

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

UNITED STATES OF AMERICA

v.

ANDREW BROWN, also known as TYREE BYRANT.

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:
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CRIMINAL ACTION

NO. 99-730

CIVIL ACTION

NO. 04-4121

Memorandum and Order

YOHN, J.

October ____, 2006

Defendant Andrew Brown has filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to Title 28 U.S.C. § 2255. In addition, Brown has filed a supplement to that motion. Brown presents two remaining claims alleging ineffective assistance of counsel in violation of the Sixth Amendment. Brown's other claims were resolved in the court's memorandum and order dated June 28, 2005. For the reasons set forth below, I will deny the balance of the motion with prejudice.

I. Factual Background & Procedural History

On September 28, 1999, Philadelphia Housing Authority ("PHA") officers Olney Johnson and Fredrick Boyle arrested the defendant, Andrew Brown, following a high-speed car chase in North Philadelphia. On November 4, 1999, a United States Magistrate Judge signed a federal criminal complaint and arrest warrant charging Brown with a violation of 18 U.S.C. §

922(g)(1), which prohibits felons from “possess[ing] in or affecting commerce, any firearm or ammunition...”¹ On November 16, 1999, a federal grand jury returned an indictment charging Brown with a violation of 18 U.S.C. § 922(g)(1). The case was subsequently assigned to this court and a jury trial commenced on May 31, 2000.

At trial, the government called two witnesses, Officer Johnson and Philadelphia Police Detective Timothy Brooks. Officer Johnson testified that at approximate 9:40 p.m., he and Officer Boyle witnessed Brown standing in the PHA’s Richard Allen Homes public housing site holding a large handgun. (N.T. Trial, May 31, 2000, at 41-44.) When the police officers exited their patrol car to investigate, Brown ran to a parked car and drove away at a high rate of speed. (*Id.* at 45-47.) Officer Johnson testified that the officers pursued Brown for several city blocks in their patrol car until Brown’s car crashed into a telephone pole in the 1400 block of Master Street, which is located outside of the PHA’s territorial limits. (*Id.* at 47-48.) At this point, Officer Johnson testified that Brown exited his car, dropped the handgun, and continued to flee on foot. (*Id.* at 58.) Officer Johnson testified that he eventually apprehended and arrested Brown while Officer Boyle recovered the handgun. (*Id.* at 58-60, 93.)

Detective Brooks testified next. Detective Brooks described his interview with Brown immediately following his arrest. Detective Brooks testified that at the interview Brown identified himself as “Tyree Bryant.” (N.T. Trial, May 31, 2000, at 112.) However, Detective

¹The complaint also charged Brown under 18 U.S.C. § 924(e), which provides that “[i]n the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any provisions of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).”

Brooks discovered Brown's true identity by examining the documents found in Brown's car. (*Id.* at 116-19.)

Brown called no witnesses at trial. Brown stipulated that he was a convicted felon, that the weapon described in the indictment was a "firearm" within the meaning of 18 U.S.C. § 921, and that the weapon was manufactured outside of Pennsylvania and thus satisfied § 921(g)(1)'s interstate commerce requirement. (*Id.* at 36-37.) Brown's trial counsel,² Edward Meehan, focused on the remaining element of § 921 by attempting to prove that Brown never possessed the gun in question. Trial counsel tried to do so by impeaching Johnson and Brook's testimony. Nonetheless, on June 1, 2000, the jury found Brown guilty.

On October 12, 2000, Brown filed a *pro se* motion for arrest of judgment and a new trial based on ineffective assistance of counsel, deficiency in the indictment, and discovery of new evidence. The court denied this motion on March 9, 2001. On May 4, 2001, the court sentenced Brown to 270 months in prison.

