

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIM. NO. 87-177-01
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CARL JACKSON : CIVIL NO. 97-2861

MEMORANDUM AND ORDER

BECHTLE, J.

FEBRUARY , 2000

Presently before the court in this 28 U.S.C. § 2255 action are petitioner Carl Jackson's ("Jackson") Amended Motions filed pursuant to 28 U.S.C. § 2255, the government's responses thereto, the United States Magistrate Judge's Reports and Recommendations, dated December 22, 1997 and March 11, 1999, the Objections thereto and the record. For the reasons set forth below, the court will approve and adopt in part the Magistrate Judge's Reports and Recommendations, dated December 22, 1997 and March 11, 1997, will vacate Jackson's conviction on Count One for conspiracy, will deny the Amended Motions without a hearing and will not issue a certificate of appealability.

I. BACKGROUND

On August 14, 1987, Jackson was convicted on a multi-defendant, multi-count indictment for engaging in a widespread conspiracy to import Phenyl-2-propane ("P2P"), a controlled substance, and manufacture and distribute methamphetamine. Jackson was convicted of the following counts in the indictment: Count One for conspiracy under 21 U.S.C. § 846; Count Two for

importation of P2P under 21 U.S.C. §§ 952(a), 960(a) and 960(b)(2); Counts Three, Twelve and Thirteen for possession of P2P with intent to manufacture methamphetamine; Count Ten for possession of methamphetamine; Counts Five, Six and Nine for manufacturing methamphetamine under 21 U.S.C. § 841(a)(2); and Count Forty for continuing criminal enterprise ("CCE") under 21 U.S.C. § 848.

On October 5, 1987, Jackson was sentenced to life imprisonment without parole and a \$100,000.00 fine on Count Forty, the CCE charge. Jackson was sentenced to five years in prison on Count One, the conspiracy charge, which merged with the sentence on the CCE charge in Count Forty. Jackson was sentenced to five years in prison and a \$15,000.00 fine on each of Counts Two, Three, Five, Six and Nine to run consecutively with each other and concurrently with the sentence on Count Forty. Jackson was sentenced to five years in prison on Counts Ten, Twelve and Thirteen to run concurrently with each other and concurrently with the sentences on Counts Two, Three, Five, Six and Nine. The conviction and sentence was affirmed by the Third Circuit. United States v. Jackson, 879 F.2d 85 (3d Cir. 1989).

On April 23, 1997, Jackson filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. In May 1997, the court granted Jackson leave to file a more specific pleading, which was filed in June 1997. This Amended Motion raised three claims: (1) denial of due process in not being given sufficient time to review his presentence investigation reports

("PSR") or an opportunity to object to the statements contained therein; (2) violations of double jeopardy and due process rights for the possible use by the jury of the conspiracy charge as a predicate offense for the CCE charge; and (3) ineffective assistance of counsel for failure to review the PSR with Jackson prior to sentencing. (Rep. & Recomm. dated 12/22/97, at 3.) Following some time extensions, the United States Attorney then filed an Answer to the motion. On December 22, 1997, United States Magistrate Judge Diane M. Welsh issued a Report and Recommendation, recommending that the motion be denied without a hearing. (Rep. & Recomm. dated 12/22/97.)

In February 1998, Jackson filed pro se "Objections and Exceptions" to the December 22, 1997 Report and Recommendation. In his Objections and Exceptions, Jackson raised the following claims:

(1) the Court erred in charging the jury that the conspiracy count, charging [Jackson] with conspiracy to manufacture and distribute controlled substances, could be relied on as a predicate offense in the determination of whether he had committed a continuing series of three or more related offenses under the Controlled Substances Act; (2) the Court erred in instructing the jury that [Jackson] "could be convicted of the CCE offense if they found beyond a reasonable doubt that [Jackson] committed one violation of the Controlled Substances Act;" (3) the jury charge on the CCE offense was deficient in that it failed to communicate to the jury [that] the "essence of the CCE offense is large scale, well organized, deeply entrenched and continuing narcotics trafficking;" (4) the Court erroneously instructed the jury on the CCE offense since it failed to instruct the jury that "'conspiracy' between six or more participants in the enterprise," was required or that "culpable participation of six or more persons in each of the three predicate offenses" was required . . . (5) the

Court's jury instruction was erroneous since it did not convey to the jury that "five or more persons under defendant's supervision must culpably participate in each offense" for conviction of the CCE offense . . . and (6) there were no unanimity instructions on the CCE charge.

