

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

MARCOS F. SANTIAGO, :
 : Civil Action No. 07-253 (RMB)
Petitioner, :
 :
v. :
 :
UNITED STATES OF AMERICA, :
 :
Respondent. :
 :

UNITED STATES OF AMERICA, :
 : Criminal Action No. 03-157
 : (RMB)
Petitioner :
 :
v. :
 : **OPINION**
MARCOS F. SANTIAGO, :
 :
Respondent :
 :

APPEARANCES:

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BUMB, United States District Judge:

INTRODUCTION

This matter comes before the Court on the pro se motion of

Marcus Santiago to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Petitioner contends that his sentence should be vacated because he was deprived of his Sixth Amendment right to effective assistance of counsel and because he was prejudiced by several questions asked and identifications made at trial. He also avers that he is actually innocent of some of the offenses for which he was convicted. For the reasons set forth below, the petition is denied.

BACKGROUND

On January 13, 2004, a grand jury in the Eastern District of Pennsylvania returned a second superseding indictment of Marcos Santiago (hereinafter "Santiago" or Petitioner") along with his brother Alfred Santiago. Two other defendants, Tarik Roberts and Carlos Calero had been charged in earlier indictments and had pled guilty by the date of the second superseding indictment. Santiago was charged with committing three armed robberies of hotels, one count of conspiracy to interfere with interstate commerce by robbery, in violation of 18 U.S.C. § 1951(a), three counts of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c), one count of carjacking, in violation of 18 U.S.C. § 2119, and two counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

As set forth at trial, three armed robberies occurred in hotels in Lancaster and Berks Counties over a three week period in 2002. In all three robberies, a distinctive firearm was used - a .44 caliber chrome Desert Eagle semiautomatic pistol. On May 2, 2002, just after midnight, the Ramada Inn in Lancaster County was robbed. Two clerks were working at the time, Benjamin Perkins and Valerie Cooke. Both Cooke and Perkins testified at trial. Perkins identified Marcos Santiago in court as the Ramada Inn gunman and Cooke described the yellow glasses and head covering worn by the robber. At trial, Tarik Roberts testified that Petitioner was involved in the Ramada Inn robbery - specifically that Marcos went into the Inn and Tarik served as the lookout.

On May 5, 2002, around 2:00 a.m., the Days Inn in Berks County was robbed. Tarik Roberts testified that on that occasion, he went inside and Marcos Santiago stayed outside with the car. Quottysha Thomas testified, that she saw Marcos Santiago, Carlos Calero, Alfredo Santiago and Tarik Roberts with a safe later that day.

Finally, on May 19, 2002, at approximately 3:00 a.m., the Lancaster Host Resort in Lancaster County was robbed. At trial, Donnie Laughman, who was working the front desk that night, identified Marcos Santiago as the robber. Following that Host robbery, Tarik Roberts was immediately apprehended while fleeing

from police. Marcos Santiago was apprehended after going to a local convenience store, stealing a car left unattended by a store patron, and then fleeing on foot. Police captured Santiago holding the Desert Eagle and the money from the Host Resort. Santiago later confessed in writing to all three robberies. See Pet.'s Ex. S.

Following a jury trial that took place between March 25, 2004 and April 2, 2004, the jury convicted Petitioner of all three counts of interference with interstate commerce by robbery, two counts of possessing a firearm in furtherance of a crime of violence, and two counts of being a felon in possession of a firearm. On February 16, 2005, the District Court imposed a sentence of 402 months imprisonment. Final judgment was entered on February 25, 2005, and Santiago filed a timely notice of appeal on March 1, 2005.

Santiago's appeal before the United States Court of Appeals for the Third Circuit raised two issues: 1) whether the Hobbs Act robbery statute is constitutional under the Commerce Clause, and 2) whether the Court's Hobbs Act jury instruction regarding the necessary impact of crimes in interstate commerce was plain error. On May 10, 2006, the Third Circuit affirmed Santiago's conviction, determined that the Hobbs Act was constitutional and that the District Court's jury instruction was a correct statement of the law. On January 19, 2007, Petitioner filed the

instant habeas corpus petition.

LEGAL STANDARD

"[A] motion to vacate sentence under 28 U.S.C. § 2255 is addressed to the sound discretion of the district court."

United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980).

Under 28 U.S.C. § 2255,

[a] prisoner in custody under sentence of a [federal] court . . . 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.

Habeas corpus is not a substitute for direct appeal. See United States v. Addonizio, 442 U.S. 178, 184 (1979). Where a

Petitioner fails to raise a claim on direct appeal, that claim is defaulted. In order to raise a defaulted claim in a § 2255

petition, a petitioner must "demonstrate either 'cause' and actual 'prejudice,' or that he [or she] is 'actually innocent.'"

