply, Movant concludes that if even DEA chemists could disagree on how to determine substantial similarity, he could not have been imputed with that knowledge. (Doc. 39 at 16)

Respondent argues that the undisclosed evidence relating to the MDPV/MDEA draft analogue monograph and the DEA internal emails are not material because the jury was charged to decide whether, before October 21, 2011, MDPV was an analogue of methcathinone and not of any other Schedule I controlled substance. (Doc. 34 at 50-51) Moreover, Respondent asserts that Movant argued at trial, again at sentencing, and then on appeal that the alleged analogue substances were closer to the Schedule V controlled substance pyrovalerone than they were to the charged comparator substances methcathinone or MDPV after it became a Schedule I controlled substance and that the Court and the Ninth Circuit rejected this argument. (*Id.*) Respondent urges that Movant's arguments about DEA's consideration of MDEA as a comparator to MDPV are as immaterial to Movant's convictions as Movant's arguments regarding pyrovalerone were found to be by the Court and by the Ninth Circuit. (*Id.* at 51)

Respondent also contends that Movant suffered no prejudice by the withholding of evidence regarding the discussion within DEA comparing MDPV to MDEA as an analogue substance. (*Id.* at 51-53) Respondent indicates that MDPV was charged as an analogue substance only in Count One, along with the other alleged analogue substances a-PVP, a-PBP, Pentedrone, and Pentylone, and that a conviction on Count One required a finding that only one of the five alleged substances was an analogue. (*Id.* at 52) As it turned out, the jury found that each of the five substances charged in Count One was a controlled substance analogue. (CR Doc. 465 at 1) Respondent argues that "any internal discussion about whether MDPV was an analogue of MDEA or methcathinone before

MDPV became a Schedule I controlled substance . . . would not have impacted [Movant's] convictions as to the other substances charged in Count One . . . or any of the substances charged in Counts Three and Five . . . ." (Doc. 34 at 51)

Further, Respondent concludes that Respondent's disclosure to Movant that DEA had considered MDPV as an analogue of both MDEA and methcathinone before abandoning MDEA as a comparator was ample notice allowing Movant to pursue the "alleged internal debate as a line of defense at trial." (*Id.* at 53-55) Additionally, Respondent argues Movant is unable to establish materiality because there is "overwhelming evidence" outside of Dr. DiBerardino's testimony proving that Movant knew the alleged substances were analogues. (*Id.* at 55-64)

b. Materiality regarding a *Brady* claim

Even in the circumstance where favorable evidence has not been disclosed by the Government, a *Brady* violation does not occur unless the evidence is material.[18] *Strickler*, 527 U.S. at 281-82. The Ninth Circuit informs that:

> [t]he Supreme Court and courts of appeals have found evidence to be "material" when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Maxwell v. Roe*, 628 F.3d 486, 509 (9th Cir. 2010) (quoting *Strickler*, 527 U.S. at 280, 119 S. Ct. 1936). "A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial." *Id.* (citing *Kyles*, 514 U.S. at 434, 115 S. Ct. 1555). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickler*, 527 U.S. at 289–90, 119 S. Ct. 1936 (quoting *Kyles*, 514 U.S. at 434, 115 S. Ct. 1555); *see Hovey*, 458 F.3d at 916. Reversal of a conviction or sentence is required only upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Williams v. Ryan*, 623 F.3d 1258, 1274 (9th Cir. 2010) (quoting *Kyles*, 514 U.S. at 435, 115 S. Ct. 1555). This

[18] The Ninth Circuit has explained that the terms "material" and "prejudicial" have been "used interchangeably in *Brady* cases. Evidence is not 'material' unless it is 'prejudicial,' and not 'prejudicial' unless it is 'material.' Thus, for *Brady* purposes, the two terms have come to have the same meaning." *Price*, 566 F.3d at 911 n.12.

> necessarily is a retrospective test, evaluating the strength of the evidence after trial has concluded.

*United States v. Olsen*, 704 F.3d 1172, 1183 (9th Cir. 2013).

c. The withheld documents do not establish Dr. DiBerardino testified falsely

Movant's arguments for a finding of a *Brady* violation center on Dr. DiBerardino's testimony. However, despite Movant's claim that Dr. DiBerardino testified falsely, consideration of DiBerardino's testimony as a whole reveals that his characterization of the DEA process to determine substantial similarity in chemical structures was not inconsistent with the newly discovered evidence relevant to Movant's case.

At the *Daubert* hearing, Dr. DiBerardino testified that a decision about substantial similarity in chemical structure within DEA relied on feedback from FS chemists "so that we're in unity and there's a clear decision" and that DEA was "pretty adamant that we all need to be in agreement." (CR Doc. 264 at 24) With regard to finalized analogue monographs, DiBerardino stated that such documents had been "evaluated DEA-wide and approved by our Analogue Committee in that we all agree that it can be treated as a scheduled and controlled substance analogue." (*Id.* at 45)

However, at trial Dr. DiBerardino further explained that the DEA process of determining analogue substances included "discussions and comparisons and debates" not just within DCE but also involving the bench chemists of FS, who would also "weigh in." (CR Doc. 439 at 8) DiBerardino stated that DCE would do a Prong One analysis of substantial similarity in chemical structure, and if it found such similarity between the analogue and comparator substances, DCE would write up a draft monograph and send it to FS for evaluation and feedback. (*Id.*) Dr. DiBerardino explicitly stated that there could be diverging opinions between DCE and FS and explained that FS might think a proposed analogue substance "should be compared to something else" or that "there's a problem with that comparison." (*Id.*) Dr. DiBerardino further testified that "[w]hatever the case may be, we take their feedback and ultimately determine whether or not something is

substantially similar." (*Id.*) He stated that after DCE drafted a monograph, it would have discussion to "make sure that everybody is onboard." (*Id.* at 12) Dr. DiBerardino declared that during review of a draft monograph there were times that somebody would disagree and during the ensuing discussion the person with a contrary opinion may or may not "be swayed." (*Id.* at 13)

Dr. DiBerardino's trial testimony is consistent with a June 2, 2020, declaration of Terrance L. Boos, Section Chief of DCE filed by Respondent as an exhibit to the response in opposition to Movant's motion for discovery (Doc. 33). Dr. Boos declared that DEA does not have "set criteria" in determining whether a substance meets the definition for an analogue prosecution. (Doc. 33-1 at 6) Dr. Boos explained that "each new substance is researched and evaluated, individually; chemical structure confirmation, analysis, and review are confined within knowledge, concepts, and techniques well-accepted in the field of chemistry." (*Id.*) Dr. Boos further detailed that if DEA chemists "are unanimous that that the substance has a substantially similar chemical structure to a Schedule I or II substance and can support treatment under the analogue provision," the substance will be evaluated by DEA pharmacologists for pharmacological effects substantially similar to a Schedule I or II substance. (*Id.* at 6-7) Dr. Boos also declared that if DEA pharmacologists unanimously agree that a substance has substantially similar pharmacological effects to a Schedule I or II substance, a monograph is completed "for internal reference that provides a general summary of the scientific opinion of [DCE] on the scientific prongs of the Analogue Act." (*Id.* at 7) Dr. Boos emphasized that the decision within [DCE] "must be unanimous; if one chemist or pharmacologist within [DCE] does not agree on substantial similarity, DEA will not provide expert support for investigations or prosecutions of that substance under the Analogue Act." (*Id.*) Dr. Boos further explained that when DCE evaluates structural similarity, it "may consult" with other representatives of the Analogue Committee, including [FS] representatives and may forward a draft monograph to [FS] for review and comment. (*Id.*) He clarified that "there is no standard protocol prescribing when and how [DCE] seeks consultation from [FS] and [FS] may not be consulted about

every substance."[19] (*Id.*) In circumstances where FS is consulted, Dr. Boos stated that there may be "discussion" and "conversation" about which scheduled substance a subject substance should be compared, particularly in circumstances where a subject substance could "fairly be compared to more than one Schedule I or II substance." (*Id.* at 7-8)

Movant contrasts DEA employee testimony in *Gas Pipe* with portions of Dr. DiBerardino's testimony in Movant's case in which DiBerardino discussed the process of determining substantial similarity in chemical structure and the finalization of a monograph on an analogue substance. (Doc. 39 at 24-25) Movant concludes that "Dr. DiBerardino's false testimony painted a picture for the jury of a strong consensus and high degree of certainty among the DEA's chemists on analogue determinations that we now know did not actually exist." (*Id.* at 25-26)

Specifically, Movant discusses the August 2018 testimony in the *Gas Pipe* case of David Rees, a chemist with FS. (Doc. 39 at 24-26) Movant states that Mr. Rees testified that an analogue decision did not have to be unanimous between DCE and FS and that DCE made the decision as to whether a proposed analogue substance was substantially structurally similar while FS "just gave their opinion from their point of view." (Doc. 39 at 24) This statement is actually consistent with Dr. DiBerardino's trial testimony that DCE would take FS's feedback and "ultimately determine whether or not something is substantially similar." (CR Doc. 439 at 8). DiBerardino's testimony at the *Daubert* hearing that DCE sought feedback from FS to obtain unity on decisions on analogue determinations and that DEA was "pretty adamant" that analogue decisions be the result of agreement (CR Doc. 264 at 24) must be considered together with his trial testimony that FS and DCE did not, in fact, always agree on analogue determinations (CR Doc. 439 at 8). Dr. DiBerardino advised that despite discussion aimed to ensure that "everybody is onboard," agreement was not always possible when opposing viewpoints could not be "swayed" and that DCE may ultimately make the substantial similarity decision. Dr.