(Rep. & Recomm. dated 3/11/99, at 3-4.) On September 22, 1998, the court ordered that Jackson's Objections and Exceptions be treated as a motion to amend the habeas petition, that the motion be granted as such and that the motion be remanded for further consideration of the issues raised. (Order dated 9/22/98.) Again, following extensions, the United States Attorney filed a response to Jackson's Objections and Exceptions.

On March 11, 1999, United States Magistrate Judge Diane M. Welsh ("Magistrate Judge") issued another Report and Recommendation, recommending that the Objections and Exceptions, treated as an amended § 2255 motion, be denied without a hearing. The Magistrate Judge held that Jackson's first five claims made in his Objections and Exceptions were procedurally waived because they were not raised at trial, sentencing or on appeal and that Jackson failed to show cause to excuse his procedural default. (Rep. & Recomm. dated 3/11/99, at 6-8.) With respect to Jackson's sixth claim in his Objections and Exceptions, the Magistrate Judge held that Jackson's claim was procedurally waived because he was unable to establish prejudice that resulted from the court's alleged error in failing to instruct the jury on the specific unanimity requirement under a CCE charge. (Rep. & Recomm. dated 3/11/99, at 8-12.) On March 26, 1999, Jackson

filed Objections to the Report and Recommendation dated March 11, 1999.

II. STANDARD OF REVIEW

Under the relevant statute,

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C. § 2255. If the court finds that such claim has merit, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255.

III. DISCUSSION

The court will approve and adopt in part the Reports and Recommendations, dated December 22, 1997 and March 11, 1999, will vacate Jackson's conviction under Count One for conspiracy, will deny Jackson's Amended Motions under § 2255 and will not issue a certificate of appealability. Jackson makes eight objections to the Magistrate Judge's Report and Recommendation dated March 11, 1999. The court will address each of these objections. In addition, the court will also address Jackson's arguments made in his amended § 2255 motion filed in June 1997, as addressed by the Magistrate's Report and Recommendation dated December 22, 1997.

First, the court will address Jackson's pro se status in this action. Second, the court will discuss the issue of whether Jackson's claims raised in his Objections and Exceptions are time barred. Third, the court will address the first five claims raised in Jackson's Objections and Exceptions. Fourth, the court will address Jackson's challenge to the court's failure to give a specific unanimity instruction regarding the identity of the predicate offenses required for a CCE. Fifth, the court will address Jackson's remaining claims as addressed by the Magistrate Judge's Report and Recommendation dated December 22, 1997. Last, the court will address why it will not issue a certificate of appealability.

A. Jackson's Pro Se Status

Jackson's first objection to the Report and Recommendation date March 11, 1999 is that the record should reflect that his

original amendment of his § 2255 motion was filed pro se and that he was assisted by another inmate after his attorney passed away. The record reflects that Jackson was represented at the time he filed his original § 2255 motion on April 23, 1997. The record also reflects that Jackson was represented by attorney George E. Goldstein, Esquire when he filed his Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence on June 6, 1997. Then, the court, by Order dated December 22, 1997, noted its receipt of a letter notifying the court that Jackson's attorney passed away in August 1997. Thus, by that time the court recognized that Jackson was proceeding pro se. In any event, it is clear that by the time Jackson filed his Objections and Exceptions in February 1998, which the court treated as a motion to amend his § 2255 motion, that he was proceeding pro se. Furthermore, the court is aware that, for the purposes of ruling on Jackson's instant Amended Motions under § 2255, Jackson has proceeded pro se.

B. Time Bar

Jackson's second objection to the Report and Recommendation dated March 11, 1999 is to "the Magistrate's finding that Jackson's § 2255 motion be denied, because it was time barred by the Antiterrorism and Effective Death Penalty Act [("AEDPA")]."

Jackson's objection is misplaced as the Magistrate Judge made no such finding. In fact, the Magistrate Judge declined to rule on whether Jackson's claims, raised in February 1998 in his Objections and Exceptions, were time barred. (Rep. & Recomm.

dated 3/11/99, at 6.) Instead, the Magistrate Judge's holding was based on the finding that Jackson's claims were procedurally waived. (Rep. & Recomm. dated 3/11/99, at 6-7.)

