

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

UNITED STATES OF AMERICA	)	Criminal Action
	)	No. 05-cr-00534-01
v.	)	
	)	
EFRAIN REYES,	)	Civil Action
	)	No. 09-cv-01809
Defendant	)	

\* \* \*

APPEARANCES:

JOHN M. GALLAGHER, ESQUIRE  
Assistant United States Attorney  
On behalf of the United States of America

EFRAIN REYES  
Defendant pro se

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**O P I N I O N**

JAMES KNOLL GARDNER  
United States District Judge

This matter is before the court on the Motion to Vacate, Set Aside, or Set for New Trial Pursuant to 28 U.S.C. § 2255, filed by defendant pro se on April 20, 2012 ("Defendant's 2255 Motion");<sup>1</sup> and the Motion to Vacate, Set Aside, or Correct

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<sup>1</sup> Although the docket entries reflect that the Motion to Vacate, Set Aside, or Set for New Trial Pursuant to 28 U.S.C. § 2255 was filed April 24, 2009, (Document 178), defendant certifies that "this document was given to prison officials on 4-20-2009 A.D., for forwarding to the U.S. District Court [f]or the Eastern District of Pennsylvania." (See Petition, page 13.)

Pursuant to the prison mailbox rule, this court will consider the date of filing as April 20, 2009. The prison mailbox rule deems a motion to have been filed on the date the petitioner delivered his petition to prison

Sentence By a Person in Federal Custody, a Habeas Corpus Motion filed under 28 U.S.C. § 2255 by defendant pro se on June 12, 2009 ("Standard Form 2255 Motion").<sup>2</sup>

On December 11, 2009, the Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to Title 28 U.S.C. § 2255 was filed. On October 15, 2010, Petitioner's Response to the Government's Motion was filed by defendant.

For the reasons expressed in this Opinion, I dismiss both Defendant's 2255 Motion and his Standard Form 2255 Motion without a hearing, and deny a certificate of appealability.

#### **PROCEDURAL HISTORY**

An Indictment was filed under seal on September 15, 2005 which charged defendant Efrain Reyes, together with co-defendants Raymond Rivera, Edward Ramos, and Omar Casanova, with one count of Possession of 500 grams or more of cocaine with the

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officials to mail. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1997).

<sup>2</sup> On April 20, 2009, defendant originally filed his habeas corpus motion on the incorrect form. Pursuant to my Order dated May 18, 2009 and filed May 21, 2009 directing that defendant be provided with the proper form, he executed his habeas corpus motion on the correct form on June 5, 2009. However, because the grounds raised in both Defendant's 2255 Motion and his Standard Form 2255 Motion, I jointly consider the arguments defendant made in both documents.

intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), and aiding and abetting that offense in violation of 18 U.S.C. § 2. The Indictment was unsealed on September 20, 2005.

On October 19, 2005, defendant Reyes filed a motion for extension of time to file pretrial motions. By my Order dated October 25, 2005 and filed October 26, 2005, I declared "the case taken as a whole [to be] so unusual and so complex, due to the number of defendants or the nature of the prosecution and other complexity, that it is unreasonable to expect adequate preparation within the periods of time established."

Based upon my finding "that the ends of justice served by granting this continuance outweigh the best interests of the public and the defendant in a speedy trial", the trial of this matter was continued until February 21, 2006.<sup>3</sup> On November 3, 2005, I entered and filed an Order granting as unopposed defendant's Motion to Enlarge Time to File Pre-Trial Motions.

On November 14, 2005, defendant Reyes, through his court-appointed counsel, Robert E. Sletvold, Esquire, filed a

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<sup>3</sup> This finding was made pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(h)(8).

Pretrial Motion to Suppress Evidence. On November 15, 2005, Attorney Sletvold filed a Motion to Join in five pretrial motions of co-defendant Edward Ramos, including three discovery motions, a motion in limine to preclude admission of evidence of prior criminal convictions at trial, and a motion to sever the co-defendants for purposes of trial pursuant to Federal Rule of Criminal Procedure 14(a). These motions in which Attorney

Sletvold joined on behalf of defendant Reyes' were filed by co-defendant Ramos on November 14, 2005, the same day that Attorney Sletvold filed his motion to suppress evidence on behalf of his client, defendant Reyes.