[19] This statement is consistent with Dr. Boos' testimony at a pretrial evidentiary hearing held in *United States v. Way*, Case No. 1:14-cr-0101-DAD-BAM, 2018 WL 2229272, at *11 (E.D. Cal. May 16, 2018).

DiBerardino's testimony at the *Daubert* hearing and at trial is not inherently contradictory. Further, if the defense believed DiBerardino's trial testimony was inconsistent with his *Daubert* hearing statements, it could have challenged any inconsistencies while DiBerardino testified at trial but chose not to do so.

Mr. Rees was questioned in *Gas Pipe* about the April 14, 2011, email (Doc. 21-1 at 143) from Terrence Boos in which he advised FS that DCE intended to post the MDPV-MDEA monograph unless DCE heard otherwise.[20] When asked whether during this time the Analogue Committee would proceed to finalize a monograph "only by unanimity," Mr. Rees said he did not think that was the case, because it was DCE's duty to decide whether something was structurally similar, and that FS just gave their opinion from their point of view. (Doc. 23-1 at 27-28 (Sealed)) This statement is consistent with Dr. DiBerardino's testimony that DCE obtained feedback from FS and then DCE would determine whether or not a substance was substantially similar. (CR Doc. 439 at 8) Mr. Rees stated that he did not recall how the issue of MDPV as an analogue was resolved. (Doc. 23-1 at 29 (Sealed))

Movant also asserts that in the *Gas Pipe* case, Mr. Rees testified that in April 2012, FS disagreed with DCE about the substantial similarity decision for UR-144, a synthetic cannabinoid, but DCE listed UR-144 as an analogue without FS concurrence. (Doc. 39 at 24) As noted, neither UR-144 nor any synthetic cannabinoid was charged in Movant's case. Additionally, this circumstance did not contradict Dr. DiBerardino's statement that DCE would take FS feedback and make the ultimate decision about substantial similarity.

Additionally, Movant claims Dr. DiBerardino lied during questioning at the *Daubert* hearing when he was asked on cross-examination:

> Q When, meaning approximate date, did DEA make a determination or the conclusion that MDPV was an analogue under the Analogue Act?

[20] As noted, the next day Dr. Boos advised FS that owing to FS's opinion that MDPV and MDEA did not share a substantially similar chemical structure, DCE would not post the draft monograph and would instead wait for consensus to be reached. (Doc. 21-1 at 142)

A Are you asking then when did we go through the process? Not when the substance became an analogue, but when we went through the process of analyzing it as an analogue?
Q Yes.

A I believe that was in and around the 2010 time frame. 2011. Around there.

(Doc. 34-3 at 51-52) The evidence indicates that most of the activity surrounding the promulgation of the draft MDPV/MDEA monograph occurred in 2011, and the finalized MDPV/methcathinone monograph was released no later than January 2012. Based on this evidence, Dr. DiBerardino's testimony was factual.

Significantly, neither the evidence in Movant's case nor the withheld DEA internal emails contradict the conclusion that after FS refused to agree with DCE that MDPV shared a substantially similar chemical structure with MDEA, DCE withdrew the proposed MDPV/MDEA monograph and later finalized a monograph concluding that prior to MDPV's listing as a Schedule I controlled substance in October 2011, MDPV was an analogue of methcathinone. Movant was not prosecuted on MDPV as an analogue to MDEA, but rather as an analogue of methcathinone.

As noted, Movant observes that Dr. DiBerardino testified that DCE used 2D chemical structure depictions to determine substantial similarity and concluded that 2D analysis is adequate to make that determination. (Doc. 21 at 38) Movant asserts this testimony was false, because DiBerardino was aware at that time that FS utilized 3D assessments to determine structural similarity. (*Id.*) Movant contends that Dr. DiBerardino's incomplete testimony demonstrates that Movant did not receive a fair trial or a verdict worthy of confidence. (*Id.*)

On direct examination, Dr. DiBerardino described his assessment of chemical structure using 2D diagrams and stated he used 2D diagrams because they are "the standard method of communication between chemists." (CR Doc. 439 at 17) DiBerardino testified that earlier in his career, he had used 3D models to explain chemical structure of

substances, but that over time he came to realize that a chemist could convey the necessary information using 2D representation only. (*Id.* at 17-18) Dr. DiBerardino declared that 3D models are preferred for use in pharmaceutical drug discovery and in academia for medicinal studies of pharmaceutical response within specific parts of the body, but that relevant to the Prong One determination of chemical structure, a 2D model represents and conveys the necessary information from a 3D model. (*Id.* at 19-22) DiBerardino explained that use of 2D representation may require visualization of what is present in a 3D image, but stated that molecular components within the third dimension are readily communicated in a 2D drawing. (*Id.* at 23, 27-28) Dr. DiBerardino opined that there is a greater chance of misrepresentation of structure using a 3D model than using a 2D model. (*Id.* at 33-34)

On cross-examination, defense counsel questioned Dr. DiBerardino about defense expert witness testimony by chemists at the *Daubert* hearing that 3D models are preferable to 2D models. (*Id*. at 94, 96-97) Defense counsel questioned DiBerardino about aspects of chemical structure addressing molecular structure and electron charges, implying that these are necessary considerations to properly assess differences in chemical structure. (*Id.* at 97-104) Defense expert Dr. Cozzi testified at trial that chemists use 2D diagrams as "shorthand" for structure and twice declared that chemists do not use 2D diagrams to draw conclusions. (CR Doc. 674 at 107, 170)

In closing argument, defense counsel referred to Dr. DiBerardino's testimony as inadequate and noted that defense experts opined in connection with the *Daubert* hearing that 2D "stick figure" comparisons are "not science." (CR Doc. 675 at 103-104) Defense counsel argued that "true scientists . . . do not use 2D models except in the most elementary way." (*Id.* at 105) Defense counsel also asserted that 2D models are misrepresentative because they do not "show molecular structure and electrical circuitry, and all of things that go on with actual chemicals that exist in our universe that are always moving, and that must be looked at in order to understand them in that fashion." (*Id.*) Discussing the substances at issue in Movant's case, cathinones, defense counsel stated that of the thousands of cathinone substances, some have effects and some do not, but to analyze

"them in 2D models, there is just no way scientifically to make that determination." (*Id.* at 111)

Federal courts have repeatedly recognized in analogue cases that both 2D and 3D analyses of substantial similarity in chemical structure are acceptable. In *United States v. Lawton*, the District of Vermont recognized that "[t]he government focuses upon a two-dimensional model, while defendants prefer a three-dimensional perspective. As the district court found in *Bays*, 'there is no one avenue that an expert must take to determine whether two chemical compounds are substantially similar.'" *United States v. Lawton*, 84 F.Supp.3d 331, 339 (D. Vt. 2015) (quoting *United States v. Bays*, No. 3:13-CR-0357-B, 2014 WL 3764876, at *7 (N.D. Tex. July 31, 2014) (citing as examples *United States v. Ansaldi*, 372 F.3d 118, 123-24 (2d Cir. 2004) and *United States v. Roberts*, 363 F.3d 118, 124-27 (2d Cir. 2004)). *See also United States v. Reulet*, No. 14-40005-DDC, 2015 WL 7776876, at * 11 (D. Kan. 2015) ("'[T]wo-dimensional modeling is a reliable method of comparing the chemical structure of two chemical compounds.'") (quoting *Bays*, 2014 WL 3764876, at *8 and citing *Lawton*, 84 F.Supp.3d at 335 and *United States v. Fedida*, 942 F.Supp.2d 1270, 1279 (M.D. Fla. 2013)).