United States v. Jenkins, 333 F.3d 151, 155 (3d Cir. 2003)

(quoting Bousley v. United States, 523 U.S. 614, 622 (1998)).

Collateral relief is also available when there is an error of law that constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." Addonizio, 442 U.S. at 185. "An allegation of 'actual innocence,' if credible,

is one such 'miscarriage of justice' that enables courts to hear the merits of the habeas claim." Hubbard v. Pinchak, 378 F.3d 333, 338 (3d Cir. 2004). Where there are allegations of actual innocence, as there are in the instant case, the court "must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default." Dretke v. Haley, 541 U.S. 386, 394 (2004).

An exception to the cause and prejudice rule applies, however, where a petitioner asserts claims based on alleged ineffective assistance of counsel, which generally may be raised via timely petition. Massaro v. United States, 538 U.S. 500, 504 (2003). There are two prongs to an ineffective assistance claim pursuant to the test set forth in Strickland v. Washington, 366 U.S. 668 (1984). First, a petitioner must show "that counsel's performance was deficient, that is, that 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" United States v. Hankerson, 496 F.3d 303, 310 (3d Cir. 2007) (quoting Strickland, 466 U.S. at 687). "That is, he must prove that counsel's performance 'fell below an objective standard of reasonableness.'" United States v. Shedrick, 493 F.3d 292, 299 (3d Cir. 2007) (quoting Strickland, 466 U.S. at 694).

When examining the performance of counsel, the court must take a deferential view and "indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689. "It is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'" Hankerson, 496 F.3d at 310 (quoting United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

If a petitioner successfully demonstrates that counsel's performance was deficient under the first prong of the test, he must also demonstrate prejudice - i.e., "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. This reasonable probability exists where it is "sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong of the Strickland test will result in a rejection of an ineffective assistance claim.

DISCUSSION

In light of the directives of Dretke v. Haley, 541 U.S. 386, 394 (2004), this Court will first address Petitioner's non-defaulted claims for comparable relief, in this case, ineffective assistance of counsel, and then the other grounds for cause to

excuse procedural default before examining Petitioner's claims of actual innocence, which could act as a "gateway" to defaulted claims. See Albrecht v. Horn, 485 F.3d 103, 121 (3d Cir. 2007); U.S. v. Davies, 394 F.3d 183, 188 (3d Cir. 2005).

Ineffective Assistance Claims

Petitioner's ineffective assistance claims can be briefly stated as follows:

- Counsel failed to impeach witness, Quottysha Thomas, who committed perjury, which affected the verdict - Ground 1(c);
- Trial counsel failed to call Carlos Calero (co-defendant) as a defense witness who could have rebutted Tarik Roberts' testimony - Ground 1(d);
- Counsel failed to investigate and pursue an insanity defense regarding Count Six of the indictment (the Host Resort robbery) - Ground 2;
- Counsel failed to argue to the jury that it was Alfredo Santiago who robbed the Ramada Inn - Ground 4(a)
- Counsel failed to object to Valerie Cooke's firearm identification and failed to discredit that identification - Grounds 4(b) & (c);
- Counsel failed to rebut government and FBI Agent Dowd's testimony that petitioner attempted to alter his appearance at the line-up - Ground 4(d);
- Counsel failed to impeach Tarik Roberts and failed to rebut his testimony regarding brown gloves found in petitioner's car - Grounds 4(e) & (f);
- Counsel failed to object to the following: Benjamin Perkins' suggestive identification of a firearm and his voice identification at the line-up, the government's false argument about yellow glasses mentioned by Valerie Cooke, the government's vouching for Tarik Roberts - Grounds 4(g-j);
- Counsel failed to investigate whether Benjamin Perkins was wrongfully influenced - Ground 4(k)
- Appellate Counsel was ineffective on appeal for failing to raise a malicious prosecution claim- Ground 7
- Both trial and appellate counsel failed to object to and appeal the district court's Hobbs Act instruction -

Ground 8

As an initial matter, the Court notes that Ground 8 provides no basis for relief. Petitioner argues that the district court erred in its instruction to the jury that "you must determine whether there is an actual or potential effect on commerce between two states. . ." and that his counsel was ineffective for failing to object to that instruction. More specifically, Petitioner avers that the instruction was improper because it discussed a potential effect on interstate commerce and the Hobbs Act speaks of an actual, not a potential, effect. He additionally states that the robbery at issue had no impact on interstate commerce because "the money was returned to the hotel shortly after the robbery." Pet. Br. at 91.