Brown filed a notice of appeal with the Third Circuit on May 9, 2001. On appeal, Brown argued (1) that the government failed to prove § 922(g)(1)'s affecting commerce element, (2) that his sentence was excessive, and (3) that he was deprived of a fair trial because testimony

²Throughout these proceedings, four separate attorneys represented Brown. Brown's first attorney, a member of the federal defender's office, was appointed on November 17, 1999 and withdrew sixteen days later. Brown's second attorney, Edward Meehan, was appointed on December 3, 1999, and represented Brown through his trial. Following trial, on September 15, 2000, Brown filed a *pro se* motion to relieve and appoint new counsel. The court granted the motion and on October 12, 2000, the court appointed Brown's third attorney ("post-trial counsel"). Post trial counsel represented Brown through his sentencing. The Third Circuit permitted the post trial counsel to withdraw on June 26, 2001. The Third Circuit then appointed Brown's final attorney ("appellate counsel") on November 26, 2001. Appellate counsel represented Brown through his appeal and was permitted to resign on November 21, 2000, before Brown filed his motion for rehearing with the Third Circuit.

concerning his alias tainted the jury. *See United States v. Brown*, 54 Fed. Appx. 342 (3d Cir. Nov. 6, 2002) (non-precedential). On November 6, 2002, the Third Circuit rejected Brown's arguments and affirmed the court's judgment. *Id.*

On June 9, 2003, Brown filed a *pro se* petition of *en banc* hearing with the Third Circuit. The court denied the petition on June 25, 2003. Then, on November 20, 2003, Brown filed a *pro se* petition for writ of certiorari with the United States Supreme Court. The Court denied Brown's petition on April 19, 2004. *Brown v. United States*, 541 U.S. 1005 (2004).

On August 31, 2004, Brown filed a *pro se* Motion to Vacate, Set Aside, or Correct Sentence ("§ 2255 Motion"). The motion raised four general issues. First, Brown argued the police violated the Fourth Amendment when they seized the firearm at issue in his case. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 3-8.) Second, Brown argued that the government violated his right to a speedy trial under the Fifth Amendment, the Sixth Amendment, and the Speedy Trial Act of 1973, 18 U.S.C. §§ 3161-74. (*Id.* at 8-9.) Next, Brown asserted that the indictment, by not bearing the signature of the grand jury foreman as required by the Federal Rule of Criminal Procedure 6(c), violated his right to due process. (*Id.* at 10-11.) Lastly, Brown asserted several ineffective assistance of counsel claims. (*Id.* at 11-24.)

Brown's ineffective assistance of counsel claims relied on three main arguments. First, Brown claimed that trial counsel was ineffective for failing to interview and call two allegedly key witnesses, Aaron "Pooh" Devine and Latifah Hollywood. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 13, 15, 18, 20.) Secondly, Brown claimed that trial counsel was ineffective because he failed to call a third eyewitness, Andre Williams. (*Id.* at 14, 15-16, 20.) Brown argued that Williams' testimony contradicts the PHA officers' account of the events

leading to Brown's arrest. (*Id.*) Brown's final ineffective assistance of counsel argument dealt with PHA radio transmissions between PHA officers during the officers' pursuit of Brown. The PHA radio logs indicate that the officers sent their first transmission at 9:39 pm. However, the first transmission available on tape were not made until 9:42 pm. At trial, trial counsel offered a portion of the radio transmission into evidence to impeach one of Officer Johnson's statements. (*See* N.T. Trial, May 31, 2000, at 161-62.) Trial counsel attempted to introduce the remainder of the tape, but the court determined that the statements by the dispatcher were inadmissible hearsay. (N.T. Trial, May 31, 2000, at 14.) The parties agreed on a stipulation, which was read to the jury, describing the transmissions and explaining that the first three minutes of transmissions were unaccounted for. (*Id.* at 158.) Brown claimed that trial counsel was ineffective because (1) he failed to request a recording of the transmissions, (2) he failed to make a *Brady* objection in connection with the recordings, and (3) he failed to object to the authenticity of the recording that was eventually played at trial. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 13, 16, 10, 21; Reply in Supp. of Def.'s § 2255 Mot. at 29.)

On June 28, 2005, after reviewing the record, the court granted defendant's request for an evidentiary hearing only as to his one effective assistance of counsel claim that relates to his trial counsel's alleged failure to call Andre Williams to testify. For reasons stated in its Memorandum and Order, the court denied, with prejudice, the balance of the motion without holding an evidentiary hearing. (Mem. and Order, June 28, 2005.)

