

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

UNITED STATES OF AMERICA : CRIMINAL NO. 99-506-02  
: :  
: : CIVIL NO. 04-1145  
v. : :  
: :  
: :  
DADAJI IBN-SEKOU ODINGA :  
a/k/a “Dadaji S. Early” :

**MEMORANDUM**

Giles, J.

August 23, 2007

**I. Introduction**

Before the court is Petitioner’s Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 and Motion to Supplement his Section 2255 Motion. The ultimate issues raised by the motions and determined by the court are (1) whether Petitioner states any meritorious claims for relief in his 28 U.S.C. § 2255 petition for habeas corpus when he claims: (a) ineffective assistance of counsel because allegedly he did not know his full sentencing exposure prior to trial and counsel failed to argue sentencing entrapment, never explained aiding and abetting, failed to obtain affidavits from allegedly exculpatory witnesses, and failed to object to the pre-sentence report (“PSR”), and (b) the imposition of an illegal sentence because allegedly all counts should have been grouped and sentences on all counts run concurrently, and his sentence of sixteen years was unconstitutional under the rule pronounced in Apprendi v. New Jersey, 530 U.S. 466 (2000); and (2) whether this court should permit the amendment to Petitioner’s Section 2255 Motion, which seeks to add a new constitutional claim.

The court finds that Petitioner fails to substantiate any meritorious claims for ineffective

assistance of counsel and that his illegal and unconstitutional sentence claims lack merit.

Therefore, the court denies Petitioner's Section 2255 Motion.

The court further finds that, although not barred by the applicable statute of limitations because it relates back to a timely filed claim, amendment of Petitioner's Section 2255 motion would be futile because the amendment fails to state a claim upon which relief can be granted. The court denies Petitioner's Motion to Supplement his Section 2255 Motion. The reasons follow.

## **II. Procedural History**

On August 24, 1999, Petitioner, along with five others, was charged in all counts of a 68-count indictment with one count of conspiracy to make false statements to a federally licensed firearms dealer (Count 1), and 67 counts of making and aiding and abetting the making of false statements to a federally licenced firearms dealer (Counts 2-68). On December 16, 1999, a jury found Petitioner guilty of Counts 1 and 60-68. On August 8, 2000, this court sentenced Petitioner to sixteen years imprisonment, three years supervised release, a \$1,000.00 fine, and a \$1,000.00 special assessment. Petitioner filed a timely notice of appeal.

On June 13, 2002, the Third Circuit affirmed the conviction, but vacated the sentence and remanded the matter to this court to clarify its reasons for denying a downward departure motion. On June 17, 2002, this court re-imposed the same sentence and clarified its reasons for denying the downward departure. Petitioner again appealed. On December 18, 2002, the Third Circuit affirmed this court's decision. Petitioner did not appeal his case to the United States Supreme Court, and his judgment became final on March 18, 2003.

Petitioner filed this timely Habeas Corpus motion under 28 U.S.C. § 2255 on March 17, 2004. He asserts four grounds for relief. Ground One of Petitioner's § 2255 motion states he had ineffective assistance of trial counsel. Petitioner's trial counsel is deceased. Petitioner asserts under Ground One that: (1) trial counsel failed to inform Petitioner of his full sentence exposure; (2) trial counsel failed to call Bernadette Harris as an exculpatory witness; (3) trial counsel never explained the meaning of aiding and abetting; and (4) trial counsel failed to obtain affidavits by Sharese Mayers and Kenyetta Jones.

Ground Two of Petitioner's motion asserts that he had ineffective assistance of counsel at sentencing. Under Ground Two Petitioner asserts: (1) counsel at sentencing was ineffective for failing to object to the PSR and/or argue that the guidelines required that all counts run concurrently, and (2) to argue sentencing entrapment.

Ground Three of Petitioner's motion asserts that he had ineffective assistance of appellate counsel because appellate counsel failed to argue that all counts should have been grouped and sentences on all counts run concurrently.

Lastly, Ground Four of Petitioner's motion asserts that his sentence is illegal because all counts should have been grouped and ordered to run concurrently, and that his sentence was unconstitutional under Apprendi, 530 U.S. 466.