Jackson's first three claims raised in his § 2255 motion, filed April 23, 1997, as amended to comply with the court's order to file a more specific pleading in June 1997, were timely under the AEDPA. However, Jackson raised several new claims in his Objections and Exceptions, which were filed on February 23, 1998, ten months after the expiration of the one year limitation period under the AEDPA. The court treated this document as a motion to amend the § 2255 petition, and subsequently granted the motion and remanded the action to the Magistrate Judge for consideration of those new grounds. The Magistrate Judge held that Jackson's "amendments may be allowed if he demonstrates that circumstances are such that the limitation period should be equitably tolled or that his new claims 'relate back' to the date of his original motion." (Rep. & Recomm. dated 3/11/99, at 5.)

Recently, the Third Circuit has held that new claims brought in an amendment of a § 2255 motion, which could not relate back under Rule 15, were time barred under the AEDPA. See United States v. Duffus, 174 F.3d 333, 336-37 (3d Cir. 1999) (citing United States v. Craycraft, 167 F.3d 451, 457 (8th Cir. 1999)). Because many of the claims in Jackson's Objections and Exceptions do not arise out of the same set of facts as embodied in his original § 2255 motion, those claims do not relate back, and thus, would normally be time barred under the AEDPA. However,

the Third Circuit has also held that the one year limitation of the AEDPA functions as a statute of limitation, and thus is subject to equitable tolling. Miller v. New Jersey Dep't of Corrections, 145 F.3d 616, 617-18 (3d Cir. 1998).

Jackson has alleged that he discussed the issues raised in his Objections and Exceptions with his attorney who assured Jackson that they would be raised in his original § 2255 motion. (Jackson's Objections and Exceptions at 1.) In addition, Jackson alleges that he was hospitalized and unable to review his § 2255 petition before his attorney filed it. (Jackson's Objections and Exceptions at 1.) Further, Jackson alleged that once he received a copy of the filed petition, he inquired why several issues had not been raised. (Jackson's Objections and Exceptions at 1.) Jackson's attorney allegedly responded that it was not the appropriate time to raise those issues. (Jackson's Objections and Exceptions at 1.) Soon afterwards, Jackson's attorney passed away. (Jackson's Objections and Exceptions at 1-2.) Like the Magistrate Judge, the court need not decide whether these circumstances as alleged by Jackson warrant equitable tolling of his claims. As addressed below, Jackson has either failed to show cause for his procedural default on these claims or has failed to show that any error by the court was not harmless beyond a reasonable doubt. Thus, regardless of whether the claims Jackson raised in his Objections and Exceptions are subject to equitable tolling, his § 2255 petition should be denied without a hearing.

C. Jackson's First Five Claims in His Objections and Exceptions

Jackson's third and fifth objections to the Report and Recommendation dated March 11, 1999 are to the Magistrate's finding that he had not shown any cause to excuse the procedural default on his first five claims. (Jackson's Objections to Rep. & Recomm. dated 3/11/99, at 2-7.) Jackson did not raise his first five claims at trial or on direct appeal. In order "to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his . . . procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 167-68 (1982). Cause may be established in several ways, including through new legal precedent or a successful claim of ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488 (1986). To establish actual prejudice, a petitioner must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 456 U.S. at 170. "A mere possibility is not enough to show actual prejudice." United States v. Motto, 1991 WL 175365, at *3 (E.D. Pa. Sept. 5, 1991) (citing Frady, 456 U.S. at 170).

Jackson argues that he has shown cause through his allegations of ineffective assistance of counsel. The Third

Circuit has ruled that "claims of ineffective assistance of counsel should ordinarily be raised in a collateral proceeding under 28 U.S.C. § 2255." United States v. Oliva, 46 F.3d 320, 325 (3d Cir. 1995). Therefore, although Jackson did not raise his claims on direct appeal, the court may appropriately consider the merits of these claims because they allege ineffective assistance of counsel.

Under the Sixth Amendment to the Constitution, a criminal defendant has a right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 688 (1984). In Strickland, the Court enunciated a two-prong test that a petitioner must satisfy to prevail on an ineffective assistance of counsel claim. First, the petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. Second, the petitioner must show that he was prejudiced by the deficiency to such an extent that the result of the proceeding is unreliable. Id. It is not enough to show that the error "had some conceivable affect on the outcome of the proceeding." Id. Rather, a successful petitioner must show that but for counsel's errors, the result would have been favorably different. Id. at 693. Failure to make the required showing under either prong of the Strickland test will defeat the claim. Id. at 700.