The record demonstrates that Dr. DiBerardino did not testify falsely with regard to DCE's use of 2D diagrams and models to determine substantial similarity in chemical structure of substances. It is clear that had DEA disclosed the draft MDPV/MDEA monograph and particularly the internal DEA emails, Movant's defense counsel would have questioned Dr. DiBerardino about DCE's use of 2D models in light of FS' use of 3D models, and that such questioning and possible testimony by FS chemists for the defense likely would have carried greater weight with the jury than did the testimony of compensated expert witnesses who were not current DEA employees. Nevertheless, DiBerardino's testimony as to the utility of 2D diagrams and modeling was forcefully challenged by the trial defense, and evidence and testimony regarding FS preference for and use of 3D diagrams and models would have been cumulative to an extent.

Movant further states there was testimony in the withheld *Gas Pipe* materials that the Analogue Committee approved a monograph for a substance that FS did not agree was an analogue. (Doc. 39. at 24, citing Doc. 23-1 at 43 (Sealed)) The witness apparently worked for FS but is not identified in the excerpted *Gas Pipe* transcript. (Doc. 23-1 at 43-44 (Sealed)) The witness recalled a single instance where the monograph involved a synthetic cannabinoid substance, UR-144, and explained that because DCE was "the authoritative body within the DEA to make that determination [approving an analogue substance monograph]," he could "only assume that [DCE] knew" of FS's opposition to approval of the monograph. (Doc. 23-1 at 43-44 (Sealed)) There is no indication in the excerpt of the *Gas Pipe* transcript of when this decision occurred. The monograph, involving UR-144, was not one at issue in Movant's case. Although this evidence could be viewed as undercutting DiBerardino's statements about the need for agreement and unity in decisions on substantial similarity, the evidence is consistent with DiBerardino's testimony that DCE would "ultimately determine whether or not something is substantially similar." (CR Doc. 439 at 8).

Movant also declares that from 2011 to 2014 there were some monographs that DCE did not send to FS for review. (Doc. 39 at 25, citing Doc. 23-1 at 57-58 (Sealed)) The testimony to which Movant cites appears to be an examination of Dr. Terrance Boos of DCE, in which Dr. Boos was asked whether Boos was aware of any monographs that were not sent to FS during the 2011 to 2014 time period. (Doc. 23-1 at 57 (Sealed)) The only instance Dr. Boos could recall involved XLR-11, a synthetic cannabinoid. (*Id.*) Dr. Boos declared that he "had no idea why" the monograph was not sent to FS. (*Id.* at 58)

Movant also speculates that there could have been disagreement between DCE and FS regarding the finalized MDPV/methcathinone monograph. However, the online article Movant has attached as an exhibit to the Amended Second Motion suggests that DCE "came around to [FS's] view" (Doc. 21-2 at 40), and Dr. Boos in his declaration expressly avers that FS "affirmatively suggested using methcathinone as a comparator" to MDPV and that "all chemists within [DCE] evaluated the chemical structure of MDPV relative to

methcathinone and agreed that methcathinone could be supported under a substantially similar prong one analysis." (Doc. 33-1 at 9)

For the reasons set forth above, undersigned concludes that Movant has failed to establish that the withheld evidence demonstrates that Dr. DiBerardino's testimony in Movant's case was false.

d. Caselaw from other jurisdictions cited by Movant

Movant cites to the outcomes in four analogue substance cases in which he alleges similar evidence to that withheld in his case was provided prior to trial and argues that if the DEA email evidence had not been withheld, he would have obtained a favorable verdict. (*Id.* at 34-39) These cases are addressed below.

In *United States v. Stockton*, the magistrate judge ruled on a defendants' joint motion to compel discovery in a case charging conspiracy to distribute and distributing synthetic cannabinoids that the government alleged were analogues of the Schedule I controlled substance JWH-018, also a synthetic cannabinoid. *United States v. Stockton*, Cr. No. 13-571 MCA, 2015 WL 13662858 (D.N.M. June 1, 2015). The defendants sought to compel the government to disclose documents relating to "all analogue determinations the DEA has made, including "'internal DEA emails that discuss analogue determinations,' and 'any documents that reflect an opinion that a substance should not be treated as an analogue' or does not meet the criteria for an analogue." *Id.* at *10. The magistrate judge found "potentially exculpatory, material to preparing a defense, and subject to disclosure under Rule 16(a)(1)(E)(i)" "items evidencing internal DEA discussions in which anyone expressed any doubt or dissent regarding, or questioned or challenged the reasoning of, a determination that a charged substance meets the criteria of a controlled substance analogue[,]" where "the substance under discussion was one which the Defendants are charged with conspiring to distribute or distributing[.]" *Id.* The court found that evidence regarding internal dissenting discussions about non-charged substances was not material. *Id.*

The evidence the DEA failed to disclose in Movant's case involved the substance MDPV that had been proposed within DEA to be an analogue to MDEA, which was ultimately rejected by DEA as a comparator for MDPV. Instead, the DEA concluded that methcathinone was a better comparator to MDPV. MDEA was not used as a comparator to MDPV in Movant's case. *Stockton* does not support Movant's position because the FS dissent in Movant's case was over MDPV compared to MDEA rather than to methcathinone, the comparator Schedule I controlled substance on which Movant was charged.

Movant also cites *United States v. Broombaugh*[21], No. 14-40005-DDC, 2017 WL 712795 (D. Kan. Feb. 23, 2017) in which Movant says the government sought to suppress "evidence of internal conflicts within the DEA as to how to determine which substances were analogues, whether substances found by (DCE) to be analogues were in fact analogues, and the processes involved." (Doc. 21 at 35) The defendant in *Broombaugh* filed motions to compel, the government opposed the motions, and the court ordered the government to produce materials and allowed subpoenas for DEA witnesses. (*Id.*) Movant states that in *Broombaugh*, the government produced materials that were used in trial, that DEA witnesses testified, and that defendant was acquitted of all charges. (*Id.*) The district court in *Broombaugh* explained that the record included emails from March and April 2012 documenting a disagreement between FS and DCE, in which DCE's position apparently was that the synthetic cannabinoid substance UR-144 was substantially similar in chemical structure to the Schedule I controlled substance JWH-018, while FS opined that UR-144 and JWH-018 were not substantially similar in chemical structure. *Broombaugh*, 2017 WL 712795, at *1. The defendant sought to compel additional documents including "a document describing the Analogue Committee protocol for determining that a substance is an analogue," an internal DEA list of substances that DEA had decided were analogues,

[21] The cited memorandum and order is captioned *United States v. Adams*, using the name of defendant Broombaugh's co-defendant. For purposes of consistency with the pleadings and because the cited decision is on defendant Broombaugh's motion to compel and motion for subpoenas, undersigned refers to the case as *United States v. Broombaugh* for purposes of this report and recommendation.

and a "running list" that "purportedly tracked substances added to the DEA analogue list in violation of analogue-committee protocol." *Id.* In granting the defendant's motion to compel, the court stated:

> The court grants defendant's Motion to Compel the DEA documents. The court finds that the documents are material to the defense. Title 21 U.S.C. § 802(32)(A) defines a controlled substance analogue, in part, as one "the chemical structure of which is substantially similar to the chemical structure of a controlled substance." And, under binding precedent, the government must prove beyond a reasonable doubt that defendant *knew* the substances listed in the indictment had a "substantially similar chemical structure" to a controlled substance. *See McFadden v. United States*, 135 S. Ct. 2298 (2015); *United States v. Makkar*, 810 F.3d 1139 (10th Cir. 2015). So, while UR-144's placement on a purported list as a controlled substance analogue does not determine defendant's culpability under the CSSA, what defendants knew or did not know about UR-144's chemical structure is a central issue in this case. If sophisticated chemists at the DEA disagreed over UR-144's chemical structure and whether it was substantially similar to that of a controlled substance, their disagreement—if indeed they disagreed—may make it less probable that defendants knew the answer to this central question.

*Id.* at * 2. In Movant's case, in contrast, there is no evidence there was any disagreement between the DEA chemists over the structural chemical similarity between the purported analogue substances charged and the Schedule I controlled substances to which the purported analogues were compared.