On September 20, 2004, Petitioner filed with this court a Motion to Supplement his § 2255 petition. Petitioner asserts in his supplement an entirely new claim for relief. The new claim was filed after the one-year statute of limitations under 28 U.S.C. § 2255 expired. The new claim is that Petitioner is entitled to relief under the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296 (2004), which related to state custody only and held that sentencing

schemes that permit a sentence to be enhanced on the basis of facts other than those found by the jury violates a defendant's Sixth Amendment right to a jury trial.

On July 19, 2006, the court appointed Attorney Vernon Z. Chestnut to assist Petitioner in his habeas petition. On March 13, 2007, Attorney Chestnut sent a memorandum to this court, explaining that he reviewed Petitioner's case for any potential habeas issues and concluded that the Petitioner does not have any meritorious legal issues to pursue. On June 18, 2007, after various time extensions granted by this court, the Government submitted its response to Petitioner's motion. Petitioner, pro se, filed his reply brief on August 3, 2007.

### **III. Discussion**

When a motion is made under 28 U.S.C. § 2255, the question of whether to order a hearing is committed to the sound discretion of the district court. United States v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992). In exercising that discretion, 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. Further, the court must order an evidentiary hearing to determine the facts unless the motion and files and records of the case show conclusively that the movant is not entitled to relief. Id.

#### **A. Petitioner's Motion Pursuant To § 2255.**

Grounds One, Two, and Three of Petitioner's timely filed motion allege ineffective assistance of counsel at the trial, sentencing, and appellate stages of the litigation. Ground Four of Petitioner's motion alleges that his sentence is illegal because all counts should have been grouped and run concurrently. Petitioner's claims of ineffective assistance of counsel and

imposition of an illegal sentence lack merit and are mistaken as to the law.

**1. Grounds One, Two, And Three Of Petitioner's § 2255 Motion, Claiming Ineffective Assistance Of Counsel At All Stages Of Litigation.**

Petitioner claims ineffective assistance of counsel at trial, sentencing, and on appeal.

There is a two-part test to determine whether a defendant was denied effective assistance of counsel. To prevail the defendant must establish that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The Petitioner must establish that there is a reasonable probability that, but for unprofessional errors, the result would have been different. Id. In assessing whether counsel was competent, judicial scrutiny of an attorney's performance must be highly deferential. Id. at 689.

**a. Ground One: Ineffective Assistance Of Trial Counsel.**

Petitioner claims trial counsel was ineffective for: (i) failing to explain that the maximum penalty faced was twenty years in prison and not five, and that all "counts" could run consecutively; (ii) failing to call Bernadette Harris as a witness who would have exculpated the Petitioner; (iii) failing to explain aiding and abetting; and (iv) failing to obtain allegedly exculpatory statements of witnesses Mayers and Jones. All of the claims lack merit and therefore no relief can be granted.

*i. Petitioner's Claim Regarding Knowledge Of His Full Sentencing Exposure.*

Petitioner's claim that he did not know his full sentence exposure prior to trial and was denied the ability to enter a guilty plea, which was never offered by the Government, does not entitle him to relief. To prove ineffective assistance of counsel at the plea bargaining stage, the petitioner must prove: (1) that a plea offer was extended by the government, and (2) that a reasonable probability exists that he would have accepted the plea offer and the court would have approved the agreement. United States v. Day, 969 F.2d 39, 44-46 (3d Cir. 1992).

The Third Circuit held in Day that a hearing was necessary because petitioner stated a facially valid claim for ineffective assistance of counsel when he was notified of the terms of the plea bargain, but alleged that the advice he received was so incorrect and insufficient that it undermined his ability to make an intelligent decision about whether to accept the offer. Id.; see Enright v. United States, 347 F. Supp. 2d 159, 165 (D.N.J. 2004) (finding that the petitioner failed to state a viable claim for ineffective assistance of counsel at the plea bargaining stage because there was no formal plea offer, nor was a specific offer made even informally); see also U.S. v. Pungitore, 15 F. Supp. 2d 705, 733-34 (E.D. Pa. 1998) (holding that the petitioner failed to show that the Government ever extended a plea offer, as required by Day).

Here, the Government asserts, and the Petitioner concedes, that a plea offer, formal or informal, was never made. The Government asserts that it and Petitioner's trial counsel never discussed a plea. These circumstances do not meet the standards for demonstrating prejudice at the plea bargaining stage.

Petitioner claims his counsel was deficient in giving him misleading advice regarding his

potential sentence, and that if he knew he faced twenty years in prison, he would have accepted responsibility and pled guilty. The Government asserts that at the pre-trial stage Petitioner was told by his Co-Defendant Johnson that the maximum sentence was five years, but that Petitioner's counsel and Johnson's counsel told petitioner that Johnson was incorrect and that Petitioner faced much longer than five years.