Shortly thereafter, on June 29, 2005, Brown filed a motion for leave to supplement his § 2255 Motion. The government consented to the motion and the court, therefore, granted this motion on July 28, 2005. Brown filed his Supplement to his § 2255 Motion on November 18,

2005. In his supplement to his § 2255 Motion, Brown makes another allegation in connection with the recordings of the PHA radio transmissions on the night of his arrest. Brown claims that trial counsel was ineffective by agreeing to a stipulation, which was read to the jury, describing the transmissions and explaining that three minutes of the transmissions were unaccounted for. (*See* N.T. Trial, May 31, 2000, at 144.)

The court held the first of two evidentiary hearings on November 15, 2005. At the first hearing, Brown's current defense counsel presented the testimony of Andre Williams. Williams testified that on September 28, 1999, two PHA officers pulled him over while he was driving just south of Girard Avenue. Williams further testified that after the officers requested his license, registration, and proof of insurance, he saw Brown drive by in a white Acura. The PHA officers then allegedly gave back Williams his papers and pursued Brown. Williams could not recall the exact time he was pulled over because he was intoxicated most of the day. (Evidentiary Hr'g, November 15, 2005, at 13.) Williams testified that he disclosed the incident to Brown, and subsequently to Brown's trial counsel, Edward Meehan. In addition, Williams testified at the hearing that he had several pending charges at the time of Brown's trial, several prior convictions, and that he and Brown were acquaintances from childhood. (Evidentiary Hr'g, November 15, 2005, at 10, 15-18.)

The second hearing took place on January 10, 2006, at which Edward Meehan testified concerning his experience and recollection of his preparation for Brown's trial. Meehan testified that he began practicing criminal defense in 1989, and that he has tried "probably a couple of hundred jury trials" (Evidentiary Hr'g, Jan. 10, 2006, at 11.) Meehan then testified that he represented Brown in a previous criminal proceeding. As to his preparation for Brown's trial,

Meehan testified that he did recall interviewing Williams. (Evidentiary Hr’g, Jan. 10, 2006, at 10-11, 14.) Meehan also authenticated his notes from his meeting with Williams prior to trial. (Evidentiary Hr’g, Jan. 10, 2006, at 14.) However, Meehan could not specifically recall making the notes. In one note to his private investigator, Meehan briefly described the incident as described by Williams and wrote that “[w]e will want to get a statement later, maybe.” (Ex. 11 to Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot.; Gov’t’s Resp. to Def.’s § 2255 Mot.) Further, Meehan testified that although he could not recall the specific reasons why he chose not to call Williams as a witness, there must have been something that caused him to believe that Williams would not be a helpful witness. (Evidentiary Hr’g, Jan. 10, 2006, at 16-18.) Additionally, Meehan testified that Brown was an active client throughout the course of preparing for trial and the trial itself. (Evidentiary Hr’g, Jan. 10, 2006, at 16, 27.)

III. Discussion

Only two claims remain from Brown’s Motion to Vacate, Set Aside, or Correct Sentence Pursuant to Title 28 U.S.C. § 2255 (“§ 2255 Motion”). Both of these two claims allege ineffective assistance of trial counsel. In the first claim, Brown argues the his trial counsel was ineffective for not calling Andre Williams as a witness. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 13, 15-16, 20; Def.’s Reply in Supp. of Supplement to Def.’s § 2255 Mot. at 1-3.) In the second claim, Brown asserts that his trial counsel was ineffective by agreeing to a stipulation, which was read to the jury, describing the PHA radio transmissions and explaining that three minutes of the transmissions were unaccounted for. (Def.’s Supplement to § 2255 Motion at 2-3.) For the following reasons, I will deny both claims.