In *United States v. Williams*, several co-defendants were charged with crimes involving synthetic cannabinoids that were controlled substance analogues. *United States v. Williams*, No. 13-00236-01/03-CR-W-DGK, 2017 WL 1856081, at *1 (W.D. Mo. Apr. 7, 2017). The various substances charged as analogues were compared to JWH-018, a Schedule I controlled substance. *Id.* at *3. The defendant moved for subpoenas to obtain documents "indicating any internal disagreement within the DEA, including [FS], as to whether any purported analogue listed in the Superseding Indictment has a chemical structure substantially similar to a Schedule I or II controlled substance . . . ." *United States v. Williams*, No. 13-00236-01-CR-W-SRB, ECF Dkt. 250 at p.1 (W.D. Mo. June 13,

2017). The Western District of Missouri, relying on the holding in *Broombaugh* discussed above, ordered the government to produce dissenting opinions related to "internal disagreement in the DEA over the evaluation of UR-144, XLR-11 and other unidentified controlled substance analogues[.]" *Id.* at 7. The court concluded that a disagreement between DEA chemists on whether the chemical structures of charged analogues were substantially similar to the structure of a scheduled controlled substance "may make it less probable that [the defendant] knew the answer to this central question." *Id.* As with *Stockton* and *Broombaugh*, *Williams* involved internal DEA disagreement over the structural similarity between charged analogues and a specific comparator Schedule I or II controlled substance charged in the case.

Movant also discusses *United States v. Gas Pipe, Inc.*, the 2014 case heard by the Northern District of Texas which was the source of the documents obtained by Movant in 2018. *Gas Pipe* involved charges on the sale of synthetic cannabinoids that were alleged to be a controlled substance or controlled substance analogue. *United States v. Real Prop. Located at 1407 N. Collins St., Arlington, Tex.*, 901 F.3d 268, 271 (5th Cir. 2018). The defendants issued a Federal Rule of Criminal Procedure 17(c) subpoena to the DEA to produce a variety of documents. *United States v. Gas Pipe, Inc.*, No. 3:14-cr-298-M, 2018 WL 5262361, at *1 (N.D. Tex. June 18, 2018). The court addressed the Government's motion to quash defendants' request for "'[a]ny documents reflecting knowledge by [DCE] or analogue committee that [FS] disagreed with, dissented from, objected to, or declined to join in, an opinion of [DCE] that a chemical compound is a controlled substance analogue.'" *Id.* at *3. The court concluded, without further explanation, that the defendants had "shown with adequate specificity that the documents sought . . ., even if they relate to substances not at issue in the indictment, would be relevant and may be admissible and are requested with adequate specificity." *Id.*

The *Gas Pipe* court's grant of a subpoena for documents unrelated to substances not at issue in the indictment is out of step with the holdings in *Stockton, Broombaugh,* and *Williams*, where in each case the alleged substance analogues were compared to the

Schedule I controlled substance JWH-018. *Stockton*, 2015 WL 13662858, at *1; *Broombaugh*, 2017 WL 712795, at *1; *Williams*, 2017 WL 1856081, at *3. *Stockton*, *Broombaugh*, and *Williams* are also consistent with the decision announced by the Southern District of New York in *United States v. Nashash*, in which the court considered the defendants' motion for discovery pursuant to Federal Rule of Criminal Procedure 16 of information regarding the Government's classification of the substances UR-144 and XLR-11 as analogues of JWH-018. *United States v. Nashash*, No. 12 CR 00778(PAC), 2014 WL 169743, at *1 (S.D.N.Y. Jan. 15, 2014). The court noted that a defense motion cited "an internal DEA email where a special forensics lab concluded that 'UR-144 and JWH-018 are not substantially similar in structure and are not Analogues.'" *Id.* The court declared that if "the Government is in possession of documents showing that these substances are not substantially similar to JWH-018, that information bears directly on the Defendants' guilt[]" and would be material to their defense. *Id.* In contrast, here Movant attempts to attack his conviction by relying on documents related to MDEA, a Schedule I controlled substance that was not used as a comparator to any of the alleged analogue substances in Movant's prosecution. That DCE and FS could not agree on the structural similarity between MDPV and MDEA would have no bearing on Movant's knowledge about the structural similarity between MDPV and methcathinone, on which there is no evidence of a dispute within DEA.

e. *United States v. Way*

The Ninth Circuit recently issued an unpublished memorandum decision in an analogue case on the defendant's appeal of his convictions in which the court concluded that evidence of disagreement within DEA about whether substances are analogues is not relevant to the determination of analogue status of a substance, because the Analogue Act delegates that decision to a judge or jury. *United States v. Way*, 804 Fed.Appx. 504, 509 (9th Cir. 2020), *cert. denied*, *Way v. United States*, __S.Ct. __, 2020 WL 5883373 (Oct. 5, 2020). The Ninth Circuit found the Eastern District of California had not abused its discretion when it declined to order further discovery into internal DEA decision-making.

*Id.* at 508-09. The documents requested were intended to be used for "impeachment related to the methodology used by DEA to determine [whether] a substance is 'structurally similar[.]'" *United States v. Way*, Case No. 1:14-cr-0101-DAD-BAM (E.D. Cal. Mar. 12, 2018), Min. Order (ECF No. 449).

The Ninth Circuit found that testimony by DEA employee Dr. Boos indicated the Government did not possess the requested documents. *Id.* The court further concluded that the defendant/appellant had failed to "establish materiality because the Analogue Act cases require the jury to decide whether a substance is a controlled substance analogue based on the expert testimony presented at trial. DEA's internal decisions to treat the substances at issue as analogues would thus not help [defendant/appellant] prepare a defense." *Id.* at 509. Additionally, the Ninth Circuit held the district court did not err by disallowing testimony regarding DEA's internal processes for determining what are controlled substance analogue drugs. *Id.* The court agreed with the district court's ruling that "since the jury would decide what was a controlled substance analogue, any internal DEA disagreement as to whether 5-F-UR-144 was an analogue was irrelevant." *Id.*

Although the *Way* decision is unpublished and nonprecedential, if the Ninth Circuit's reasoning in *Way* is applied to Movant's case, none of the withheld evidence would be material under *Brady* except perhaps to the extent that it was used to impeach Dr. DiBerardino's testimony, because DiBerardino was the prosecution's sole expert on the question of substantial similarity of chemical structure. As is discussed above in Section IV.D.3.d, the withheld materials do not establish that Dr. DiBerardino's testimony was false.

f. Movant's reply argument regarding a-PPP

In his reply, Movant contends that the newly discovered evidence from *Gas Pipe* might suggest the existence of DEA internal dissents regarding a substance not charged in Movant's case, a-PPP. (Doc. 39 at 16-21) In the United States' response it stated that while Colin Stratford worked to identify a replacement substance for MDPV, he experimented

using both a-PVP and a-PPP and initially selected a-PPP.[22] (Doc. 34 at 18) In a footnote within its response, the United States noted that a-PPP was "less potent than other substances" at issue in the case and "was not alleged in this case to be an analogue of any schedule I or schedule II controlled substance." (*Id.* at 18, n.7) Among the evidence Movant obtained from defense counsel in *Gas Pipe* is a list of "Controlled Substance Analogues" apparently created by the DEA. (Doc. 39-1 at 36-41) The list is labeled as "DEA sensitive for internal use only" and instructs that "[t]he issue of whether a substance is a 'controlled substance analogue' is an issue of fact which must be determined by a judge or jury." (*Id.* at 36) Although undated, the list includes notations indicating that the list was produced no earlier than November 14, 2016. (*Id.* at 38) The list indicates that a-PPP is a probable analogue of MDPV. (*Id.* at 41)

Movant has also attached a list that appears to have been created by DEA entitled "Library of Scientific Opinions." (*Id.* at 43-48) The list apparently refers to substances for which DCE opinions were available. (*Id.* at 43) A notation below the header of the list indicates that "[DCE] may be able to provide expert testimony for the following substances. Please contact [DCE] or the Office of Chief Counsel (CCO) for further assistance." (*Id.*) The list is not dated, but notations within the list indicate that the list was produced no earlier than November 3, 2017. (*Id.* at 45) The substance a-PPP appears on the list. (*Id.* at 47) Movant indicates that "[i]t is unknown how [a]-PPP was determined to be less potent than MDPV in 2012/2013, but later determined by [DCE] to have a substantially similar or greater effect than [comparator controlled substance] MDPV." (Doc. 39 at 17) Movant concludes that it "is possible the discrepancy involves a dissenting opinion or other exculpatory evidence that could have been beneficial to [Movant's] case." (*Id.*)

Movant argues that if his defense had known that the prosecution had not charged him with a-PPP as an analogue substance because it was "less potent than other substances at issue," this might have assisted his case. (*Id.* at 17) Movant asserts that if his defense