The United States Attorney who prosecuted Petitioner's case, Faith Moore Taylor, states in a signed affidavit that, prior to jury selection, counsel for both defendants talked to the government about its estimation of their respective client's sentences. Further, Taylor avers that Petitioner's counsel, the late Timothy P. Booker, understood and agreed that his client was facing approximately twenty years. Additionally, Taylor states that counsel and the Government were never able to have discussions about a non-trial disposition because Petitioner would not accept the fact that he was facing approximately twenty years.

Edward J. Daly, the attorney for Petitioner's Co-Defendant, Kenneth Johnson, states in an unsigned affidavit that Booker believed that his client, Petitioner, was facing approximately twenty years. Daly relates that Booker had several conversations with Petitioner in an attempt to convince him that his guidelines range was approximately twenty years. Daly states that Booker confirmed that the source of Petitioner's misinformation was Co-Defendant Johnson. Daly recounts that Booker asked Daly to speak with Petitioner about Petitioner's sentencing exposure and verify that Johnson's information was incorrect. Daly confirms in his unsigned affidavit that he did just that, but was unsuccessful at dissuading Petitioner of this notion.

In addition, Petitioner in his § 2255 motion claims that the Government "kept saying" that he faced twenty years in prison. (Pet'r Mot. 5-6.) Petitioner demonstrates that he was aware

of the Government's statements that he faced twenty years, and cannot now credibly claim that he did not plead guilty because he thought his maximum exposure was five years.

Because there is no merit to Petitioner's claim and no plea offer was ever made by the Government, as required under Day, 969 F.2d at 44-46, to prove ineffective assistance at the plea bargaining stage, Petitioner is not entitled to relief for this claim as a matter of law.

***ii. Petitioner's Claim Of Ineffective Assistance Of Trial Counsel For Failing To Call Bernadette Harris, An Allegedly Exculpatory Witness.***

Counsel's decision not to call Bernadette Harris to testify was not deficient performance and did not prejudice the result of the litigation. To establish constitutional ineffectiveness of counsel, Petitioner must show that his counsel's performance was outside the wide range of professionally competent assistance and that the incompetent performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). For Petitioner's defense to have been prejudiced, he must prove that there exists a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance, that the challenged action might be considered sound trial strategy. Id.

Petitioner claims his counsel was ineffective for not calling to the stand Bernadette Harris. Petitioner claims that this deficient performance prejudiced his defense. Petitioner avers that Harris' testimony would have tipped the verdict in his favor because Harris' testimony would have undermined the credibility of government witness Kyle Faulk. Specifically,

Petitioner first claims that Harris' testimony would have contradicted Faulk's because Harris and Faulk gave inconsistent statements to the ATF regarding Faulk's gun purchases on August 14, 1998 (Counts 60-63).

The main points of the Harris statement are summarized as follows. Sometime in late August or early September 1998, Faulk had Harris' automobile and was supposed to pick her up after work. Faulk arrived between 5:30 and 5:45 p.m. and was accompanied by an unknown male (Kenneth Johnson a/k/a "Hassan") who was in the front passenger seat. Harris got into the back seat where her daughter was sitting. Faulk pulled the car into the parking lot of a one story building. Faulk told Harris to wait in the car, while Faulk and the unknown passenger (Johnson) went inside the building. Harris went back into the store after some time and noticed there were six to eight forms on the counter in front of Faulk and realized that he was buying guns. Faulk then drove to the West Philadelphia area and dropped off his passenger at an unknown location and at that time Faulk opened the trunk, Harris was uncertain what, if anything, was removed.

In contrast, Faulk stated in his ATF interview that Hassan was the driver and that after he purchased the guns, Hassan drove them back to his ex-wife's car, that was parked at her place of work. However, at trial, Faulk gave a different account; one that was similar to Harris' ATF statement. Petitioner alleges that this was purposefully done to corroborate his story with that of Harris.