Because of the inherent difficulty in evaluating counsel's representation, the court must indulge in a strong presumption

that the conduct falls within the wide range of reasonable assistance. Id. at 689. Under the Strickland test, strategic decisions of counsel are virtually unchallengeable because they normally do not fall below an objective standard of reasonableness. Id. at 690. In addition, the fact that counsel failed to recognize a claim or failed to raise it generally is not sufficient to constitute ineffective assistance. Murray, 477 U.S. at 486. Counsel's failure to detect a colorable claim is treated the same as a deliberate decision to forgo pursuing such a claim. Id. at 492. In each of the first five claims brought by Jackson in his Objections and Exceptions, he cannot meet his burden to show ineffective assistance of counsel. Consequently, he cannot show cause for his procedural default, and thus, his objections on these grounds are without merit. The court will address separately each of Jackson's first five claims in his Objections and Exceptions.

1. Conspiracy as a Predicate Act.

Jackson's first claim in his Objections and Exceptions was to the court's jury instruction that the conspiracy charge could be relied upon as a predicate offense for the CCE charge.¹ Jackson's basis for showing cause to excuse his procedural default on this claim appears to be either that: (1) his trial and appellate counsel's failure to raise the argument constituted

¹ In addition, Jackson's seventh objection to the Report and Recommendation dated March 11, 1999 is to the Magistrate's finding that the conspiracy count could act as a predicate act for the CCE count.

ineffective assistance; or that (2) the Supreme Court's 1996 decision in Rutledge v. United States, 517 U.S. 292 (1996) establishes new legal precedent.

In Rutledge v. United States, 517 U.S. 292, 307 (1996), the Supreme Court held that a conviction for a CCE under 21 U.S.C. § 848 necessarily includes a finding that the defendant also participated in a conspiracy under 21 U.S.C. § 846. Id. at 307. Thus, the Court held that "one of [those] convictions, as well as its concurrent sentence, [was] unauthorized punishment for a separate offense," and must be vacated. Id. (citations and internal quotations omitted).² The Supreme Court's decision in Rutledge did not, however, address whether a lesser included § 846 conspiracy charge may serve as a predicate offense for a § 848 CCE charge. In fact, several courts have held that a conspiracy may serve as a predicate offense for a CCE. See United States v. Miller, 116 F.3d 641, 678 (2d Cir. 1997) (holding that "Rutledge did not purport to alter the principle that a narcotics conspiracy may properly be considered as a predicate to CCE"); United States v. Fernandez, 822 F.2d 382, 385

² Jackson was convicted of both a conspiracy under Count One and a CCE under Count Forty. However, the court merged the sentence on the conspiracy count with the sentence on the CCE count. (Judgment and Commitment Order, Jackson's Mem. in Support of § 2255 Mot. Ex. A.) In his amended motions under § 2255, Jackson does not seek to vacate his conviction under the conspiracy count. Nevertheless, in order to be clear and in keeping with the Supreme Court's holding in Rutledge, the court, sua sponte, will vacate Jackson's conviction on Count One for conspiracy. Due to the merger, the court need not re-sentence Jackson.

(3d Cir. 1987) (holding that underlying conspiracy may serve as predicate offense for CCE); United States v. Escobar-de Jesus, 187 F.3d 148, 173 n.24 (1st Cir. 1999) (holding in post-Rutledge case that conspiracy charge could serve as predicate offense for CCE); United States v. Spearman, 166 F.3d 1215 (6th Cir. 1998) (Table) (slip op. at **8, available at 1998 WL 840870) (using conspiracy charge as predicate act for CCE); Fisher v. United States, 6 F. Supp. 2d 254, 260 (S.D.N.Y. 1998) (rejecting argument that conspiracy could not serve as predicate offense for CCE after Rutledge decision); cf. United States v. Wilson, 135 F.3d 291, 303 (4th Cir. 1998) (stating that "defendant convicted under 21 U.S.C. § 848 (CCE) cannot, in addition, be convicted for any predicate conspiracy charges proved as elements of the § 848 offense"). Thus, Jackson cannot show cause for his procedural default because he cannot show ineffective assistance of counsel or any new legal precedent which would cause this court to consider his argument.