[22] Stratford testified that he initially selected a-PPP as a replacement substance for MDPV because he "figured it was safer, less neurotoxic." (Doc. 34-6 at 53)

had been aware that DEA had determined that a-PPP was not an analogue substance to any of the comparator controlled substances, this determination might have supported the argument that "all of the other substances charged in [Movant's] case" having a substantially similar chemical structure to MDPV were also less potent" and thus failed the Prong Two requirement. (*Id.* at 17-18) Additionally, Movant contends that if DEA subsequently determined that a-PPP is an analogue of MDPV, that likely would have entailed discussion and a decision that a-PPP and MDPV had comparable potencies. (*Id.* at 19) Movant suggests that such discussions could "have had value in challenging the substances [Movant] was charged with." (*Id.*)

Movant's argument is premised on the assumption that Respondent's statement in footnote 7 that a-PPP was "[l]ess potent than other substances at issue in this case" signified a DEA conclusion about the analogue status of a-PPP at the time Movant was charged. The statement, taken in context within the record and Respondent's discussion in the response, is not reasonably interpreted to signify any official conclusion by DEA, but rather appears to be an explanation merely noting that the prosecution did not charge Movant on a-PPP. As is discussed above, because a-PPP was not charged in Movant's case, evidence that allegedly was not disclosed to Movant regarding the analogue status of a-PPP is not material. Furthermore, it should be noted that the lists Movant obtained regarding controlled substance analogues and library of scientific opinions were created well after Movant's trial, conviction, sentencing and appeal were completed.

g. Substantial evidence Movant knew the charged substances were controlled substance analogues

The record contains considerable evidence supporting a conclusion that Movant knew the substances that he obtained, developed, marketed, or sold, and that were the subject of the charges against him, were Analogue Act substances. The record clearly indicates that Movant was not only aware of the Analogue Act, but that he discussed it with numerous persons within his orbit. For example, prosecution witness Colin Stratford, a chemist and Movant's employee at Dynamic Distribution, described his discussions with

Movant about the Analogue Act, including possible ways to sell products and avoid prosecution, as follows:

> Q Now, I'm going to back up for a second, sir. During the course of your relationship with [Movant], did you ever hear or learn about the Analogue Act?
>
> A Yes.
>
> Q Did you ever talk about that with [Movant]?
>
> A Yes.
>
> Q And what did you talk about the analogue act with [Movant] about [sic]?
>
> A The reason that we were able to sell these products was based off the federal analogue act. Basically the stipulations in the federal analogue act, if you adhere to them in a certain way, you might be able to skirt around the law.
>
> Q And what stipulation are you talking about?
>
> A Mainly the "not for consumption" clause, if that's what you would call it.
>
> Q And you discussed this with [Movant]?
>
> A Yes.
>
> Q How did you find your way to the federal analogue act? Who pointed you in that direction?
>
> A [Movant].

(Doc. 34-6 at 44-45) Mr. Stratford testified that he trained sales persons associated with Movant's enterprise, Dynamic Distribution, about "a brief overview of the federal analogue act, "how legally you shouldn't describe the effects, you can't compare it to other banned substances, and any other relevant general information to protect yourself from the

law enforcement." (*Id.* at 68) Mr. Stratford testified that he and Movant placed the "not for human consumption' label on their "White Water Rapid" product. (*Id.* at 51)

In an email dated June 12, 2011, from Movant to an associate named Gil Bresnick, apparently addressing a request from potential purchasers for guidance on how to take "8ball," Movant stated that "[e]veryone that is involved in sales at 8ballz has been lectured and warned as to the consequences of the Analog Act." (Doc. 34-7 at 2-3) In another email to Gil Bresnick dated July 16, 2011, Movant referenced a news article and stated he had read the article and suggested that "another reason those cats got pinched is through the Analog Act (they sold it as a drug and explained how to use it)." (Doc. 34-8 at 2)

In a December 2011 email, Movant discussed the status of proposed federal legislation, "HR 1254," and commented that "MDPV is an analogue of [a substance Movant had identified as "Proferring"] and pvp is an analogue of mdpv." (Doc. 34-11 at 2) Movant further stated that "if the bill is signed by the [P]resident all but 2 products we carry are gone." (*Id.* at 3) In February 2012, Movant emailed an individual named Larry requesting information regarding the status of a-PBP and a-PVP pending a ban on sales of chemicals in Nevada. (Doc. 34-29 at 2-4) Movant included in his email a summary of information about both a-PBP and a-PVP including their chemical names and formulas, statements that a-PBP is considered a homologue of both a-PVP and a-PPP, a description of their individual stimulant effects, and the statement that a-PVP "is a legal substitution of MDPV."[23] (*Id.*) Movant's email also included the statement that "[c]hemical companies also warn you that a-PVP is not for human consumption it can be used for the purposes of chemical research only. It can damage your health if consumed." (*Id.* at 4) In March 2012, Movant emailed Scott Stone and with regard to a drug named desoxypipradrol (DPMP) noted that this drug "doesn't belong to any list of banned research chemicals in any country. In many countries its use is not controlled by authorities or by Federal Laws or Analogue Acts." (*Id.* at 5-6)

[23] Movant's email was dated well after MDPV was listed as a Schedule I controlled substance.

Importantly, Movant also was directly informed by federal agencies that substances he had been purchasing and using in his products were illegal analogue substances. In March 2012, Movant received a letter from the U.S. Customs and Border Protection agency ("CBP") advising him that his order from China for a-PVP had been seized and that this substance was a "controlled substance analogue" pursuant to 21 U.S.C. § 813. (Doc. 34-17 at 2) In May 2012, CBP again wrote Movant notifying him they had seized a shipment of a-PBP and a-PVP from China and advised him these substances were controlled substance analogues under § 813. (*Id.* at 3)

The record is replete with evidence that Movant knew about the Analogue Act and mislabeled his analogue substances in an attempt to circumvent the provisions of the Act and try to evade liability under the Act. (Doc. 34, Exhs. 7-11) Similarly, there is abundant evidence of Movant's advance knowledge that MDPV would be listed as a Schedule I controlled substance and of Movant's extensive efforts to find replacement substances that would replicate the effects on users of MDPV. Colin Stratford testified that in September 2011, Movant advised him that MDPV would be "banned," that is, listed as a scheduled controlled substance, and they discussed the need to find a replacement stimulant for MDPV. (Doc. 34-6 at 43-44) Stratford explained that he initially decided to use a-PPP (*Id.* at 44) because he thought it was safer, meaning "less neurotoxic" (*Id.* at 53), but that Movant wished to develop a "stronger" product and so they created a product using a-PVP (*Id.* at 54). Emails sent and received by Movant in September 2011 involving a seller of chemicals indicate Movant was seeking a replacement chemical for MDPV that was stronger than a-PPP and was told that a-PVP was such a replacement chemical. (Doc. 34-9 at 2)

Movant and Gil Bresnick discussed labeling Movant's products to refer to non-drug related ("bogus") uses, such as "raft conditioner, lady bug attractant, water repellant, and aroma therapy enhancer." (Doc. 34-10 at 2) In June 2011, Movant emailed Gil Bresnick and suggested they could create a video to appear like a news report that would "really illustrate how strong our product is. We could introduce the video with

captions 'Ingesting 8ballz can be hazardous to your health, not for human consumption' then they watch the video and buy a pound at a time." (Doc. 34, Exh. 25) In May 2012, Movant received an email from co-defendant Nicholas Zizzo regarding a news article apparently on ABC news referencing Movant's product "Amped" with the byline "new synthetic drug used to get high." (Doc. 34-26 at 2) Mr. Zizzo's message read "You seem to be doing good. Just play it safe and be careful and in 30 days you will have one less competitor on the market when we [Consortium Distribution] go all natural. Take it easy. -Nick." (*Id.*) Movant thanked Mr. Zizzo, declared it was the first time he had seen an article, and acknowledged that his company "may be moving up from the minors into the big league." (*Id.*)

h. Conclusion

As is discussed above, the record including the withheld internal DEA emails and the draft MDPV/MDEA monograph, does not support Movant's argument that Dr. DiBerardino's testimony at the *Daubert* hearing and at trial was false. As relevant to Movant's case, the withheld evidence addresses the determination of MDPV as an analogue substance before it was listed as a Schedule I controlled substance on October 21, 2011. MDPV as an analogue was charged only in Count One, along with four other purported analogue substances. The jury found Movant guilty on Count One and unanimously found not only MDPV but also a-PVP, a-PBP, pentedrone and pentylone to be controlled substance analogues. (CR Doc. 465 at 1) Even assuming the withheld documents had been disclosed to the defense, the evidence was only relevant to Movant's conviction as to MDPV. Additionally, there was substantial evidence indicating that Movant knew that the substances he was charged with were analogue substances, a circumstance that was reflected in the jury's verdict.