On December 1, 2005, the government filed separate omnibus responses to the pretrial motions of defendants Reyes and Ramos respectively. On December 19, 2005, the government filed separate supplemental responses to the pretrial motions of defendants Reyes and Ramos respectively, as well as a pretrial motion to admit audio recordings of conversations of the defendants and undercover law enforcement officers, and transcripts of those recordings, into evidence at trial.

On January 5, 2006, defendant Edward Ramos pled guilty to the sole offense charged in the Indictment. At his change of

plea hearing on that date, I granted the oral motion of co-defendant Ramos to withdraw his pending pretrial motions, which were the pretrial motions in which defendant Reyes' sought to join.

On January 18, 2006, co-defendant Omar Casanova pled guilty to the sole charge in the Indictment. Also on that date, the government filed an Information Charging Prior Offense for the purpose of sentence enhancement in defendant Reyes' case. That Information indicated that defendant Reyes had five previous felony controlled substance convictions for which he was sentenced between 1984 and 1997 in the Superior Court of Essex County, New Jersey, and the Court of Common Pleas of Lehigh County, Pennsylvania.

On January 19, 2006, a hearing was held before me concerning the pretrial motions filed by defendant Reyes. The hearing addressed defendant Reyes' motion to suppress evidence, as well as the pretrial motions of defendant Edward Ramos in which defendant Reyes joined, but which were withdrawn by defendant Ramos when he pled guilty on January 5, 2006.

At the January 19, 2006 hearing, by agreement of government counsel and Attorney Sletvold, I granted the government's oral motion, made at the hearing, to dismiss as

moot, defendant Reyes' November 15, 2005 motion to join in the Ramos pretrial motions. I granted the motion based upon representations from government counsel at the pretrial motion hearing, that the government had provided all non-Jencks Act discovery to defendant Reyes at that time; that it would provided all Jencks Act material to defendant Reyes by February 10, 2006; and that it would comply with its continuing duty to disclose additional discovery evidence or Jencks Act material before or during trial in accordance with Federal Rule of Criminal Procedure 16(c).

Moreover, during the January 19, 2006 pretrial motion hearing, the government represented that it would not seek to admit the evidence which Attorney Sletvold, on defendant Reyes' behalf, sought to suppress. Based upon that the government's representation, and by agreement of government counsel and Attorney Sletvold, I granted the government's oral motion and dismissed defendant Reyes' November 14, 2005 motion to suppress evidence as moot.

Finally, for the reasons stated simultaneously on the record at the January 19, 2006 pretrial motion hearing, I granted the government's December 19, 2005 pretrial motion seeking to admit audio recordings and transcripts of those recordings at

trial.

On February 3, 2006, co-defendant Raymond Rivera pled guilty to the sole offense charged in the Indictment.

On February 7, 2006, I conducted a pretrial conference on the record with counsel for the government, Attorney Sletvold, and defendant Reyes each present. During the pretrial conference, defendant Reyes was permitted to address the court at considerable length. In doing so, he expressed concern that his pretrial motions had been dismissed as moot and his belief that the dismissal of those motions as moot demonstrated that Attorney Sletvold was not adequately representing him.

Specifically, defendant Reyes stated:

[W]hen you declare something moot, to me its like the person is not a hundred percent doing this job like he supposed to.

And, like I say, based on that, I would like to at least be taken out, you know, the claim of ineffective assistance of counsel against Mr. Sletvold and that he be removed from my case to represent me and that another counsel will be appointed that could be more effective and if the Court decides to not appoint nobody else to represent me, so I would like the whole proceeding to be in Spanish so I can be able to express myself to the fullest because, in English, it's a little confused to me. Sometimes I don't understand all the words of definitions of law. Only in Spanish, I believe I will be able to

defend myself a little bit better.<sup>4</sup>

For the reasons expressed on the record at the pretrial conference, I denied the oral motion of defendant Reyes which sought to have Attorney Sletvold replaced by alternative court-appointed counsel. In articulating my reasons for denying his request for appointment of new counsel, I noted -- in response to defendant Reyes' concern about his pretrial motions having been dismissed as moot -- that having those motions dismissed as moot did not reflect ineffective assistance of counsel by Attorney Sletvold's because, in effect, Attorney Sletvold obtained the relief sought by those pretrial motions by agreement of the government. In particular, the government agreed that it would not seek to introduce any of the evidence which was the subject of the November 14, 2005 motion to suppress evidence filed by Attorney Sletvold on behalf of defendant Reyes.