A. Trial Counsel's Decision as to Andre Williams

28 U.S.C. § 2255 permits a federal prisoner to move the sentencing court to vacate, set aside, or correct his sentence if “the sentence was imposed in violation of the Constitution or laws of the United States, . . . the court was without jurisdiction to impose [the] sentence, . . . the sentence was in excess of the maximum authorized by law, or [the sentence] is otherwise subject to collateral attack.” When a prisoner files a § 2255 motion, the district court may dismiss the motion without an evidentiary hearing if “the motion and files and records of the case show conclusively that the movant is not entitled to relief.” *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989) (citation omitted). In making this determination, “the court must accept the truth of the movant’s factual allegations unless they are clearly frivolous on the basis of the existing record.” *Id.*

“A Section 2255 petition is not a substitute for an appeal.” *Gov’t of the Virgin Islands v. Nicholas*, 759 F.2d 1073, 1074-75 (3d Cir. 1985) (citation omitted). However, defendants are not to raise ineffective assistance of counsel claims on direct appeal. *United States v. DeRewal*, 10 F.3d 100, 103-04 (3d Cir. 1993); *see also United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir. 1994) (stating “[a] § 2255 motion is a proper and indeed the preferred vehicle for a federal prisoner to allege ineffective assistance of counsel”).

To establish ineffective assistance of counsel, a defendant must show that: 1) his attorney’s performance was deficient, and 2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficiency, a defendant must establish that counsel’s performance “fell below an objective standard of reasonableness under prevailing professional norms.” *Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir. 1999) (citing

Strickland, 466 U.S. at 688). To show prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive him of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding,” *id.* at 694, rather “the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *id.* at 695. Under *Strickland*, counsel is presumed to have acted within the range of “reasonable professional assistance,” and the defendant bears the burden of “overcoming the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (citation omitted). While a defendant has the right to effective assistance of counsel, courts have explained that the Constitution does not guarantee the right to a perfect trial. *See Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002) (noting that “the court is not engaging in a prophylactic exercise to guarantee each defendant a perfect trial with optimally proficient counsel, but rather to guarantee each defendant a fair trial, with constitutionally competent counsel”).

Brown argues that trial counsel was ineffective for deciding against calling Andre Williams as a witness at trial (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 13, 15-16, 20.) Trial counsel took Williams’ oral statement while he was visiting Brown because Brown and Williams were apparently housed in the same jail (Def.’s Reply in Supp. of Supplement to Def.’s § 2255 Mot. at 23.) Williams stated that on the night of Brown’s arrest, PHA officers Johnson and Boyle stopped him in his vehicle on a routine traffic stop (Ex. 10 to Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot.) Next, Williams claimed that defendant drove by in his vehicle and the officers “took off” after defendant without taking

Williams' paperwork (*Id.*) Brown asserts that trial counsel, who knew the substance of Williams' account, should have called Williams as a witness to contradict and impeach the PHA Officer Johnson's testimony. (Def.'s Reply in Supp. of Supplement to Def.'s § 2255 Mot. at 1.) Further, Brown supports his argument by asserting that Williams was the only witness available to the defense. (*Id.* at 3.) The court held two evidentiary hearings to further investigate this claim. At the evidentiary hearings, both trial counsel and Williams testified. Williams' testimony, if accepted as true, calls into question PHA Officer Johnson's testimony that he saw defendant standing on the street holding a weapon. Trial counsel could not recall why he decided against calling Williams as a witness. However, for the following reasons, I will deny this claim.

Brown has failed to show that trial counsel's performance was deficient by refraining from calling Williams as a witness. Trial counsel's inability to recall at an evidentiary hearing held six years after the trial his reasons for refraining from calling Williams does not by itself overcome the presumption that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90; *see also Greiner v. Wells*, 417 F.3d 305, 307 (2d Cir. 2005); *Williams v. Head*, 185 F.3d 1223, 1227-28 (11th Cir. 1999). Under the direction of *Strickland*'s strong presumption, when counsel cannot recall the reasons why he may have made a certain decision, the court should look to the record to determine if any legitimate strategic reasons exist. *See Greiner*, 417 F.3d at 320; *Fretwell v. Norris*, 133 F.3d 621 (8th Cir. 1998). Here, the record contains several legitimate justifications for why trial counsel, who was quite experienced and well-known to the court as an effective and conscientious advocate, may have refrained from calling Williams as a witness.