Notwithstanding the inconsistencies in the Harris and Faulk ATF statements, the lack of Harris' testimony at trial did not prejudice the defense. Petitioner's Co-Defendant's counsel, Daly, cross-examined Faulk thoroughly regarding his inconsistent accounts. (See Trial Tr. vol. 170, 162, Dec. 9, 1999.) Petitioner cannot credibly claim now that his case was prejudiced by the

lack of Harris' testimony on the same inconsistencies. Additionally, this court instructed the jury that it should scrutinize Faulk's testimony more carefully because he was an alleged co-conspirator. (Trial Tr. vol. 170, 151, Dec. 9, 1999.)

Furthermore, it appears from the record that the defense's trial strategy did not include using Harris to attack the credibility of Faulk. Defense counsel in both the opening statement, (Trial Tr. vol. 170, 37, Dec. 9, 1999), and closing arguments, (Trial Tr. vol. 167, 46, Dec. 13, 1999), attacked Faulk's credibility, highlighting that Faulk was testifying pursuant to a plea bargain. It may have been that counsel did not wish to call Ms. Harris as a witness because she may have ultimately corroborated Faulk's trial testimony.

Petitioner claims next that Harris' statement to the ATF that the man with Faulk on August 14, 1998 was "clean shaven" exculpates him. Petitioner avers that this statement is exculpatory because his Co-Defendant, Johnson, is Muslim and not "clean shaven," and therefore could not have been the man with Faulk on the date in question. This conclusory allegation does not support a claim of ineffective assistance of counsel. That Harris may have testified that the man who accompanied Faulk was clean shaven does not create a reasonable probability that the outcome of Petitioner's case would have been different. There was eye-witness evidence presented at trial that Johnson was with Faulk at the gun shop on August 14, 1998. A government witness, Charles J. Gallo, a federally licenced gun dealer and the owner of C&C Sports Center, identified Johnson as being with Faulk in his gun shop on the day in question. (Trial Tr. vol. 170, 73, Dec. 9, 1999.)

Lastly, Petitioner avers that if Harris would have testified that she suspected Faulk was purchasing the guns for someone other than Petitioner, this could have tipped the verdict in his

favor. This allegation does not sufficiently undermine confidence in the outcome of Petitioner's case. Whether Harris suspected Faulk was purchasing guns for Petitioner does not change the fact that Faulk testified that he spoke with Petitioner on August 14, 1998 about buying more guns, (Trial Tr. vol. 170, 142-43, Dec. 9, 1999), and that Gallo testified that on September 10, 1998 (counts 64-68) Faulk entered the gun shop with Petitioner and his Co-Defendant Johnson, and after the purchases, the three men left together (Trial Tr. vol. 170, 85, Dec. 9, 1999).

Petitioner fails to demonstrate that, but for counsel's failure to call Harris to the stand, the result of his proceeding would have been different. Therefore, no relief can be granted.

***iii. Petitioner's Claim That Trial Counsel Was Ineffective For Failing To Explain Aiding And Abetting.***

Petitioner claims ineffective assistance because his trial counsel never explained the meaning of aiding and abetting. Petitioner claims that he believed that he could only be convicted if he himself made false statements. Petitioner does not allege that the evidence presented at trial fails to sustain his conviction on a theory of aiding and abetting. It appears that Petitioner asserts this particular claim to support his first claim, that he was not aware of his sentence exposure prior to trial and if he were, he might have accepted a guilty plea. As stated earlier, to prove ineffective assistance of counsel at the plea bargaining stage, the petitioner must prove: (1) that a plea offer was extended by the government, and (2) that a reasonable probability exists that he would have accepted the plea offer and the court would have approved the agreement. United States v. Day, 969 F.2d 39, 44-46 (3d Cir. 1992)

Here, the government did not make any formal or informal plea offer, nor does the

Petitioner now claim that it did. Because Petitioner fails to demonstrate that his counsel was ineffective at the plea bargaining stage for failing to explain the meaning of aiding and abetting, the court cannot accept his contention that he was unaware of his full sentence exposure.

Therefore this claim lacks merit and no relief can be granted.

*iv. Petitioner's Claim That Trial Counsel Was Ineffective For Failing To Obtain Exculpatory Statements From Other Witnesses.*

Petitioner claims that counsel's failure to obtain affidavits from Mayers and Jones, regarding their statements given to police on October 4, 1998, was deficient and prejudiced the result of his case. Petitioner again states that these statements exculpated him, but does not explain how they do.