It is clear from the Third Circuit's prior opinion in this matter, however, that "the Hobbs Act may be applied to robberies involving a minimal impact on interstate commerce." U.S. v. Santiago, 180 Fed. Appx. 345, 346 (3d Cir. 2006). Moreover, the Circuit found that "the government satisfied its burden of showing an impact on interstate commerce." Id. As such, this Court finds that the Third Circuit has already heard and rejected the arguments Petitioner faults counsel for not raising, including his objection to the "potential effect" instruction. Id. at 347. Thus, Ground 8 of the petition fails.

Petitioner's claims that counsel failed to impeach the testimony of Quottysa Thomas - Ground 1(c), and failed to call

Carlos Calero to impeach Tarik Roberts - Ground 1(d), are unsuccessful because, even assuming Petitioner could meet the first prong of the Strickland test, he has failed to show how "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. For example, while Quottysha Thomas may have stated on November 26, 2002, that she was at her house with Angie, and on November 5, 2003, told a different story that she was at Carlos Calero's girlfriend's house, Petitioner fails to show how impeaching Thomas on this point would lead to a different result, especially in light of Tarik Roberts' testimony that Petitioner was part of the Days Inn robbery. Trial Tr. 3/30/04 at 21-35.

Petitioner's claim regarding counsel's failure to call Carlos Calero suffers the same fate. Petitioner has only stated that, had Calero been called, the jury would have heard Tarik Robert's testimony that Petitioner agreed to rob the Days Inn, "and they would have heard Carlos Calero's testimony that petitioner was arguing with them for 15 minutes trying to dissuade them from robbing the hotel." Pet's Br. at 14. Again, there is no reason to believe that even if Calero's testimony had been elicited, that the result of the proceedings would have been different - the jury could still have chosen to believe Tarik Roberts' testimony instead of Carlero's.

Petitioner also faults his counsel in Ground 2 for failure

to pursue an insanity defense. Petitioner states that there is plenty of evidence to show that he was suffering from a serious mental illness at the time of the Host Resort Robbery on May 19, 2002. Petitioner relies on portions of the Pre-sentence Investigation Report referring to his past complaints of depression, anxiety, cocaine and alcohol abuse and states that "Petitioner has been suffering for many years from uncontrollable violent thoughts. . . ." Pet.'s Br. at 18. He faults counsel for failing to show the jury that he was diagnosed with a mental disorder and had a history of suicide attempts.

In response, the government argues that counsel cannot be faulted for not raising an insanity defense because no such valid defense was available. Even if Petitioner's assertions of uncontrollable violent thoughts, drug use, intoxication and history of suicide are true, Petitioner has not shown that, but for counsel's error, he would have demonstrated that he was unable to appreciate the nature and quality or the wrongfulness of his acts at the time he committed the robbery by clear and convincing evidence. See U.S. v. Askari, 222 Fed. Appx. 115, 120 (3d Cir. 2007). Even if Petitioner was intoxicated and under the influence of drugs during the robbery, such impairments do "not satisfy the requirement for legal insanity that the defendant be 'unable to appreciate the nature and quality or the wrongfulness of his acts.'" Id. (emphasis in original) (quoting 18 U.S.C.

§17(a)). Because Plaintiff cannot satisfy the prejudice prong of the Strickland test, his claim for ineffective assistance in Ground 2 is unsuccessful.

In Ground 4 of his petition, Santiago presents several arguments regarding counsel's performance. First, he asserts that counsel was ineffective because he failed to argue that Alfredo Santiago robbed the Ramada Inn because Valerie Cooke picked Alfredo out of a photo array, and a shoe print expert stated that a print found at Ramada did not match the sneaker Petitioner was wearing at the time of his arrest. However, when reviewing what arguments counsel decided to present, this Court is mindful that "Strickland and its progeny make clear that counsel's strategic choices will not be second-guessed by post-hoc determinations that a different trial strategy would have fared better." Rolan v. Vaughn, 445 F.3d 671, 681-82 (3d Cir. 2006). Moreover, even if a different strategy was employed, Petitioner has failed to satisfy the prejudice prong of the Strickland test - his arguments do not sufficiently undermine evidence in the outcome in light of Tarik Roberts' testimony implicating Petitioner and the identifications of Benjamin Perkins and Valerie Cooke, and Petitioner's own admission that he robbed the Ramada.¹ See Pet.'s Ex. S.

¹ As discussed below, Petitioner failed to appeal the denial of his motion to suppress and, therefore, this claim has been defaulted as he can demonstrate no cause as to why he did not

Relatedly, Petitioner also faults his counsel for failing to impeach Tarik Roberts (who petitioner claims committed perjury) Ground 4(e), failing to rebut Roberts' testimony regarding brown gloves found in petitioner's car - Ground(f), and vouching for Tarik Roberts - Ground 4(i).