2. Jury Instruction Regarding "One" Violation of Controlled Substances Act.

Jackson's second claim in his Objections and Exceptions was to the court's jury instruction that the evidence must show beyond a reasonable doubt that Jackson "committed one or more violations of the Controlled Substances Act."³ (Jackson's Mem. in Support of § 2255 Mot. Ex. C, at 25.41.) Jackson argues that

³ This is also Jackson's eighth objection to the Report and Recommendation dated March 11, 1999.

this instruction conveyed to the jury that Jackson could be convicted of the CCE offense if the Government had proved that Jackson committed only one violation of the Controlled Substances Act. Jackson's objection is misplaced. The instruction to the jury that it was necessary that Jackson "commit one or more" violation of the Controlled Substances Act appropriately addressed the requirement in the definition of a CCE that a person is engaged in a CCE, if, among other things, "he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony." 21 U.S.C. § 848(c)(1). As such, the court's instruction on this element of a CCE was proper. In addition, the court further instructed the jury regarding the element that the violation be part of a continuing series of violations. 21 U.S.C. § 848(c)(2). Specifically, the court instructed that the jury "must find at least three violations in order for there have to been a series." (Jackson's Mem. in Support of § 2255 Mot. Ex. C., at 25.43.) The court's instructions regarding these aspects of 21 U.S.C. §§ 848(c)(1) & (2) were proper. Consequently, Jackson does not show any basis for a claim of ineffective assistance of counsel regarding this claim, and thus, his challenge to these instructions is procedurally waived.

3. Jury Instruction Regarding "Essence" of the CCE Offense.

Jackson's third claim in his Objections and Exceptions appears to generally attack the court's instructions on the

definition of a CCE. Specifically, Jackson argues that the instructions failed to communicate to the jury that the "essence of the CCE offense is large scale, well organized, deeply entrenched and continuing narcotics trafficking." (Jackson's Objections and Exceptions, at 3.) No such specific instruction is required. The court's instructions to the jury included the requirements that Jackson's violations be part of a continuing series of at least three violations, that they be in some way part of a series or in some way connected or related and that there must be five or more other persons associated with him in a series of violations. The court further instructed that the five or more persons instruction was "intended to address an enterprise as opposed to a series of episodes between two or three persons." (Jackson's Mem. in Support of § 2255 Mot. Ex. C, at 25.43.) To the extent that Jackson's claim addresses the propriety of these elements of a CCE, the court finds that the instructions were appropriate. Jackson does not show any basis for a claim of ineffective assistance of counsel regarding this claim, and thus, Jackson's claim that the instruction failed to communicate "the essence" of a CCE is procedurally waived.

4. Failure to Instruct Jury That Conspiracy Between Six or More Participants in the Enterprise Was Required or That Culpable Participation of Six or More Persons in Each of the Three Predicate Offenses Was Required.

Jackson's fourth claim in his Objections and Exceptions is to the court's jury instructions on the third element of a CCE, requiring a continuing series of violations. Jackson argues that

the jury was not informed that a conspiracy among the various participants in the "enterprise" is required. On the third element of a CCE, the court instructed as follows:

The third element is that the defendant must be shown from the evidence to have committed such a continuing series of violations in concert with five or more other persons. There must be five or more other persons associated with him in a series of violations of the Controlled Substances Act.

That prevents this statute from being violated by someone who maybe just has a series of violations along with one person or maybe two. This is intended to address an enterprise as opposed to a series of episodes between two or three persons. It is five or more persons.

If you find there was a series of violations only between Mr. Carl Jackson and four other persons, the offense has not been made out. But if it is five or more than five, that element would be satisfied.

All this evidence must be established beyond a reasonable doubt.

It is not necessary that the five other persons actually worked together or in concert in the same offense or same group or it is [sic] the same episode at any given time.

It is not necessary to show that they were present at any single time, but the government must show that the defendant worked in concert with five other persons even though they may not have worked in concert with each other over the course of the enterprise.

(Jackson's Mem. in Support of § 2255 Mot. Ex. C., at 25.43-25.44.) To the extent that Jackson's fourth claim challenges the sufficiency of this instruction, his claim must fail. See Fernandez, 822 F.2d at 386 (finding that almost identical instructions given by district court properly construed statute).

Additionally, the court was not required to specifically instruct the jury that the offense of conspiracy is an element of the CCE offense. In Jeffers v. United States 432 U.S. 137 (1977), the Supreme Court interpreted the "in concert" language

of 21 U.S.C. § 848(c)(2)(A) "to have its common meaning of agreement in a design or plan." Contrary to Jackson's argument, a "trial court need not define specific statutory terms unless they are outside the common understanding of a juror or are so technical or specific as to require a definition." United States v. Chenault, 844 F.2d 1124, 1131 (5th Cir. 1988); see United States v. Brito, 136 F.3d 397, 407 (5th Cir. 1998) (same); United States v. Sanchez-Sotelo, 8 F.3d 202, 212 (5th Cir. 1993) (same); United States v. Morris, 928 F.2d 504, 511 (2d Cir. 1991) (same); see also United States v. Jackson, 953 F.2d 640 (4th Cir. 1992) (Table) (slip op. at **2, available at 1992 WL 4248) (holding that "trial court had no obligation to define the term 'in concert' . . . as the term has been accorded by the courts its ordinary and common meaning").⁴ Jackson has set forth no basis