Any failure to obtain affidavits from Mayers and Jones did not prejudice Petitioner's case because his counts of conviction did not include any transaction with Mayers or Jones. The Government offers that his "Counts" of conviction do not include any conspiracy or transactions involving Mayers or Jones. The record substantiates that position. The record shows that Mayers and Jones both testified at trial that they lied to the police in their October 4, 1998 statements. (Trial Tr. vol. 168, 88, 109, Dec. 10, 1999.) In addition, Petitioner's counsel and his Co-Defendant's counsel thoroughly cross-examined Mayers, (Trial Tr. vol. 168, 90-96, Dec. 10, 1999), and Jones, (Trial Tr. vol. 168, 109-115, Dec. 10, 1999).

Further, counsel's performance was not deficient because the suggested material, the original Jones and Mayers statements, would have been incredible. The rule in Brady v. Maryland, 373 U.S. 83 (1963) requires the disclosure of exculpatory evidence to the defense.

The Third Circuit has held that where the government fails to disclose exculpatory evidence that is not credible, there is no Brady violation. See United States v. Messerlian, 832 F.2d 778, 795 (3d Cir. 1987) (finding that the government's withholding of non-credible testimony that would not have altered the jury's verdict was not a Brady violation). If the government does not commit a Brady violation in such circumstances, then by extension a defense attorney cannot have provided ineffective assistance for allegedly failing to obtain copies of the same non-credible material. Cf. Wright v. Vaughn, 473 F. 3d. 85, 91-92 (3d Cir. 2006) (holding that appellate counsel was not ineffective for failing to argue trial counsel's failure to call a non-credible witness).

In addition, Petitioner's counsel thoroughly cross-examined Mayers and Jones regarding their prior statements of October 4, 1998. Therefore Petitioner's claim that his counsel was ineffective for failing to obtain affidavits from Mayers and Jones regarding their admittedly false statements to the police is frivolous.

**b. Ground Two: Ineffective Assistance Of Counsel At Sentencing.**

Petitioner's claims that his counsel at sentencing was ineffective for (i) failing to object to the PSR; (ii) argue that the counts should run concurrently; and (iii) argue sentencing entrapment lack merit.

***i. Contrary To Petitioner's Allegation, Counsel Did Object To The PSR.***

The record demonstrates that Petitioner's counsel did object to the PSR. He objected to Petitioner's base offense level of 24, the four-level enhancement Petitioner received for his

leadership role, and the five-level enhancement Petitioner received for the number of guns involved in the offense. (Sentencing Tr. vol. 183, 5, 8, 11, Aug. 8, 2000.) Therefore, Petitioner's claim of ineffective assistance of counsel for failing to object to the PSR is frivolous and no relief can be granted.

*ii. Counsel Was Not Ineffective Because He Did Argue That The Guidelines Required Concurrent Sentences.*

Petitioner's claim that counsel was ineffective at sentencing for failing to argue that sentencing guidelines required sentences on all counts run concurrently is frivolous and no relief can be granted. The record shows that counsel and the Petitioner himself presented the argument that Petitioner's sentences on each count should be grouped so that his total sentence would be five years imprisonment. (Sentencing Tr. vol. 183, 26-28 Aug. 8, 2000.) Furthermore, counsel is not ineffective in failing to raise, or to pursue on appeal, frivolous issues. See United States v. Benish, 5 F.3d 20, 25 (3d Cir. 1993). The relevant portions of the sentencing record are as follows:

**Mr. Cunningham:** His argument is that with regard to paragraph 83, under sentencing options, the PSI gives the guideline provisions and states the guideline range for imprisonment is 188 to 235 months. However, the argument that I make on behalf of my client is that these violations in counts 60 through 68 should be grouped in such a way that my client cannot be sentenced to more than the maximum offense for any one of the firearm violations, which would mean that the possible sentence would not fall within that guideline range, but would be a maximum of sixty months.

**The Court:** Mr. Early, you may state it in your own words.

**The Defendant:** Thank You, Your Honor. I don't have the case law, and I discussed it with my lawyer, and I wanted to go over it with him, and we haven't had the time to do so

**The Court:** Then what's your - - what's your point? It may be as a matter of law you're wrong.

**The Defendant:** Under statutory sentencing guidelines, it says that you cannot be

sentenced more than the maximum sentence of - - which in my case is five years.  
And - -

**The Court:** For each offense

**The Defendant:** For each offense. And then in another section of the law, it says that the - - that if the crime was done together or - - I forget the legal words for it, but it should be grouped, unless you (sic) outside of a certain statute.