Petitioner claims that the government improperly vouched for Tarik Roberts by comparing Roberts' later admission regarding drug dealing to a "moment of truth." See Trial Tr. 4/1/04 at 94-96. In order for vouching to be improper, the prosecutor's assurance of a witness's credibility must be "'based on either the prosecutor's personal knowledge, or other information not contained in the record.'" United States v. Harris, 471 F.3d 507, 512 (3d Cir. 2006) (quoting United States v. Walker, 155 F.3d 180, 187 (3d Cir. 1998)). The prosecutor's statement that Tarik Roberts had a "moment of truth" when confronted with evidence of drug dealing and his use of an example of his daughter admitting to breaking a lamp does not constitute vouching; the prosecutor was not assuring the jury of Roberts' credibility "'based on either the prosecutor's personal knowledge, or other information not contained in the record.'" Id.

Even if this Court were to find, however, that the prosecution improperly vouched for Roberts and that counsel's failure to object fell below an objective standard of

raise this on appeal.

reasonableness, Petitioner has not shown that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The jury was still free to evaluate the credibility of Roberts and, in fact, was instructed that they were "the sole judges of credibility . . . and only you determine the importance or weight that a witness' testimony deserves." Trial Tr. 4/1/04 at 107-108. Thus, this Court cannot find that Petitioner has met his burden. See United States v. Rahamin, 2008 U.S. Dist. LEXIS 28986 at * 19-20 (W.D. Pa. Apr. 9, 2008) (finding lack of resulting prejudice where counsel failed to object to alleged vouching by prosecution).²

In Grounds 4(e) and (f), Petitioner faults his counsel for failing to impeach Tarik Roberts with prior inconsistent statements. Petitioner contends that had he done so, the jury would have know that Tarik lied about the Ramada Inn robbery and "would have proved. . .that Tarik lied at every stage. . . ." Pet. Br. at 58. However, the trial transcript reveals that counsel did confront Roberts' with his prior inconsistent statements and attempted to discredit his testimony as

²Petitioner also raises this vouching issue in Ground 3(g) of his petition. Because his ineffective assistance claim is unsuccessful for the reasons discussed, and he presents no other reasons in his petition as to why he failed to raise this argument on appeal, he fails to satisfy the cause requirement to save the claim from procedural default.

untruthful. See Trial Tr. 3/3/0/04 at 9-14. The types of "lies" counsel confronted Tarik Roberts with in order to discredit him constitute tactical decisions by counsel and are entitled to deference. See Hakeem v. Beyer, 990 F.2d 750, 763 n.10 (3d Cir. 1993) (noting deference to counsel's strategic decisions). Moreover, Petitioner has failed to show, even if Roberts had been confronted with the inconsistent statements set forth in the petition (for example testimony regarding who wore brown gloves at the robbery), that the outcome of the trial would have been different.

Petitioner makes two arguments in Grounds 4(b) and (c) regarding counsel's alleged ineffective assistance in relation to Valerie Cooke identifications. Specifically, he avers that counsel failed to object to her suggestive identification of the firearm used during the robbery and failed to discredit her after she identified it. Despite Petitioner's contention, this Court cannot find that counsel's failure to object to Cooke's identification of the gun rises to the level of an ineffective assistance claim; Ms. Cooke identified the firearm, not the Petitioner and, therefore, did not run afoul of the government's statement that they would not make any identification issues (referring to the identification of Petitioner). Thus, an objection by counsel would have been groundless. Moreover, contrary to Petitioner's assertion, counsel did cross-examine Ms.

Cooke and elicited that on the night of the robbery, she did not describe the gun to the police. Trial Tr. 3/30/04 at 158.

However, even if counsel failed to discredit Cooke, as Petitioner avers, he has presented no arguments to show how the outcome would have been different but for this alleged error.

Similarly, Petitioner's arguments in Ground 4(d), related to the identification testimony of Benjamin Perkins and Valerie Cooke, fail because Petitioner has failed to make any allegations that the outcome would have been different had counsel rebutted their testimony. In light of other corroborating evidence - i.e., Tarik Roberts' testimony regarding Petitioner's involvement and Petitioner's written confession, this Court cannot say that but for counsel's error, there is a reasonable probability the outcome would have changed.

Petitioner also faults counsel for allegedly failing to object to Benjamin Perkins' identification of the firearm at trial (Ground 4 (g)) and his voice identification that took place at the line-up (Ground 4(j)). Petitioner avers that the government made it too easy for Perkins to identify the gun used in the robbery and, that counsel, by failing to object to the identification of the firearm, was ineffective. Petitioner has not sufficiently supported an ineffective assistance claim based on the firearm identification because he has not demonstrated how an objection to the identification would likely change the

outcome of the proceedings.