The caselaw from other jurisdictions cited by Movant does not support a conclusion that the withheld internal DEA emails and the draft MDPV/MDEA monograph was material in his case. Moreover, under the Ninth Circuit's decision in *Way*, which is not precedential, a panel of the court determined that evidence of internal dissent within DEA

regarding a decision of the analogue status of a substance was not material to the defendant's preparation of a defense because under the Analogue Act the jury must decide whether a substance is an analogue based on expert testimony presented at trial. Respondent's comment about a-PPP not being charged in Movant's case is also not material. Significantly, the record contains abundant evidence that Movant knew the substances he was charged with were controlled substance analogues.

For the reasons discussed, Movant is unable to meet the reasonable probability standard requiring him to establish that if the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley*, 473 U.S. at 682. Moreover, because the Motion is a second or successive motion, the standard applied to Movant's claims is to prove that newly discovered evidence, "if proven and viewed in light of evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense[.]" 28 U.S.C. § 2255(h)(1). Movant does not meet this even more exacting standard.

**E. There was no *Giglio* violation**

Movant argues that Respondent violated his due process rights when it withheld the DEA internal emails because that evidence represents material, exculpatory impeachment evidence that could have been used by the defense during Dr. DiBerardino's testimony. (Doc. 21 at 25-31) Movant claims Dr. DiBerardino provided false testimony about how DEA reached its analogue determinations, including how the determinations were made, when they were made, the degree of consensus and strength of such determinations and who made the determinations. (*Id.* at 26)

Movant asserts that Dr. DiBerardino falsely testified that the DCE used 2D chemical structure drawings when making structural similarity determinations. (*Id.* at 26-27) Movant concludes that this testimony was false because, although DCE used the 2D overlay method, FS instead used a 3D analysis. (*Id.* at 27) Movant refers to Dr. DiBerardino's trial testimony that when there were differences of opinion within DEA about analogue monographs, sometimes opinions could be swayed so that agreement is

reached. (*Id.* at 27-28) Movant complains that DiBerardino glossed over the degree of disagreements between FS and DCE and states that by the time of Movant's trial in July 2013, the disagreements resulted in DCE publishing a monograph despite FS's opposition. (*Id.* at 28) Movant further details how the withheld DEA internal emails reveal that with regard to the proposed MDPV/MDEA monograph, DCE tried to pressure FS into agreeing that MDPV was an analogue of MDEA, which Movant asserts was inconsistent with Dr. DiBerardino's trial testimony and could have provided a basis for impeachment of that testimony. (*Id.* at 30-31)

Respondent contends that the withheld internal DEA emails are consistent with Dr. DiBerardino's testimony and his opinion that MDPV was an analogue of methcathinone prior to October 2011. (Doc. 34 at 74-75)

The elements of a claim under *Giglio* are the same as those for *Brady*. *United States v. Kohring*, 637 F.3d 895, 901-02 (9th Cir. 2011). To determine if undisclosed evidence is material, *Brady/Giglio* requires an "inquiry into whether 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different[.]'" *Mellen v. Winn*, 900 F.3d 1085, 1089 (9th Cir. 2018) (quoting *Turner v. United States*, __ U.S. __, 137 S.Ct. 1885, 1888, 1893 (2017)).

Movant's arguments fail as not material because he conspicuously ignores the fact that DCE ultimately agreed to not finalize the draft MDPV/MDEA monograph and DEA later issued a finalized monograph indicating that MDPV was an analogue to methcathinone prior to October 21, 2011. Additionally, the withheld DEA internal emails detailing disagreement between FS and DCE regarding certain other analogue determinations occurred primarily after DEA's determination of the pre-October 2011 analogue status of MDPV and did not involve the substances at issue in Movant's case. As is discussed in detail above in Section IV.D with regard to his *Brady* claim, Movant has failed to prove either that Dr. DiBerardino's testimony was false or that the newly discovered evidence, "if proven and viewed in light of evidence as a whole, would be

sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense[.]" 28 U.S.C. § 2255(h)(1).

**F. The prosecution did not violate *Napue***

Movant contends that the prosecution violated his due process rights pursuant to *Napue v. Illinois*, 360 U.S. 264 (1959) when Dr. DiBerardino testified falsely or lied by omission at both the *Daubert* hearing and at trial. (Doc. 21 at 31-33) Movant argues that Dr. DiBerardino's false testimony centers on his reliance of 2D rather than 3D analysis of chemical structures, his statements that analogue determinations were made "in unity" and that a monograph is finalized by DEA with everyone in agreement. (*Id.* at 5-6, 32-33) Movant asserts that if his counsel had access to the internal DEA emails, counsel could have impeached Dr. DiBerardino and "eviscerated" the government's claim that [Movant] knew the chemical structure of the substances he sold were substantially similar to controlled substances in Schedule I or II of the CSA." (*Id.* at 32-33)

Respondent counters that Dr. DiBerardino did not lie and the prosecution did not fail to correct any false testimony. (Doc. 34 at 72-74) Respondent notes that the prosecution was unaware of the DEA internal emails, that Dr. DiBerardino's testimony was consistent with "the general process DEA used in this case" and accurately noted "the level of certainty that DEA reached in such matters[,]" and addressed disagreements within DEA during determinations of whether a substance is an analogue of a controlled substance. (*Id.* at 73-74)

To prevail on a *Napue* claim, a petitioner must show that (1) the testimony or evidence was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material. *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003) (citing *Napue*, 360 U.S. at 269–71); *see Morris v. Ylst*, 447 F.3d 735, 743 (9th Cir. 2006).

For the reasons discussed above in Section IV.D, undersigned concludes that Movant has failed to prove Dr. DiBerardino's testimony was false, or that newly discovered evidence, even "if proven and viewed in light of evidence as a whole, would be sufficient

to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense[.]" 28 U.S.C. § 2255(h)(1).

**G. No Jencks Act violation**

Movant argues that Respondent violated the Jencks Act, 18 U.S.C. § 3500, and Federal Rule of Criminal Procedure 26.2 when it failed to disclose the newly discovered evidence during Movant's direct appeals or his previous § 2255 action. (Doc. 21 at 33-34)

The Jencks Act requires that:

> [a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . .

18 U.S.C. §3500(b). Similarly, Rule 26.2 provides that:

> [a]fter a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

Fed. R. Crim. P. 26.2(a). Movant complains that he has never received any Jencks Act material regarding Dr. DiBerardino's "prior statements, prior emails, or prior disagreements with [FS]." (Doc. 21 at 33-34)

Respondent contends that the withheld material cannot be Jencks Act material as to Dr. DiBerardino because the emails were not his and thus do not qualify as a "statement of the witness." (Doc. 34 at 75) Moreover, Respondent argues that the DEA emails do not relate to the "subject matter of the witness's testimony" in Movant's case because the United States neither argued nor alleged that MDPV was an analogue of MDEA, and the United States provided Jencks Act disclosures about "Dr. DiBerardino's statements on the

subject of determining MDPV was an analogue of methcathinone." (*Id.* at 76, citing to Doc. 34-4)

Title 18 U.S.C. § 3500(e) defines the term "statement" for the purposes of § 3500 as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e). As Respondent correctly states, none of the withheld materials qualifies as a statement for purposes of the Jencks Act. Accordingly, the United States' failure to disclose the materials does not violate the Jencks Act. Movant has failed to prove that newly discovered evidence, "if proven and viewed in light of evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense[.]" 28 U.S.C. § 2255(h)(1).

**H. Motion for discovery and evidentiary hearing**

Movant filed a motion for discovery and request for an evidentiary hearing on January 17, 2020. (Doc. 24)

Movant has requested leave of the Court to compel disclosure of any and all documents: (1) filed under seal in the *Gas Pipe* case including those about the DEA's non-analogue decisions; (2) regarding a determination for or against a finding of substantial similarity as to a-PVP, a-PBP, a-PPP, MDPV, MPPP, pentylone, or pentedrone to a controlled substance; (3) regarding any DEA decision that any synthetic cathinone is a non-analogue; (4) relating to an instance when DCE requested review by FS of an analogue monograph for a synthetic cathinone, but DCE finalized the analogue determination

without first receiving FS input; (5) "reflecting any concern, doubt, or contrary or conflicting opinions by anyone in the Department of Justice or DEA" regarding the "process of determining or the decision to determine that any of the analogues alleged in [Movant's] case is a controlled substance analogue"; (6) disclosing the "exact date(s) that the DEA made its determination that any of the analogues alleged in [Movant's] case are controlled substance analogues"; and (7) consisting of all emails between the AUSA and Movant's trial counsel pertaining to Movant's case. (Doc. 24 at 2-3)

In § 2255 cases, "A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, and or in accordance with the practice and principles of law." Rule 6(a) of the Rules Governing Section 2255 Proceedings. In exercising that discretion, habeas courts are cautioned that they "should not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation." *Calderon v. U.S. Dist. Court for the Northern Dist. of Cal.*, 98 F.3d 1102, 1106 (9th Cir. 1996). "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). "But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, 394 U.S. 286, 300 (1969).