The government cites a pre-trial "memo" that trial counsel prepared to show that trial

counsel had sound reasons for not calling Williams. (Gov't's Resp. to Def.'s § 2255 Mot. at 22.) The "memo" describes trial counsel's meeting with Williams and says "[w]e will want to get a statement later, *maybe*." (Ex. 11 to Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot.) (emphasis added). Additionally in the "memo," trial counsel asks an associate to obtain records of traffic stops made by the PHA police on the night of defendant's arrest, which indicates that trial counsel tried to search for evidence that would corroborate Williams' testimony.

The "memo" suggests that trial counsel had reservations about Williams' credibility as a witness. A strong reason for trial counsel's reservations could have resulted from discovering that Williams' record showed several convictions within the past ten years. In fact, Williams had nine to ten convictions from 1987 to 1999 involving several robbery convictions and an auto-theft conviction. (Ex. A-D to Gov't's Resp. to Def.'s Supplement to Def.'s § 2255 Mot.) Meehan had a report of Williams' conviction in his file. (Evidentiary Hr'g, January 10, 2006, at 13.) At trial, the government could have impeached Williams with many of these convictions. (See Ex. A-D to Gov't's Resp. to Def.'s Supplement to Def.'s § 2255 Mot.) The record also shows that the government could have impeached Williams' testimony as biased based on the fact that Williams and Brown knew each other "from the neighborhood" since they were thirteen or fourteen years of age. (Evidentiary Hr'g, November 15, 2005, at 15.) The government could have also impeached Williams' credibility because he admitted he had been drinking for most of the day in question. (*Id.* at 13.) The record also lacks any evidentiary support corroborating Williams' testimony. Further, trial counsel testified that he met with Brown "quite a bit" during the trial and that Brown was active in his representation and defense. (Evidentiary Hr'g, January

10, 2006, at 27.) The court also noted Brown's active involvement with his counsel during the trial. Trial counsel also testified that he could not imagine deciding against calling Williams without having first discussed the decision with Brown. (*Id.* at 27.) Meehan was certain that he did not forget about Williams during the trial (*id.* at 16), that he must have had legitimate reasons for not calling him (*id.* at 16-18), and that he must have discussed it with Brown and they mutually decided not to call him (*id.* at 16). Meehan further noted that if he thought Williams would be helpful to the defense he certainly would have called him to testify. (*Id.* at 17.) The court finds the testimony of Meehan to be very credible.

Therefore, I find that trial counsel, having reservations about the credibility Williams' account and fearing the government's impeachment of Williams, decided against calling Williams as a witness for these reasons. I further find that Williams made this decision together with Brown. It is crystal clear that the decision was not made because Meehan, Brown, or both, forgot about him. This decision to refrain from calling Williams as a witness does not "fall below an objective standard of reasonableness under prevailing professional norms." *Buehl*, 166 F.3d at 169 (citing *Strickland*, 466 U.S. at 688). Brown's reliance on trial counsel's inability to recall the specific reason for deciding against calling Williams is insufficient to overcome the presumption that counsel's decision was "sound trial strategy" falling "within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, based on the other facts surrounding the decision.

Brown argues that, under the circumstances, the court should not apply the presumption that trial counsel's assistance falls within the wide range of reasonable professional assistance. (Def.'s Reply in Supp. of Supplement to Def.'s § 2255 Mot. at 2-3.) In support of his argument,

Brown relies on *Wiggins v. Smith*, 539 U.S. 510 (2003), and *White v. Roper*, 416 F.3d 728 (8th Cir. 2005). Brown incorrectly asserts that these cases call into question the reasoning of *Williams* and *Fretwell* cited above.

In *Wiggins*, the Supreme Court held that counsel's failure to reasonably investigate and present mitigating evidence in the sentencing phase of a capital offense case constituted ineffective assistance of counsel. *Wiggins*, 539 U.S. at 534. In doing so, the Court reaffirmed the holding in *Strickland*, that "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at 521-522 (quoting *Strickland*, 466 U.S. at 690-91). Brown, relying on the Eighth Circuit's decision in *Roper*, 416 F.3d at 732, argues that, when counsel fails to make an adequate investigation, the presumption that counsel's decision is "sound trial strategy" does not apply. Indeed, the *Roper* court, interpreting *Wiggins*, did correctly state that "the strength of the presumption turns on the adequacy of counsel's investigation. *Roper*, 416 F.3d at 732. However, Brown's argument assumes that his trial counsel refrained from calling Williams without first making a reasonable investigation.