**The Court:** Well, the whole process - - the process of going through the - - the sentencing guidelines applications, is to do it as a grouping.

If you were to receive a sentence that could aggregate - - could combine all the five year possibilities of each offense, then you would be way beyond the 235 months, which is possible. You'd be looking at a life sentence. So the statutory - - if you're facing a statutory time, let's say five years for a violation, but the sentencing guidelines ends up giving you a possible sentence less than what the statute would give you.

**The Defendant:** I understand what you're saying, Your Honor, but I went over that, also. And from my understanding, it - - it's more to it than that, and I - - I'm just not in - - I can't argue it because I don't have the proper stuff to argue it.

**The Court:** From my experience, the guideline calculation is being done appropriately, and as such, the guideline range resulting is 188 to 235 months.

(Sentencing Tr. vol. 183, 28, Aug. 8, 2000.)

Contrary to Petitioner's claim, his counsel at sentencing did argue that his counts should run concurrently, that argument was dismissed by this court as incorrect as a matter of law.

Therefore, Petitioner's claim that his counsel was ineffective for failing to argue that his counts should be grouped and run concurrently lacks merit and no relief can be granted.

*iii. Counsel Had No Basis To Argue Sentencing Entrapment And The Third Circuit Does Not Recognize It As A Basis For Downward Departure.*

Petitioner claims that counsel was ineffective for failing to argue sentencing entrapment, on the basis that the gun dealer required that an ATF 4473 form be filled out for each gun purchased even though there was space to fill out as many as four guns per form. Sentencing entrapment occurs when a defendant, although predisposed to commit a minor or lesser offense,

is entrapped in committing a greater offense subject to greater punishment. United States v. Tykarsky, 446 F.3d 458, 477 (3d Cir. 2006). The Third Circuit has not yet recognized sentencing entrapment as a basis for downward departure. Id. Petitioner's claim fails as a matter of law.

Even if the Third Circuit recognized sentencing entrapment as a basis for downward departure, the Government did not entrap the petitioner because it was the gun shop owner who required one form be completed per each gun. Here, there is no indication that the gun shop owners were acting upon police instruction when they had Faulk complete one of the required ATF 4473 forms for each gun, a total of nine forms. Each form constituted a separate false statement and was charged in a separate count of the indictment. A gun shop owner is not prohibited from asking a buyer to complete one form per firearm. There is nothing illegal, outrageous, or even unusual about a buyer completing one form per gun. See, e.g., United States v. Thomas, 961 F.2d 1110, 1112-13 (3d Cir. 1997) (noting that four ATF 4473 forms were filled out to purchase five guns). Petitioner's claim for ineffective assistance of counsel for not arguing sentencing entrapment lacks merit, and thus no relief can be granted.

**c. Ground Three: Ineffective Assistance Of Appellate Counsel.**

Petitioner argues that his appellate counsel was ineffective because appellate counsel failed to argue that all counts should have been grouped and sentences on all counts run concurrently. For the reasons stated above, Petitioner's claim that his appellate counsel was ineffective for failing to argue that his counts should be grouped and run concurrently lacks merit and no relief can be granted.

**2. Ground Four: Petitioner's Claim That His Sentence Is Illegal And Unconstitutional.**

Petitioner's claims that his sentence is unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000), and illegal lack merit and no relief can be granted.

**a. Apprendi Does Not Apply To The Facts Of Petitioner's Case.**

Petitioner claims that his sentence is unconstitutional because of the Supreme Court's holding in Apprendi, 530 U.S. 466. The Supreme Court held in Apprendi that sentencing schemes that authorize increases in the statutory maximum sentence for an offense, based on facts not submitted to the jury and proven beyond a reasonable doubt, violate the constitution. Id. The limitations of Apprendi do not apply unless the sentence imposed exceeds the statutorily prescribed maximum. United States v. Parmelee, 319 F.3d 583, 591 (3d Cir. 2003); see United States v. Vazquez, 271 F.3d 93, 98 (3d Cir. 2001) (finding that Apprendi was violated when the judge, rather than the jury, determined the drug quantity involved and sentenced that defendant to a term in excess of his prescribed statutory maximum.)