Petitioner also faults his counsel for failing to object to Benjamin Perkins' request for a voice identification at a 2004 line-up. Because most of the suspects spoke with Spanish accents, Petitioner avers that his voice, because he speaks without an accent, stood out more from the others at the line-up. Again, Petition fails to show how, even if counsel had objected, the outcome of the trial would have been changed without Perkins' voice identification.

It is undisputed that during the line-up process Benjamin Perkins was out in the hallway with FBI Agent Dowd for a brief period of time. Petitioner claims that counsel failed to investigate whether Perkins was wrongly influenced by FBI Agent Dowd (Ground 4(k)). During trial, Perkins testified that there was no substantive conversation regarding the line-up with Agent Dowd. See Trial Tr. 3/30/04 at 113. However, Petitioner avers that counsel should have pointed out to the jury that Perkins tried to make eye-contact with Agent Dowd in the hallway. Petitioner's arguments are based on mere speculation that is totally unsupported by the record. As such, the Court cannot find that counsel was ineffective for failing to make this an issue with the jury, when there is no evidence that such an issue existed.

In Ground 4(h), Petitioner takes issue with the arguments

made to the jury regarding yellow glasses that Valerie Cooke stated that the robber was wearing, and that were found in the Petitioner's car. Specifically, Petitioner states that the government's arguments to the jury were false because "the glasses found in petitioner's car were not yellow at all" but "more of a brown-ish red" Pet. Br. at 62. Moreover, none of the witnesses were asked to identify the glasses at trial.

Petitioner avers, that counsel was ineffective because he failed to object to the fact that no witnesses identified the glasses as the ones the robber wore and because he failed to bring to the jury's attention that the glasses were not yellow. Again, Petitioner has failed to show how, even if counsel had objected and argued that the glasses found were not yellow or not the one's worn by the robber, the outcome of the trial would have changed.

Grounds 6 and 7 of the petition relate to Santiago's contention that he was subject to vindictive prosecution because he was charged with an additional count for the Ramada Inn robbery via superceding indictment after Petitioner informed the government that he would not plead guilty.³ The government contends that this claim has been procedurally defaulted because

³ As evidence of alleged vindictiveness, Petitioner points to steps taken against Denise Hoover, his girlfriend, but fails to show how these actions are at all related to the superceding indictment.

Petitioner did not move to dismiss the indictment for vindictive prosecution. Petitioner attempts to resurrect this claim by stating that his appellate counsel was ineffective for failing to raise this issue on appeal.⁴ However, in order to raise it on appeal, Petitioner would have had to move to dismiss the indictment for vindictive prosecution at trial and there is no reason to believe that such a motion would have succeeded; "just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded." United States v. Goodwin, 457 U.S. 368, 380 (1982). Thus, this claim has been defaulted and Petitioner cannot resurrect it via an ineffective assistance claim because there is no resulting prejudice. Moreover, even if the claim had been raised, it is well-established that additional charges may be filed pre-trial with no presumption of vindictiveness. Id. at 381.

Procedurally Barred Claims

The Government contends that all of Petitioner's asserted

⁴ Petitioner submitted supplemental materials in support of his ineffective assistance claim, Docket Nos. 264 & 265. Petitioner annexes his appellate counsel's motion to withdraw as counsel and appellate counsel's motion for an extension of time to file Defendant's brief as evidence of the alleged ineffectiveness.

grounds for relief, other than those alleging ineffective assistance of counsel, are procedurally barred because he either could have or did unsuccessfully raise those issues on direct appeal. "A federal court cannot review the merits of procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice resulting therefrom, or that a fundamental miscarriage of justice will result if the court does not review the claims." Guinn v. Phelps, 2008 U.S. Dist. LEXIS 30816 at * 6 (D. Del. Apr. 15, 2008) (citing McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999)).

The Supreme Court has delineated what constitutes "cause" for the procedural default: the petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). By way of example, the Court opined that showing a factual or legal basis for a claim was not reasonably available to counsel or showing interference by government officials sufficient to make compliance impracticable, would constitute acceptable cause for federal habeas review of the defaulted claim. Id. . . .

With regard to the prejudice requirement, the habeas petitioner must prove "not merely that the errors at ... 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." Id. at 494 (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)). This standard essentially requires the petitioner to show he was denied "fundamental fairness" at trial. Id.

Dreher v. AG, 2008 U.S. App. LEXIS 8039 at * 24-25 (3d Cir. Apr.

14, 2008) (quoting Werts v. Vaughn, 228 F.3d 178, 192-93 (3d Cir. 2000) (emphasis in original)). Additionally, “[i]t is well settled that attorney error can constitute cause for a procedural default if the error rises to the level of constitutionally ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).” Gibbs v. United States of America, 2008 U.S. Dist. LEXIS 17621 at * 4-5 (Del. Mar. 5, 2008). However, for the reasons discussed at length above, this Court finds that counsel’s performance did not rise to the level of constitutionally ineffective assistance with regard to any of Petitioner’s claims.