⁴ Jackson cites United States v. Bollinger, 796 F.2d 1394 (11th Cir. 1986) in support of his argument. In Bollinger, the defendant challenged the district court's denial of his request for an instruction that he had to have "conspired" with five or more persons to prove that he acted "in concert" with them under 21 U.S.C. § 848. Id. at 1403. The Eleventh Circuit held that the district court should have allowed the instruction. Id. Nevertheless, the court did not reverse the decision because the defendant did not explain how the error seriously impaired his ability to present an effective defense. Id.

Jackson's reliance on Bollinger is misplaced. First, Bollinger involved the district court's denial of a requested instruction. Here, no such instruction was requested. In addition, Jackson has failed to allege with any specificity how his trial counsel's failure to request such an instruction meets the Strickland standard for ineffective assistance of counsel. As discussed above, the court finds that it properly instructed the jury that a continuing series of violations must be in concert with five or more persons. Lastly, the court separately instructed the jury on the conspiracy charge in Count One and Jackson was convicted on that count. See Bollinger, 796 F.2d at 1403 (stating that fact "[t]hat the jury convicted [the

for a claim of ineffective assistance of counsel, and thus, his claim on this ground is procedurally waived.

5. Failure to Convey to Jury That Five or More Persons Under Defendant's Supervision Must Culpably Participate in Each Offense for Conviction of the CCE Offense.

Jackson's fifth claim in his Objections and Exceptions is to the court's jury instruction regarding the requisite relationship between the defendant and the five or more other persons acting in concert with the defendant. Jackson claims that there must be "five or more underlings who are guilty of each of the offenses, either as principals or accessories", or in other words, that "five or more persons under defendant's supervision must culpably participate in each offense." (Jackson's Objections and Exceptions, at 10.) The Third Circuit has rejected such arguments. See Fernandez, 822 F.2d at 386. In Fernandez, the district court instructed the jury on the third element of the CCE charge as follows:

The third element is that the defendant committed these violations in concert with five or more other persons. This does not mean that five or more persons must have participated with the defendant in committing each violation of the continuing series, or even that five or more persons were involved in committing each violation of the continuing series, or even that five or more persons were involved in committing any one of the offenses that is part of a series of offenses constituting the continuing criminal enterprise.

Id. The Third Circuit found that such an instruction properly

defendant] of conspiracy . . . demonstrates that they found the requisite agreement between [the defendant] and one or more co-defendants]").

construes the CCE statute. Id. Jackson has set forth no basis for a claim of ineffective assistance of counsel, and thus, his claim on this ground is procedurally waived.

D. Jackson's Challenge to Unanimity Instructions

Jackson's sixth claim in his Objections and Exceptions was to the lack of an unanimity instruction on the CCE charge. At trial, Jackson requested an instruction that the jury could convict Jackson of a CCE only if all twelve members of the jury agreed on the same five or more such persons. The court denied Jackson's request and instead, gave a general unanimity instruction. On appeal, the Third Circuit held that there is no "unanimity requirement as to the identities of the underlings in a CCE charge." Jackson, 879 F.2d at 89. To the extent that Jackson's § 2255 motion challenges this ruling, Jackson has already litigated this issue and may not re-litigate it now. United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993).⁵ Additionally, to date, neither the Third Circuit nor the Supreme Court has required the jury to unanimously agree about the identity of the five or more persons. See Richardson v. United States, 526 U.S. 813, 119 S. Ct. 1707, 1713 (1999) (assuming, without deciding, government's argument that jury need not unanimously agree about identity of the five or more persons); United States v. Edmonds, 80 F.3d 810, 822 (3d Cir. 1996)

⁵ Thus, the court finds no merit in Jackson's fourth objection to the Report and Recommendation dated March 11, 1999. (Jackson's Objections to Rep. & Recomm. dated 3/11/99 at 2-3.)

(holding that juror unanimity as to identity of five or more persons not required). Thus, to the extent that Jackson's argument addresses the court's failure to give a unanimity instruction regarding the identity of the five or more persons, his claim fails.