Here, Petitioner was convicted on one Count of conspiracy (Count 1) and nine Counts of aiding and abetting the making of false statements (Counts 60-68). The maximum statutory penalty for each violation is five years and thus Petitioner's statutory maximum was fifty years. (Gov't Sentencing Mem. 1-2.) At sentencing, this Court found by a preponderance of the evidence standard that Petitioner was a leader who used more than five individuals to purchase firearms for him, (Sentencing Tr. vol. 183, 10, Aug. 8, 2000), and that he was responsible for the purchasing of thirty guns, (Sentencing Tr. vol. 183, 17, Aug. 8, 2000). These enhancements

brought Petitioner's guideline range for imprisonment to 188-235 months. (Sentencing Tr. vol. 183, 26, Aug. 8, 2000.) Because Petitioner's statutory maximum time faced was fifty years, far more than 235 months, Apprendi does not apply and his claim must be denied as a matter of law.

**b. Petitioner's Sentence Is Not Illegal Because The Court's Order To Run His Sentences Consecutively Was Proper.**

Petitioner claims that his sixteen year sentence is illegal because "at most the violation occurred on two separate days only justifying a statutory maximum of ten years." (Pet'r Reply Br. 6.) Although Petitioner concedes that it was within this court's discretion to run the sentences consecutively, he argues that his counts of conviction should have been grouped and run concurrently. (See id.)

Under the sentencing guidelines, the first question that arises when a defendant is convicted on a number of counts is whether they should be grouped. United States v. Velasquez, 304 F.3d 237 (3d Cir. 2002). If a defendant is sentenced on a number of counts, the sentence imposed on each other count shall be the total punishment. Id. at 241. The total punishment is calculated by combining the facts in the relevant sections of the guidelines without respect to maximum statutory sentences. Id. According to the guidelines, if the sentence for the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively to the extent necessary to make the final sentence equal to the total punishment. Id.; see U.S.S.G. § 5G1.2(d).

Here, Petitioner's counts of conviction were grouped together to arrive at his sentencing range of 188-235 months. This court sentenced Petitioner to 192 months, within the guideline range. To reach a sentence equal to Petitioner's total punishment, it was necessary for this court

run the sentences consecutively. This decision was within the sound discretion of this court and was proper.

The U.S. Sentencing Guidelines, 18 U.S.C. § 3584, instructs the sentencing court to refer to the factors set out in 18 U.S.C. § 3553(a) to determine whether or not to apply consecutive or concurrent sentences. Section 3553(a) provides that the factors to be considered include “the nature and circumstances of the offense and the history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1), and “the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; [and] (C) to protect the public from further crimes of the defendant,” 18 U.S.C. § 3553(a)(2).

The court properly considered the Section 3553(a) factors in reaching its decision. Petitioner had a prior violent criminal history, (Sentencing Tr. vol. 183, 18, Aug. 8, 2000), and in consideration of the nature and circumstances of the offense, this court made clear at sentencing that the consequences of Petitioner’s crime and the harm inflicted on society will be ongoing.

**The Court:** And every time one of these guns is discovered, every time somebody is hurt, every time somebody goes to the funeral home because of your conduct, I want the prosecutor to send you a notice letting you know how your crime is still hurting people.

(Sentencing Tr. vol. 183, 45, Aug. 8, 2000.)

Therefore, the sentence was a proper exercise of discretion, and consecutive sentences were proper. Petitioner’s claim that his sentence was illegal because all counts did not run concurrently lacks merit and no relief can be granted. Furthermore, because relief cannot be granted under Petitioner’s Section 2255 motion, he is not entitled to an evidentiary hearing.

**B. Petitioner's Motion To Supplement His § 2255 Motion.**

Petitioner asserts in his supplement to his § 2255 motion that he is entitled to a new hearing because of the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296 (2004). Blakely held that the State of Washington's sentencing scheme, which allowed enhancements to a defendant's sentence based on facts not determined by a jury or a guilty plea, violated the defendant's Sixth Amendment right to a trial by jury. Id. at 301-02.

Blakely only applies to persons in state custody, but its holding was extended to persons in federal custody by the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005). The court thus applies Booker, not Blakely, when deciding Petitioner's motion to amend. Petitioner's motion to amend was filed on September 20, 2004, more than eighteen months after his conviction became final. The court finds that Petitioner's motion to amend his § 2255 motion, although it properly relates back to timely-filed claims and is not barred by the one-year statute of limitations under 28 U.S.C. § 2255, is denied because the amendment would be futile.