In “Ground 1a” of his petition,⁵ Santiago avers that the government knowingly used the perjured testimony of Quottysa Thomas, the girlfriend of Petitioner’s brother, Alfred Santiago. In support of this argument, Petitioner submits the affidavit of Thomas, exhibit B to his petition, where Thomas states that “I have been [sic] dishonest at the grand jury trial.” Pet.’s Ex. B. Thomas states that all of her testimony was a fabrication, but does not specifically provide which aspects of her testimony were false, only that she “do[es] not remember anything that I stated during my numerous encounters with agent Dowd.” Id.

While Petitioner argues that Thomas fabricated her

⁵ Petitioner make additional arguments regarding “Ground 1a” in a supplemental submission to the Court [Docket No. 261].

testimony, he has presented no argument or evidence to support the notion that the Government knowingly used such testimony at trial. In fact, Thomas' affidavit stating that her testimony was fabricated is dated over two years after trial ended. Instead, Petitioner argues that Thomas gave two different accounts of what she knew about the Days Inn robbery - specifically, that Thomas did not identify Petitioner in connection with the Days Inn robbery in a statement given on November, 26, 2002, but later, and inconsistently, identified Petitioner with that robbery in a statement given on November 5, 2003. However, to the extent that Petitioner bases his claim of perjury on allegedly inconsistent statements by Thomas, there is no contention that he was not aware of the allegedly inconsistent statements at the time of trial, a fact fatal to Petitioner's claim. See Brown v. United States, 556 F.2d 224, 227 3d Cir. 1977) ("the information presently relied upon for § 2255 relief was known to both the defendant and his counsel at the time of and during trial, a fact fatal to the § 2255 claim."). Equally problematic for the Petitioner, as discussed below, is that he has failed to show how the alleged perjured testimony would have exonerated him.

Finally, Petitioner's claim that Thomas' statement constitutes "new evidence" would have been more properly asserted in a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. See United States v. Kearney, 682 F.2d 214, 219

(D.C. Cir. 1982) (“[a]ttempts are numerous by convicted defendants to overturn their criminal convictions by presenting affidavits of recanting witnesses in support of a section 2255 motion. . . [and] courts treat such requests as a motion for new trial.”). Even if this Court treats Petitioner’s request as one for a new trial pursuant to Fed. R. Crim. P. 33, such a request should still be denied. First, the affidavits of recanting witnesses are generally treated with “great suspicion.” Landano v. Rafferty, 856 F.2d 569, 572 (3d Cir. 1988). Additionally, Petitioner was independently placed at the scene of the crime by another witness, Tarik Roberts. Therefore, at most, Thomas’ recanting affidavit does not affirmatively exonerate Petitioner, but merely calls into question the credibility of Thomas’ testimony and does not critically undermine evidence of guilt. Id. at 573; see United States v. Leary, 206 Fed. Appx. 111, 116 (3d Cir. 2006) (“impeachment evidence can be material and support a new trial if that witness's testimony furnishes the only evidence of guilt or would have undermined a critical element of the prosecution's case.”) (internal quotations omitted).

Petitioner also argues that the government presented perjured testimony from Benjamin Perkins because, on the night of the robbery, Perkins did not provide a detailed description of the robber at the Ramada Inn, but, two years later said he was able to pick the perpetrator out of a line-up. To Petitioner,

these allegedly inconsistent statements constitute proof that Perkins lied and that the government presented perjured testimony. However, Petitioner has set forth no reasons whatsoever as to why he did not raise this claim on appeal and, therefore, fails to save this claim from default.

Several other grounds for relief asserted by Petitioner have been procedurally defaulted due to Santiago's failure to raise those issues on direct appeal: Ground 1(b) based on the allegedly erroneous use of leading questions; Grounds 3(a) & (e) for error in admission of evidence (the firearm used in the robbery); Ground 3(b) regarding evidence used about petitioner's appearance at the time of a line-up; Grounds 3(c), (d) & (f) touching on alleged errors in the government's closing argument; Ground 5, claiming that the court erred in denying Santiago's motion to suppress statements made to police the night of his arrest; and, Ground 6 claiming that this prosecution was vindictive because the government sought a superseding indictment after Santiago rejected a plea offer.

As stated above, if an issue could have, but was not, raised on direct appeal, it is procedurally defaulted. See Reed v. v. Farley, 512 U.S. 339, 354 (1994) ("[w]here the petitioner -- whether a state or federal prisoner -- failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes "cause" for the waiver and shows "actual

prejudice resulting from the alleged . . . violation.'") (quoting Wainwright v. Sykes, 433 U.S. 72, 84 (1977)).