To the extent that Jackson's § 2255 motion challenges the court's failure to give an instruction regarding juror unanimity on the predicate offenses of a CCE, his claim fails because any error by the court is harmless beyond a reasonable doubt. Seven years after Jackson's appeal, in 1996, the Third Circuit decided United States v. Edmonds, holding that the CCE statute requires unanimous agreement as to the identity of each of the three related offenses comprising the series. 80 F.3d at 822. This requirement was recently upheld by the Supreme Court. Richardson v. United States, 526 U.S. 813, 119 S. Ct. 1707, 1713 (1999) (requiring juror unanimity with respect to each individual violation constituting the series of a CCE). In light of the holdings in Edmonds and Richardson, the court's general unanimity instruction at Jackson's trial was in error. However, such error in the jury instruction is subject to harmless error review. See Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 1833-36 (1999) (holding that trial court's omission of essential element of offense during jury instructions was subject to harmless error review); see also Escobar-de Jesus, 187 F.3d at 161 (stating that "where a court omits . . . an essential element of the offense, as happened here by the court's failure to instruct the jury that

the 'violations' were themselves elements of the CCE crime and that they therefore must agree unanimously which violations make up the 'continuing series,' the conviction must nonetheless be affirmed if the reviewing court can conclude beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error"); Edmonds, 80 F.3d at 823-27 (applying harmless error analysis to district court's error in omitting specific unanimity instruction on CCE charge). Thus, despite the court's error, Jackson's conviction on the CCE count must nonetheless be affirmed if the court can conclude beyond a reasonable doubt that a rational jury would have found him guilty absent the error.

Here, in addition to the CCE conviction, the jury convicted Jackson on the following counts, all of which qualify as predicate acts for a CCE: (1) Count One for conspiracy under 21 U.S.C. § 846; (2) Count Two for importation of P2P under 21 U.S.C. §§ 952(a), 960(a) and 960(b)(2); (3) Counts Three, Twelve and Thirteen for possession of P2P with intent to manufacture methamphetamine; (4) Count Ten for possession of methamphetamine; (5) Counts Five, Six and Nine for manufacturing methamphetamine under 21 U.S.C. § 841(a)(2). These convictions are "tantamount to the jury having found that [Jackson] committed each of these violations for the purposes of the CCE count." Escobar-de Jesus, 187 F.3d at 162.

In addition, the evidence supporting these separate convictions establishes their relatedness to each other. See id. (holding that although numerous guilty verdicts on counts which

serve as predicate acts "erase as a matter of logic any concern that the jury did not agree that [the defendant] actually committed the offenses making up the series, we can affirm the CCE conviction only if we can conclude beyond a reasonable doubt that the jury, had it been properly instructed, would have found that at least three of those counts were related to each other"); see also id. (citing Edmonds, 80 F.3d at 814) (stating that "[s]ection 848 also requires that jurors agree that the 'series' of violations be 'continuing' in nature--that is, that they be related in some way"). The government produced overwhelming evidence of Jackson's involvement in a set of historically related drug trafficking activities. See Jackson, 879 F.2d at 86. The counts for which Jackson was convicted reveal continuing efforts to import P2P and manufacture and distribute methamphetamine between 1981 and 1984. See Count Two (charging Jackson with importation and aiding and abetting in importation of P2P into United States from Canada between April 22 and 30, 1982); Count Three (charging Jackson with possession of P2P on or about April 23, 1982); Count Five (charging Jackson with manufacturing and aiding and abetting in manufacturing methamphetamine in May 1982); Count Six (charging Jackson with manufacturing and aiding and abetting in manufacturing methamphetamine in May 1982); Count Nine (charging Jackson with manufacturing and aiding and abetting in manufacturing methamphetamine in November 1982); Count Ten (charging Jackson with possession with intent to distribute and aiding and abetting

in possession with intent to distribute methamphetamine in November 1982); Count Twelve (charging Jackson with possession of P2P with intent to manufacture methamphetamine in April 1983); Count Thirteen (charging Jackson with possession of P2P with intent to manufacture methamphetamine in May 1983); see generally, Count One (charging Jackson with conspiracy to manufacture and distribute methamphetamine between 1981 and 1984). The time frames and subject matter of these counts show an ongoing operation of importing P2P and then manufacturing and distributing methamphetamine. See Escobar-de Jesus, 187 F.3d at 162 (finding that counts charged against defendant showed persistent and continuing efforts to import and distribute cocaine between 1989 and 1990 and that their proximity in time and identity of purpose showed their relatedness). The court concludes beyond a reasonable doubt that, had the jury been properly instructed, it would have found that the counts were related and continuing in nature. Thus, the court concludes that its error in failing to instruct the jury that they must unanimously agree about which violations make up the continuing series of violations in the CCE charge was harmless beyond a reasonable doubt.⁶