Jury selection took place February 21, 2006 and trial commenced the next morning, February 22, 2006. The trial lasted three days and concluded February 24, 2006 when the jury returned a guilty verdict on the sole charge in the Indictment against

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<sup>4</sup> Transcript of Pre-Trial Conference Before The Honorable James Knoll Gardner[,], United States District Court Judge on February 7, 2006 ("N.T. 2/7/06") at pages 13-14.

defendant Reyes.

On March 27, 2006, defendant Reyes', through Attorney Sletvold, filed a post-trial motion seeking a new trial based upon the allegedly improper introduction of evidence concerning two smaller un-charged heroin transactions between defendant Reyes and an undercover officer which led to the charged transaction on April 7, 2005. This evidence was among the evidence which the court ruled admissible at the January 19, 2006 pretrial motions hearing when it granted the government's December 19, 2005 pretrial motion to admit various audio recordings. Defendant Reyes' motion for a new trial was denied by my Order dated August 8, 2006 and filed August 10, 2006.

On August 22, 2006, I sentenced defendant Reyes to 396 months imprisonment, 8 years supervised release, and a \$100.00 special assessment on the charge of Possession of 500 grams or more of cocaine with the intent to distribute.

Defendant Reyes filed a Notice of Appeal on August 24, 2006. On March 8, 2008, the United States Court of Appeals for the Third Circuit entered a Judgment and accompanying Opinion which affirmed his conviction.

Defendant filed his first within Motion to Vacate, Set Aside, or Set for New Trial Pursuant to 28 U.S.C. § 2255 pro se

on April 20, 2009. Pursuant to my Order dated May 18, 2009 and filed May 21, 2009, the Clerk of Court furnished defendant with a copy of this court's standard form for section 2255 habeas corpus motions. On June 12, 2009, defendant filed his second Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody on this court's standard form (the Standard Form 2255 Motion).

On December 11, 2009, the Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to Title 28 U.S.C. § 2255 was filed.

On December 15, 2010, defendant filed Petitioner's Response to the Government's Motion. Hence this Opinion.

#### **FACTS**

Based upon the evidence presented during the trial in this matter, the pertinent facts concerning the crime charged are as follows.

#### **February 25, 2005**

On February 25, 2005, Berks County Detective Geraldo Martinez, working undercover, traveled to the 300 block of Church Street in Reading, Pennsylvania for a prearranged meeting with defendant Efrain Reyes. Detective Martinez called defendant Reyes upon arriving at their Church Street meeting place.

Defendant Reyes arrived shortly thereafter and got into Detective Martinez's unmarked vehicle.<sup>5</sup>

Unknown to defendant Reyes, Detective Martinez was recording the conversation taking place in his car using two recording devices -- a Sony mini-disk recorder as well as a Kell transmitter which transmitted the conversation to a surveillance vehicle located nearby.<sup>6</sup>

On February 25, 2005, defendant Reyes delivered fourteen grams of heroin to Detective Reyes in exchange for \$1,000 in prerecorded marked currency. In addition to consummating the heroin sale, defendant Reyes told Detective Martinez that he could supply Detective Martinez with a kilogram of powder cocaine for \$25,000.<sup>7</sup>

April 5, 2005

On April 5, 2005, still working undercover, Detective Martinez returned to the 300 Block of Church Street in Reading. As on February 25, 2005, upon arriving on Church Street, Detective Martinez placed a phone call to defendant Reyes and

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<sup>5</sup> Transcript of Trial, February 22, 2006 ("N.T. 2/22/06") at pages 34-37.

<sup>6</sup> N.T. 2/22/06 at page 37.

<sup>7</sup> N.T. 2/22/06 at pages 46, 48.

defendant Reyes arrived shortly thereafter. Again, defendant Reyes entered Detective Martinez's vehicle; and, again, Detective Martinez was recording their conversation and transmitting it to a nearby surveillance vehicle.<sup>8</sup>

On April 5, 2005, in Detective Martinez's unmarked car, defendant Reyes delivered a relatively small quantity of heroin to Detective Martinez in exchange for \$250.00.<sup>9</sup>

During this second relatively small heroin transaction, Detective Martinez told defendant Reyes that he was ready to, and wanted to, purchase the kilogram of cocaine for \$25,000 which defendant Reyes had offered on February 25, 2005.<sup>10</sup> At that point, defendant Reyes placed a phone call to an unknown individual, and confirmed that the cocaine was ready and that the one-kilogram cocaine transaction could be completed two days later, on April 7, 2005.<sup>11</sup>

April 7, 2005

As arranged during their April 5, 2005 meeting,

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<sup>8</sup> N.T. 2/22/06 at pages 62-66.