The Court in *Wiggins* stated that in "assessing counsel's investigation, we must conduct an objective review of [his or her] performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688-89). Using this standard, the Court found that counsel's decision not to further

investigate defendant's troubled childhood and present such reasonably available mitigating evidence at sentencing fell below "the standard practice in Maryland in capital cases at the time of [defendant's] trial." *Id.* at 524 (referring to the ABA Guidelines for the Appointment of Performance of Counsel in Death Penalty Cases). The Eighth Circuit in *Roper* applied the reasoning of *Wiggins* and held that counsel's failure to reasonably investigate eyewitnesses made the *Strickland* presumption inapplicable. *Roper*, 416 F.3d at 731-32. Further, in that case the court could not find any reasonable justification in the record as to why counsel decided against calling the eyewitnesses, particularly when counsel called a far weaker eyewitness. *Id.* After finding that the failure to call the witnesses at trial prejudiced the defendant, the *Roper* court held that the defendant had received ineffective assistance of counsel. *Id.*

Brown has failed to show that his trial counsel's investigation of Williams' potential as a witness fell below the standard of "reasonableness under prevailing professional norms." *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688). In viewing "the challenged conduct as seen 'from counsel's perspective at the time,'" this court cannot find that trial counsel's investigation of Williams as a potential witness was unreasonable. *Wiggins*, 539 U.S. at 523 (citations omitted). Unlike in *Wiggins*, the record does not show that, under the circumstances, Brown's trial counsel performed an inadequate or unreasonable investigation as to Williams. Trial counsel interviewed Williams when he discovered that Williams could possibly be a defense witness in Brown's case. He directed his investigation to try to find corroborating evidence to support the testimony. He also was aware of Williams' prior criminal record and his friendship with Brown. Subsequent to the investigation, trial counsel made the decision to refrain from calling Williams as a witness for a reason he cannot recall. Thus, the

present case before the court is therefore distinguishable from *Wiggins*.

Further, unlike in *Roper*, the record for the present case contains several reasonable justifications as to why Brown's trial counsel refrained from calling Williams as a witness. Trial counsel's memorandum from the interview with Williams indicates that he had his reservations about Williams' story. For example, in one part of his memorandum, Brown's trial counsel describes Williams' story and writes that "[w]e will want to get a statement later, *maybe*." (Ex. 11 to Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot.) (emphasis added). Finally, Williams' vulnerability to impeachment based on bias and past convictions would influence trial counsel's decision to refrain from calling Williams as a witness. Therefore, Brown's reliance on *Wiggins* and *Roper* to support his claim that counsel was ineffective in his investigation of Williams as a potential witness is misplaced. Thus, trial counsel's decision to refrain from calling Williams as a witness is entitled to the presumption that it falls within the wide range of "reasonable professional assistance" and sound trial strategy.

Because Brown has failed to demonstrate that trial counsel was ineffective by refraining from calling Williams as a witness, I will deny his ineffective assistance of counsel claim concerning trial counsel's decisions with regard to Williams.

B. Trial Counsel's Stipulation to the Three Minute Gap of Radio Transmissions

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a one-year limitations period applies to petitions for writs of habeas corpus brought by persons in federal custody. 28 U.S.C. § 2255. However, a district court may, in its discretion, permit an amendment to a § 2255 motion pursuant to Rule 15(c)(2) of the Federal Rules of Civil Procedure "so long as the original and amended [habeas] petitions state claims that are tied to a common