⁶ Jackson's sixth objection to the Report and Recommendation dated March 11, 1999 is that the Magistrate Judge failed to properly distinguish the facts of Edmonds and overlooked the Third Circuit's decision in United States v. Russell, 134 F.3d 171 (3d Cir. 1998). The court has reviewed these cases in undertaking its harmless error analysis and finds that they do not support Jackson's claim for relief. Specifically, Jackson's reliance on Russell is misplaced. In

E. Remaining Claims from Report and Recommendation Dated 12/22/97

Jackson's Amended Motion under § 2255 filed in June 1997 raised three arguments: "(1) the denial of due process in the sentencing phase of the case in not being given sufficient time to review his presentence investigations reports [("PSR")] or an opportunity to state his objections to statements contained in the PSR; (2) that his conviction was obtained in violation of his 'protection against double jeopardy and was a violation of due process' due to the possible use by the jury of the conspiracy charge as a predicate act for the CCE charge; [and] (3) ineffective assistance of counsel for failure to review the PSR with [Jackson] prior to sentencing." (Rep. & Recomm. dated 12/22/97, at 3.) Jackson's second argument was also raised in his Objections and Exceptions and his most recent Objections to the Report and Recommendation dated March 11, 1999, and thus, are already addressed in section III. C. 1. of this Memorandum. Jackson did not raise the first and third arguments of his June 1997 Amended § 2255 Motion in his Objections and Exceptions. The court will address those arguments now and will approve and adopt

Russell, the defendant was not separately charged with all of the underlying offenses which could have constituted predicate acts for a CCE. Thus, the court was unable to determine beyond a reasonable doubt whether a jury could have unanimously agreed, even without a specific unanimity instruction, on the three offenses which constituted the series of the CCE. See Russell, 134 F.3d at 181-82. Jackson's situation is distinguishable from that in Russell because Jackson was charged separately for his underlying offenses and was in fact convicted on several of those counts.

the Report and Recommendation dated December 22, 1997. In rejecting Jackson's first and third claims in his Amended § 2255 Motion filed in June 1997, the Magistrate found that Jackson did not raise these claims at trial, at sentencing or on appeal. (Rep. & Recomm. date 12/22/97, at 6-7.) In addition, the Magistrate found that Jackson did not present a successful claim of ineffective assistance of counsel, and thus failed to show cause excusing his procedural default on these claims. (Rep. & Recomm. dated 12/22/97, at 6-10.) The court agrees with the Magistrate's Report and Recommendation regarding these claims, and, to the extent that these claims remain as part of Jackson's § 2255 motion, the court will deny Jackson's motion with respect to these claims without a hearing.

F. Certificate of Appealability

For the reasons stated above, the court finds that Jackson has not made a substantial showing of the denial of a constitutional right. See Third Circuit Local Appellate Rule 22.2 (stating that "[i]f an order denying a petition under . . . § 2255 is accompanied by an opinion or a magistrate judge's report, it is sufficient if the order denying the certificate [of appealability] references the opinion or report"). Thus, the court will not issue a certificate of appealability.

IV. CONCLUSION

For the above reasons, the court will approve and adopt the Magistrate Judge's Reports and Recommendations, dated December

22, 1997 and March 11, 1999, will vacate his conviction under Count One for conspiracy, will deny the Amended Motions without a hearing and will not issue a certificate of appealability.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIM. NO. 87-177-01
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CARL JACKSON : CIVIL NO. 97-2861

ORDER

AND NOW, TO WIT, this day of February, 2000, upon consideration of petitioner Carl Jackson's Amended Motions filed pursuant to 28 U.S.C. § 2255, the government's response thereto, the United States Magistrate Judge's Reports and Recommendations, dated December 22, 1997 and March 11, 1999, the Objections thereto and the record, IT IS ORDERED that:

- (1) the Magistrate Judge's Reports and Recommendations, dated December 22, 1997 and March 11, 1999, are APPROVED and ADOPTED in part;
- (2) petitioner Carl Jackson's conviction on Count One for conspiracy is VACATED;
- (2) petitioner Carl Jackson's Amended Motions under 28 U.S.C. § 2255 are DENIED WITHOUT A HEARING; and
- (3) a certificate of appealability SHALL NOT ISSUE.

LOUIS C. BECHTLE, J.