**1. Amendment Is Not Barred By The One-Year Statute Of Limitations Under 28 U.S.C. § 2255.**

Petitioner's supplement to his § 2255 motion, which claims he is entitled to a new hearing because of the ruling in Booker, would not be barred by the one-year statute of limitations under 28 U.S.C. § 2255 because the amendment relates back to an originally filed claim. The Federal Rules of Civil Procedure apply to motions to amend habeas corpus motions. United States v. Duffus, 174 F.3d 333, 336-37 (3d Cir. 1999). Rule 15 provides in relevant part that pleading amendments relate back to the date of the original pleading when the claim asserted

in the amended plea “arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings.” Fed. R. Civ. P. 15(c)(2). Relation back is allowed only when the claims added by 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. Mayle v. Felix, 545 U.S. 644, 650 (2005).

Petitioner’s supplement filed on September 20, 2004, over eighteen months after his judgment was final, asserts that he is entitled to a new hearing because of the Supreme Court’s decision in Booker. This supplemental claim relies on the same core facts as the Petitioner’s timely filed claim that counsel at sentencing was ineffective for failing to object to the PSR. The PSR included the findings that (1) Petitioner played a leadership role, which added a four level enhancement, and (2) that Petitioner was responsible for more than twenty firearms, which carried a five level enhancement.

The constitutional violation arises out of this court’s adoption, by a preponderance of the evidence standard, the findings of the PSR. The ineffective assistance of counsel claim arises out of an alleged failure to object to those very findings. Because Petitioner’s supplemental constitutional violation claim relates back to his timely filed ineffective assistance of counsel claim, it is not barred by the one-year statute of limitations under 28 U.S.C. § 2255.

## **2. Amendment Is Futile.**

Nevertheless, Petitioner’s motion to amend his § 2255 is denied because the amendment would be futile. The Supreme Court has indicated that leave to amend should be freely given unless the amendment would be futile. Forman v. Davis, 371 U.S. 178, 182 (1962). Futility

means that the complaint as amended would fail to state a claim upon which relief could be granted. In re Burlington Coat Factory Sec. Litig., 114 F. 3d. 1410, 1434-35 (3d Cir. 1997). There can be no abuse of discretion when what is refused would avail the offeror nothing if allowed. Stephens v. Reed, 121 F.2d 696, 699-70 (3d Cir. 1941).

Petitioner's motion to amend raises a claim that would not survive a motion to dismiss. The Third Circuit has made clear that the ruling in Booker does not apply retroactively. Lloyd v. United States, 407 F.3d 608, 614 (3d Cir. 2005). Petitioner's judgment became final on March 18, 2003, which was more than twenty-one months prior to the decision in Booker, decided on January 12, 2005. His § 2255 motion was filed on March 17, 2004, over nine months before Booker. Although it appears from the record that there were enhancements made to the Petitioner's sentence based on a preponderance of the evidence standard, the Booker rule does not apply retroactively to his case.

Petitioner's reliance on Booker is mistaken and his amendment fails to state a claim upon which relief can be granted as a matter of law. Therefore, Petitioner's motion to amend his § 2255 motion is denied because the amendment is futile. For the same reasons, even if this court were to allow Petitioner to amend his § 2255 Motion, his constitutional claim is not meritorious and no relief can be granted.

#### **IV. Conclusion**

For the foregoing reasons, Petitioner's § 2255 Motion to Vacate, Set Aside or Correct Sentence and Motion to Supplement his § 2255 Motion are denied. An appropriate Order follows.

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

UNITED STATES OF AMERICA	:	CRIMINAL NO. 99-506-02
	:	
	:	CIVIL NO. 04-1145
v.	:	
	:	
DADAJI IBN-SEKOU ODINGA	:	
a/k/a "Dadaji S. Early"	:	

**JUDGMENT ORDER**

AND NOW, this 23rd day of August, 2007, upon consideration of Petitioner Dadaji Ibn-Sekou Odinga's (a/k/a Dadaji S. Early) Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 218), the Government's Response in opposition thereto (Docket No. 233-34), and Petitioner's Rebuttal to the Government's Response (Docket No. 235), as well as Petitioner's Motion to Supplement his Section 2255 Motion (Docket No. 224), it is hereby ORDERED that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 and Motion to Supplement his Section 2255 Motion are DENIED for the reasons set forth in the attached memorandum.

IT IS FURTHER ORDERED that, Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability is DENIED, pursuant to 28 U.S.C. § 2253©.

BY THE COURT:

S/ James T. Giles  
J.