core of operative facts.” *Mayle v. Felix*, 125 S. Ct. 2562, 2574 (2005); *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000). The idea underlying Rule 15(c) is that even where the proposed amendment would transpire after the expiration of the pertinent statute of limitations, that statute “will not bar an amendment when ‘the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.’ In that case, the amendment is said to ‘relate back’ to the date of the original pleading.” *Belle v. Varner*, 2001 U.S. Dist. LEXIS 13725, 2001 WL 1021135, at * 9 n.11 (E.D. Pa. Sept. 5, 2001) (quoting Fed. R. Civ. P. 15(c)(2)); *see also Mayle*, 125 S. Ct. at 2571. In order not to frustrate the limitations period under AEDPA, relation back is only proper “when the new claims added by the amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in ‘both time and type’ from the originally raised episodes.” *Id.* at 2571 (citing *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999)). Although the Court dealt with a § 2244 motion in *Mayle*, there is no reason why its analysis would not apply to Brown’s § 2255 motion. *See United States v. Hoffner*, 2005 U.S. Dist. LEXIS 28133, at *17 (E.D. Pa. November 16, 2005).

In his Supplement to his § 2255 Motion, Brown claims that trial counsel was ineffective by agreeing to a stipulation, which was read to the jury, describing the PHA radio transmissions and explaining that three minutes of the transmissions were unaccounted for by the government. (Def.’s Supplement to § 2255 Motion at 2-3.) The government concedes that the claim is timely under *Mayle* but argues for denial of this claim because Brown cannot establish that trial counsel was ineffective. (Gov’t’s Resp. to Def.’s Req. to Supplement § 2255 Mot. at 2.) I will deny this claim because Brown is unable to show that trial counsel was ineffective.

Brown's original § 2255 Motion raised several claims of ineffective assistance of counsel relating to the recording of the PHA radio transmissions. Brown argued that trial counsel was ineffective for (1) failing to request a recording of the radio transmissions, (2) failing to make a *Brady* objection to the recordings, and (3) failing to object to the authenticity of the recording played at trial. The court denied Brown's § 2255 Motion as to these claims. (Mem. and Order, June 28, 2005.) Brown raises another claim relating to the recording of the radio transmissions in his Supplement to his § 2255 Motion. Brown claims that trial counsel was ineffective by stipulating that three-minutes, from 9:39pm to 9:42pm, of the PHA radio transmission recordings from the night of the arrest were unaccounted for.

Brown's supplemental claim will be denied because Brown is unable to establish that trial counsel's performance was deficient for agreeing to a stipulation that three minutes of the PHA radio transmission recordings were unaccounted for by the government. *See Strickland*, 466 U.S. at 687. Trial counsel made use of the transcript of the PHA radio transmission recordings at trial to impeach Officer Johnson's statements. (*See* N.T. Trial, May 31, 2000, at 161-62.) As this court stated in its Memorandum & Order on June 28, 2005, "because trial counsel introduced the dispatch tape into evidence to bolster defendant's case, there was no reason for him to object to the authenticity of the tape." (Mem. & Order, June 28, 2005, at 25.) Therefore, if anything, trial counsel's stipulation only aided Brown's defense. By virtue of the stipulation, trial counsel could bolster his argument that the tape helped the defendant's case and a portion of it went missing while in the government's control. Finally, there is no evidence that the stipulation was inaccurate or that the stipulation was in any way prejudicial to the defendant. Trial counsel's decision fell well within the range of "reasonable professional assistance." *Strickland*, 466 U.S.

at 695. Thus, trial counsel was not ineffective by stipulating that three minutes of the PHA radio transmission recordings were unaccounted for by the government.

Because Brown cannot meet the burden of overcoming the presumption that trial counsel's stipulation might be considered sound trial strategy falling within the wide range of reasonable professional assistance, I will deny this claim of ineffective assistance of trial counsel found in Brown's Supplement to his § 2255 Motion.

IV. Conclusion

For all of the reasons above, the balance of Brown's § 2255 motion is denied with prejudice. The court must now determine if a certificate of appealability should issue. A court may issue a certificate of appealability only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires that the petitioner "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As stated above, Brown has not sufficiently shown that he suffered a denial of any constitutional right. Because he cannot demonstrate that reasonable jurists would find this court's assessment of his constitutional claims to be debatable or wrong, a certificate of appealability will not issue.

An appropriate order follows.