Petitioner has failed to demonstrate cause and prejudice as to any of the above stated grounds that he failed to raise on direct appeal. With regard to leading questions, Ground 1(b), Petitioner sets forth no reasons in his papers as to what "objective" factors impeded him from complying with the procedural rule of raising the issue on appeal and he similarly fails to specify how he was prejudiced by the alleged leading questions other than to generally state that by doing so, the government's questions "went beyond the limits of propriety." Pet.'s Br. at 9.

Petitioner's Grounds 3 (a), stating that the government impermissibly asked Valerie Cooke, to identify a firearm, and Ground (e), regarding Benjamin Perkins' identification of a firearm, suffer the same fate. Instead of addressing the reasons why he was unable to raise these issues on direct appeal, he argues that the identifications made by Cooke and Perkins were made under highly suggestive circumstances and, therefore, are inaccurate and resulted in the government's presentation of false testimony to the jury. Petitioner focuses solely on the prejudice factor, but fails to demonstrate cause as to why these issues were not raised on direct appeal. As such, these claims are foreclosed as procedurally defaulted. See Webster v. Engle,

721 F.2d 566, 569 (6th Cir. 1983) (cause and prejudice standard is conjunctive and without cause, prejudice need not be resolved).

In Ground 5, Petitioner avers that the Honorable Timothy Savage erred in denying Petitioner's motion to suppress statements made the night he was arrested. Because, however, Petitioner has presented no grounds for cause as to why this issue was not raised on direct appeal, this Court finds that it is procedurally barred. Petitioner also faults his appellate counsel for failing to raise this issue on appeal. Pet.'s Reply Br. at 33. Even if the issue had been properly raised, Petitioner cannot meet the high burden of the Strickland test. Petitioner's involvement with the Ramada Inn and Days Inn was established by the testimony of Tarik Roberts and Quottysa Thomas, and the identification of Benjamin Perkins. Thus, this Court cannot say that, even assuming that Petitioner satisfies the cause standard under Strickland, that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Petitioner has set forth no reasons for cause as to why he failed to raise the alleged government error regarding a change in his appearance in the line-up (Ground 3(b)), the government's alleged presentation of perjured testimony to the jury (Ground

3(c)), or the governments alleged misleading of the jury regarding yellow glasses allegedly worn by the during the robberies (Ground 3(d)). Again, instead of setting forth reasons why he failed to raise these arguments on appeal, Petitioner focuses on the alleged prejudice resulting from these issues. However, "[i]n procedural default cases, the cause standard requires the petitioner to show that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim" McCleskey v. Zant, 499 U.S. 467, 493 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Therefore the claims are procedurally barred.

*"Actual Innocence"*⁶

As discussed briefly above, "a 'fundamental miscarriage of justice' will remove the bar on claims that have been procedurally defaulted, and actual innocence will show such a fundamental miscarriage of justice" to overcome the procedural bar of defaulted claims. Hubbard, 378 F.3d at 338. However, "the actual innocence exception to the unreviewability of procedurally defaulted claims should be applied only in the

⁶In an April 25, 2008, Order, this Court ordered that the government respond to Petitioner's discovery requests [Docket Nos. 266 & 267] and "indicate what impact, if any, the statements of Alfredo Santiago have on Petitioner's pending petition." Inexplicably, the government ignored the Court's directive and responded only to the discovery request and failed to address the Alfredo Santiago affidavit. See Docket No. 269.

rarest of cases." Id. (citing Dretke v. Haley, 541 U.S. 386, 394 (2004)).

A petitioner who is asserting his "actual innocence of the underlying crime . . . must show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition." Calderon v. Thompson, 523 U.S. 538, 559, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) (quoting Schlup, 513 U.S. at 327). In Schlup, the Supreme Court stated that claims of actual innocence are rarely successful because the necessary evidence is unavailable in the vast majority of cases. 513 U.S. at 324. The Court explained that petitioner must support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial. Id.

Id. 339-40; U.S. v. Davies, 394 F.3d 183, 191 (3d Cir. 2005).

This Court must ask whether Santiago has presented new reliable evidence not presented at trial and, if so, whether it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. See Schlup v. Delo, 513 U.S. 298, 342 (1995); Goldblum v. Klem, 510 F.3d 204, 216 (3d Cir. 2007). "In making this second inquiry, a court 'must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial,' and 'assess how reasonable jurors would react to the overall, newly supplemented record.'" Id. (citing House v. Bell, 547 U.S. 518, 126 S. Ct. 2064, 2077 (2006)).