Respondent asserts that Movant's motion for discovery should be denied because he has procedurally defaulted his claims, because the claims are untimely, and because his claims lack merit. (Doc. 33 at 4-13) Respondent further argues Movant's requests for discovery are speculative. (*Id.* at 13-17)

Movant specifically argues that the withheld evidence obtained from defense counsel in *Gas Pipe* supports the testimony of defense witness Dr. Cozzi. (Doc. 41 at 3) Movant indicates that Dr. Cozzi testified objecting to the term "substantially similar" in the Analogue Act as unscientific and vague. (*Id.* at 4) Movant contends that evidence of

internal dissents among DEA chemists would have bolstered Dr. Cozzi's testimony and undermined Dr. DiBerardino's testimony. (*Id.* at 4-5)

Dr. Cozzi's criticism notwithstanding, the "substantially similar" language in the Analogue Act has repeatedly been deemed not unconstitutionally vague. In the Court's June 24, 2013, order on Movant's pretrial motions, it concluded that the Analogue Act is not unconstitutionally vague for omitting a definition of the terms "'chemical structure,' 'substantially similar,' or 'human consumption.'" *United States v. Lane*, No. CR-12-01419, 2013 WL 3199841, at *7 (D. Ariz. June 24, 2013). Subsequently, a number of federal circuit courts of appeals have rejected vagueness challenges to the Analogue Act based on its "substantially similar" language. *United States v. Demott*, 906 F.3d 231 (2d Cir. 2018); *United States v. Lawton*, 759 Fed. Appx. 66 (2d Cir. 2019); *United States v. Larson*, 747 Fed.Appx. 927, 929-30 (4th Cir. 2018); *United States v. Wolfe*, 781 Fed.Appx. 566, 567-68 (8th Cir. 2019).

As discussed, undersigned finds that Movant's claims are not untimely, but are procedurally defaulted. (*See* Sections IV.B and IV.C, above) Moreover, undersigned concludes that Movant's requests for discovery are speculative and that Movant seeks material that would not overcome substantial evidence of Movant's guilt. Movant supposes that because it has been shown that DEA withheld requested evidence, there will be additional withheld evidence relevant to his claims. (Doc. 24 at 3-4) As noted, the withheld evidence supplied to Movant by *Gas Pipe* defense counsel is not relevant to Movant's claims because it relates to a disagreement between FS and DCE that was resolved and the subject of the disagreement was a comparator controlled substance that was never at issue in Movant's case.

More importantly, a "'federal habeas court must allow discovery and an evidentiary hearing only where a factual dispute, if resolved in the petitioner's favor, would entitle him to relief[.]'" *Calderon*, 98 F.3d at 1106 (quoting *Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994)). Movant has provided no basis for concluding there was disagreement within DEA as to any of the alleged analogue substances on which he was charged and prosecuted

(MDPV, a-PVP, a-PBP, MPPP, pentedrone, and pentylone) and the Schedule I or II controlled substances that were actually used as comparators. Further, given evidence of Movant's guilt based on his knowledge of the analogue status of the substances on which he was charged and convicted, the discovery Movant seeks, even if it exists, would not form a basis for relief in these proceedings.

Movant also argues that an evidentiary hearing is necessary to question prosecution witnesses about alleged *Brady* violations and any dissenting opinions to DEA analogue decisions if documentation of such decisions does not exist. (Doc. 24 at 6) Under 28 U.S.C. § 2255, a court shall grant an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief ...." 28 U.S.C. § 2255(b). To show that he is entitled to an evidentiary hearing, a movant must allege "specific factual allegations that, if true, state a claim on which relief could be granted." *Leonti*, 326 F.3d at 1116 (internal quotations and citations omitted). In determining whether to grant an evidentiary hearing, a court must consider whether, accepting the truth of a movant's factual assertions that are not directly and conclusively refuted by the record, the movant could prevail on his claims. *Blaylock*, 20 F.3d at 1465; *Turner*, 281 F.3d at 851.

Here, as is explained above in Sections IV.C through G, the record conclusively shows Movant's claims are barred and meritless. Accordingly, undersigned recommends that Movant's motion for discovery and his request for an evidentiary hearing be denied. (Doc. 24)

**I. Motion for release**

Movant has filed a motion for release and argues he qualifies for release pursuant to Federal Rule of Appellate Procedure 9 and 18 U.S.C. § 3143(b)(1). (Doc. 10 at 1) Movant asserts that he is not likely to flee and does not pose a danger to community safety and that he raises substantial questions of law that present an exceptional reason for release. (*Id.* at 3-7) On March 31, 2020, Movant filed a request for a ruling on his motion for release. (Doc. 30) He argued that the Bureau of Prisons' actions during the COVID emergency put him at a greater risk of contracting the virus. (*Id.* at 2) He further explained that his mother

and stepfather were of advanced age and in poor health and asserted he would be able to assist them if he were to be released to home confinement. (*Id.* at 4) Movant also argued that his Amended Second Motion presented the Court with an "extraordinary case involving a high probability of success." (*Id.* at 5) On June 8, 2020, Movant filed a subsequent request for a ruling on his motion for release pending "appeal" in which Movant asserted that he felt a sense of urgency for the Court to rule on his motion because he faces a high risk of COVID-19 in prison. (Doc. 35 at 3-4) Movant explains as he did in his request for a ruling that he is 59 years old and was treated for pneumonia in December 2019.[24] (*Id.* at 4)

Section 3143 is part of the Bail Reform Act. *United States v. Handy*, 761 F.2d 1279, 1279-80 (9th Cir. 1985). However, "[t]he Bail Reform Act does not apply to federal prisoners seeking postconviction relief." *United States v. Mett,* 41 F.3d 1281, 1282 (9th Cir. 1994), as amended (Feb. 8, 1995). Rather, Federal Rule of Appellate Procedure 23 "governs the issue of the release or detention of a prisoner, state or federal, who is collaterally attacking his or her criminal conviction." *Mett*, 41 F.3d at 1282. Under Rule 23, "[w]hile a decision not to release a prisoner is under review, the court or judge rendering the decision . . . may order that the prisoner be . . . released on personal recognizance, with or without surety." Fed. R. App. Proc. 23(b)(3). By this plain language, the authority to release a prisoner pending habeas review appears to rest with the appellate court, not the district court. *See United States v. Carreira*, 2016 WL 1047995 (D. Haw. Mar. 10, 2016) (Rule 23 "facially applies only to motions for release filed after the district court has issued a decision on the merits of a habeas petition").

Nevertheless, other circuits have held that a district court possesses the authority to release a prisoner pending a decision on the merits of a habeas petition. *See, e.g., Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001); *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992); *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990); *Martin v. Solem*, 801 F.2d 324,

[24] The emergency room records filed with Movant's request for ruling on his motion for release indicate that Movant was seen, treated, and released on December 11, 2019, for symptoms of pneumonia. (Doc. 30 at 7-13) He was provided an antibiotic and cough medication. (*Id.* at 13) He was assessed as "fairly fit for his age." (*Id.* at 8)

329 (8th Cir. 1986); *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985); *Pfaff v. Wells*, 648 F.2d 689, 693 (10th Cir. 1981).

The Ninth Circuit has not conclusively ruled on the issue. In *In re Roe*, decided in 2001, the Court held that "[w]e need not, and specifically do not, resolve this issue today." However, the Court went on to state that, "[a]ssuming, arguendo, that a district court has the authority to release a state prisoner on bail pending resolution of habeas proceedings," the petitioner must demonstrate that it is an "extraordinary case involving special circumstances or a high probability of success." 257 F.3d 1077, 1080 (9th Cir. 2001) (quoting *Land v. Deeds*, 878 F.2d 318 (9th Cir. 1989)).

More recently, in addressing a federal prisoner's request for bail pending a decision on his § 2255 habeas petition, the Ninth Circuit cited *In re Roe* and reiterated that "[w]e have not yet decided whether district courts have the authority to grant bail pending resolution of a habeas petition, and we need not resolve that question today." *United States v. McCandless*, 841 F.3d 819, 822 (9th Cir. 2016) (citing 257 F.3d at 1080). The Ninth Circuit wrote that if a district court has that authority, "it is reserved for 'extraordinary cases involving special circumstances or a high probability of success.'" *Id.* (citing *Land*, 878 F.2d at 318, and *In re Roe*, 257 F.3d at 1080). Examples of "special circumstances" include "raising substantial claims upon which the appellant has a high probability of success, a serious deterioration of health while incarcerated, and unusual delay in the appeal process." *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989) (addressing a petitioner's appeal of the district court's denial of his motion for bail pending appeal of the denial of his habeas petition). "Special circumstances" have also been found to include situations where a petitioner's "sentence was so short that if bail were denied and the habeas petition were eventually granted, the defendant would already have served the sentence." *Parker v. Ryan*, No. CV-15-1130-PHX-JAT (JFM), 2016 WL 11431549, at *5 (D. Ariz. June 8, 2016) (quoting *Landano*, 970 F.2d at 1239).

Although in *Land* the Ninth Circuit used the conjunction "or" between the two factors of the extraordinary case test, it has not expressly discussed whether the test should

be conjunctive or disjunctive. *See Land*, 878 F.2d at 318; *Mett*, 41 F.3d at 1282. In *Benson v. California*, which was decided prior to *Land*, the Ninth Circuit required both substantial questions and exceptional circumstances. *Benson v. California*, 328 F.2d 159, 162 (9th Cir. 1964). Further, relying on cases outside the Ninth Circuit, courts in the District of Hawaii and the Northern District of California have reasoned that the test must be conjunctive because "it makes no sense that exceptional circumstances alone" would be sufficient if the petitioner was unlikely to succeed on the merits. *United States v. Lee*, Civ. No. 16-00070 JMS-BMK, 2016 WL 1039046, at *3 (D. Haw. Mar. 15, 2016) (internal citations omitted) (collecting cases from the Third, Fifth, and Eighth Circuits); *Hall v. San Francisco Superior Court*, No. C 09-5299 PJH, 2010 WL 890044 at *3; *see also United States v. Leach*, Civ. No. 16-00124 JMS-RLP, 2016 WL 2344197 at *2 (D. Haw. May 3, 2016); *United States v. Josiah*, Civ. No. 16-cv-00080 HG-KSC, 2016 WL 1328101, at *4 (D. Haw. Apr. 5, 2016) (*citing Calley v. Callaway*, 469 F.2d 701, 702-703 (5th Cir. 1974)).

Special circumstances warranting release pending habeas resolution may "include 'a serious deterioration of health while incarcerated, and unusual delay in the appeal process.'" *Mett*, 41 F.3d at 1281, n.4 (*quoting Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989))[25]; *but see United States v. Wilcher*, 2009 WL 1663995, at *1 (D. Ariz. June 15, 2009) (finding that defendant's failing health and alleged probability of success on her § 2255 claims, without more, did not establish likelihood of success or special circumstances). An additional special circumstance exists "where 'the sentence was so short that if bail were denied and the habeas petition were eventually granted, the defendant would already have served the sentence.'" *Cohn v. Arizona*, No. CV-15-00267-PHX-DLR, 2015 WL 4607680, at *2 (D. Ariz. July 31, 2015) (*quoting Landano v. Rafferty*, 970 F.2d 1230, 1239 (3rd Cir. 1992)). Yet, in *In re Roe*, the Ninth Circuit ultimately found insufficient evidence of extraordinary circumstances in a case that presented serious

[25] *Salerno* concerned an appeal of extraditability, but the Ninth Circuit has adopted its description of special circumstances to apply to general habeas cases, including § 2254 and § 2255 motions.

alleged constitutional violations, a co-defendant's statements that the defendant was not involved in the underlying crimes, the willingness of the defendant's parents to house him, defendant's alleged failing health, and the state's apparent resistance to fulfilling discovery obligations. *In re Roe*, 257 F.3d at 1080.

Courts in the Ninth Circuit have rarely encountered cases in which a § 2255 movant seeking release also asserts a *Brady* violation. In *Blazevich v. United States*, No. 03-CV-1346 IEG, 2006 WL 8427991, at *1 (S.D. Cal. April 12, 2006), the petitioner moved for release pending appeal of the denial of his § 2255 motion. The Ninth Circuit had issued a certificate of appealability ("COA") to petitioner that included "the issue of 'whether the district court erred in denying, without an evidentiary hearing, [petitioner's] claim that the prosecution violated his rights under *Brady v. Maryland*, 373 U.S. 83, 87 (1963).'" *Blazevich*, 2006 WL 8427991 at *1 (internal citations omitted). The district court denied release, finding that the Ninth Circuit's grant of a COA for petitioner's *Brady* claim did not equal a high probability of success on the claim itself as required under the standard for release.[26]

Assuming the Court does have authority to release Movant pending a decision on his § 2255 Motion, Movant has not shown that his is an extraordinary case involving special circumstances or a high probability of success. *Mett*, 41 F.3d at 1282. Movant does not establish he has any severe medical condition or that he has suffered a serious degradation of his health while he has been incarcerated. Further, it is very unlikely that Movant's sentence will run prior to a decision on his Amended Second Motion. In addition, as discussed *supra*, undersigned concludes that Movant's claims asserted in his Amended

[26] More commonly, though still rare, courts have encountered cases in which petitioners seeking habeas relief under § 2254 or § 2241 and asserting *Brady* violations have moved for release. For example, the petitioner in *Cohn v. Arizona*, 2015 WL 4607680, at *2-3 (D. Ariz. July 31, 2015), attempted to add a *Brady* claim to his § 2254 petition and subsequently moved for release, which the court denied. In *Jonassen v. Shartle*, 2018 WL 10456826, at *1 (D. Ariz. Apr. 26, 2018), the petitioner filed a § 2241 motion following denial of multiple § 2255 motions. In his § 2241 motion, petitioner claimed that the government had wrongfully withheld evidence under *Brady* and moved for release. *Id*. at *1-3. The court denied the motion for release and dismissed the petition in its entirety for being an inappropriate substitute for a § 2255 motion. *Id*. at *3-4.

Second Motion are procedurally defaulted and, in any case, fail on the merits.

Movant is advised that challenges to conditions of confinement, threats to safety or health based on inmate population density, exposure to the COVID-19 virus, lack of medical testing and medical staff, or unsanitary conditions are properly raised in a civil rights action pursuant to 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 498-99 (1973); *Crawford v. Bell*, 599 F.2d 890, 891-92 (9th Cir. 1979) (the proper remedy for complaints challenging conditions of confinement is a civil rights action under 42 U.S.C. § 1983). While release from prison is not an available remedy in a civil rights action, other types of injunctive relief are available, such as enjoining unconstitutional conduct or requiring compliance with protective measures. Movant is further advised that civil rights actions by prisoners are subject to the Prison Litigation Reform Act, which imposes filing fee obligations for prisoners, requires the Court to sua sponte screen civil rights actions, and also limits the number of in forma pauperis civil rights actions a prisoner can file.

For the reasons set forth above, undersigned recommends that Movant's motion for release pending adjudication of the Amended Second Motion be denied.

## V. CONCLUSION

The claims in the Amended Second Motion are procedurally defaulted and prejudice has not been shown to excuse the procedural defaults. Further, Movant's claims lack merit and do not warrant discovery or an evidentiary hearing. Thus, the Amended Second Motion should be denied without discovery and without an evidentiary hearing. Further, because Movant has not shown that his is an extraordinary case involving special circumstances or a high probability of success, his motion for release should be denied. Finally, Movant has not made a substantial showing of the denial of a constitutional right in any ground of his Amended Second Motion; thus, a certificate of appealability also should be denied.

Accordingly,

**IT IS RECOMMENDED** that Movant Michael Rocky Lane's Amended Motion Under 28 U.S.C. § 2255 (Doc. 21) be denied without an evidentiary hearing.

**IT IS FURTHER RECOMMENDED** that Movant's Motion for Release Pending Appeal (Doc. 10) be denied.

**IT IS FURTHER RECOMMENDED** that Movant's Motion for Discovery and Request for Evidentiary Hearing (Doc. 24) be denied.

**IT IS FURTHER RECOMMENDED** that a Certificate of Appealability be denied because Movant has not made a substantial showing of the denial of a constitutional right.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections.

Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

Dated this 3rd day of December, 2020.

Deborah M. Fine

Honorable Deborah M. Fine
United States Magistrate Judge