Per supplemental submission 266, Petitioner avers that while

he did rob the Host Resort, he did not rob the Ramada Inn or the Days Inn. In support of this theory, Petitioner presents the affidavit of his brother, Alfredo Santiago, which states, in relevant part, "I [Alfredo Santiago] and Tarik Roberts robbed the Days Inn Hotel located in Shillington, PA . . . and, that, though Marcos F. Santiago and Carlos Calero were present, they didn't want to rob this hotel. . . . But [], against their argument, I and Tarik went in to rob this hotel anyway." Docket No. 266. Earlier in the affidavit, Alfredo stats that "I was alone when I robbed [the Ramada Inn] ." Id. Petitioner points to evidence in the record that he believes corroborates this "new evidence" such as the fact that the shoe print found at the Ramada Inn did not match the shoe Petitioner was wearing the night he was arrested after the Host robbery and that Valerie Cooke gave a description of the robber that described Alfredo Santiago perfectly. Petitioner also states that the fact that he did not want to rob the Days Inn is corroborated by statements given to detectives in 2002.⁷

⁷ Petitioner submitted additional material on May 8, 2008, in support of his actual innocence claim and discussing Alfredo Santiago's affidavit. Docket No. 272. In this submission, Petitioner reiterates the evidence he believes corroborates the statements of Alfredo Santiago. However, for the reasons already discussed above, this Court finds Petitioner's submission unpersuasive. Petitioner's submission also asks this Court to reconsider its denial of his most recent discovery request. For the reasons already stated in this Court's prior denial of Petitioner's request for reconsideration, Docket No. 259, this Court will not grant Petitioner's request.

"When assessing this type of new evidence, we should 'consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of evidence.'" Goldblum, 510 F. 3d at 226 (quoting Schlup, 513 U.S. at 332). Interestingly, Alfredo's confession makes clear that he was previously unwilling to submit the affidavit and was only willing to do it after "having been convinced by my brother, Marcos Santiago, that the five year statute of limitation . . . has run its course." Docket No. 266 at ¶7. The reliability of this statement is undercut by the fact that it was only given, as clearly stated, after the affiant was convinced the statute of limitations had run. Moreover, Alfredo's statements regarding the Days Inn robbery do not exonerate Petitioner, but merely corroborate Petitioner's statement that he did not want to rob the Days Inn.

While Alfredo Santiago states that he alone robbed the Ramada Inn, the reliability of the statement is undercut by the circumstances under which it is given. Moreover, in light of the corroborating evidence presented at trial, the identification by Benjamin Perkins, the description by Valerie Cooke and Petitioner's prior confession, this Court cannot find that even "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Schlup, 513 U.S. at 329. Because Petitioner has failed to

present "evidence of innocence so strong that the court cannot have confidence in the outcome of the trial. . .", it finds that Petitioner should not be allowed to pass through the gateway of procedural default to argue the merits of his underlying claims. Goldblum, 510 F. 3d at 226.

Evidentiary Hearing

A district court is required to hold an evidentiary hearing on a § 2255 motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 (b). For the reasons already set forth, the record and files conclusively show that Petitioner is not entitled to relief. The petition will be denied without an evidentiary hearing.

CONCLUSION

For the aforementioned reasons, Petitioner's § 2255 habeas petition will be denied on all grounds and no hearing will be held. Moreover, no certificate of appealability will issue pursuant to 28 U.S.C. § 2253(c) because Petitioner has not made a substantial showing of the denial of a constitutional right. See United States v. Cepero, 224 F.3d 256, 267-68 (3d Cir. 2008). Additionally, Petitioner's request for reconsideration of his discovery request, Docket No. 272, will be denied.

An appropriate Order will issue this date.

Dated: May 8, 2008

s/Renée Marie Bumb
RENÉE MARIE BUMB
UNITED STATES DISTRICT JUDGE

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

<hr/>	MARCOS F. SANTIAGO,	:	
	Petitioner,	:	Civil Action No. 07-253 (RMB)
	v.	:	
	UNITED STATES OF AMERICA,	:	
	Respondent.	:	
<hr/>	UNITED STATES OF AMERICA,	:	
	Petitioner	:	Criminal Action No. 03-157 (RMB)
	v.	:	ORDER
	MARCOS F. SANTIAGO,	:	
<hr/>	Respondent	:	

THIS MATTER having come before the Court upon the pro se motion of Marcus Santiago to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 and Petitioner's request that this Court reconsider its denial of Petitioner's discovery request; and the Court having reviewed the petition and the opposition thereto; and for the reasons set forth in the Opinion issued this date;

IT IS HEREBY **ORDERED** that Petitioner's request for relief pursuant to 28 U.S.C. § 2255 is **DENIED**; and

IT IS FURTHER **ORDERED** that Petitioner's motion for

reconsideration, Docket No. 272, is **DENIED**.

Dated: May 8, 2008

s/Renée Marie Bumb
RENÉE MARIE BUMB
UNITED STATES DISTRICT JUDGE