<sup>9</sup> N.T. 2/22/06 at page 64.

<sup>10</sup> N.T. 2/22/06 at pages 64-65.

<sup>11</sup> N.T. 2/22/06 at page 65.

Detective Martinez again traveled to the 300 block of Church Street in Reading to complete the one-kilogram cocaine transaction that was first suggested by defendant Reyes on

Februray 25, 2005 and confirmed by Detective Santiago on April 5, 2005.<sup>12</sup>

Unlike February 25, 2005 and April 5, 2005, Detective Martinez was not alone in his unmarked vehicle when he went to meet defendant Reyes on April 7, 2005. On that day, Detective Martinez was accompanied by Criminal Investigator Edwin Santiago of the Reading City Police Department, who was also working in an undercover capacity.<sup>13</sup>

Defendant Reyes was not alone when he arrived on the 300 block of Church Street on April 7, 2005. Defendant Reyes arrived in a minivan and was accompanied by co-defendants Edward Ramos and Omar Casanova.<sup>14</sup> Co-defendant Raymond Rivera arrived

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<sup>12</sup> N.T. 2/22/06 at pages 79-80.

<sup>13</sup> N.T. 2/22/06 at page 80.

<sup>14</sup> Transcript of Trial, February 23, 2006 ("N.T. 2/23/06) at pages 11, 14.

separately in his own vehicle.<sup>15</sup>

The two undercover detective and four co-defendants initially could not agree on the actual location where, and precise mechanics of how, the exchange of the currency for the kilogram of cocaine would occur. After discussions back and forth, they agreed that the exchange would take place at another public location, the parking lot of the Fairground Square Mall also in Reading.<sup>16</sup>

The undercover detectives and four co-defendants departed from the 300 Block of Church Street and proceeded to the Fairgrounds Square Mall parking lot. Once in the mall parking lot, Investigator Santiago entered the vehicle that co-defendant Raymond Rivera was driving, while Detective Martinez and the other three co-defendants remained outside of that vehicle.

Once Investigator Santiago was inside defendant Rivera's vehicle, defendant Rivera handed him the kilogram of

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<sup>15</sup> N.T. 2/22/06 at page 82; N.T. 2/23/06 at page 15.

<sup>16</sup> N.T. 2/22/06 at pages 82, 99-101, 104; N.T. 2/23/06 at pages 19-20.

cocaine so that Investigator Santiago could inspect it.<sup>17</sup> After inspecting the kilogram, Investigator Santiago got out of defendant Rivera's car and said to Detective Martinez -- and to the arrest team who was listening via a Kell transmitter -- that "It's all there...It's all in the white vehicle."<sup>18</sup>

Within approximately 30 seconds of Investigator Santiago's statement, the arrest team arrived on the scene in the parking lot and arrested both the undercover officers and defendant Rivera, who was still in his vehicle.<sup>19</sup>

Defendant Reyes attempted to flee from the parking lot in his minivan, and co-defendants Ramos and Casanova fled on foot when the arrest team arrived. After defendant Reyes' van collided with a police vehicle and defendant Reyes attempted to flee on foot, defendants Reyes, and co-defendants Ramos and Casanova were each was captured in the parking lot.<sup>20</sup>

#### **STANDARD OF REVIEW**

Section 2255 of Title 28 of the United States Code

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<sup>17</sup> N.T. 2/23/06 at pages 22-23.

<sup>18</sup> N.T. 2/23/06 at page 23.

<sup>19</sup> N.T. 2/23/06 at page 24.

<sup>20</sup> N.T. 2/23/06 at pages 143-144.

provides federal prisoners with a vehicle for challenging an unlawfully imposed sentence. Section 2255 provides, in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a 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.

28 U.S.C. § 2255(a).

A motion to vacate sentence under section 2255 "is addressed to the sound discretion of the district court". United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). A petitioner may prevail on a section 2255 habeas claim only by demonstrating that an error of law was constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or an "omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417, 421 (1962).

#### **DISCUSSION**

Defendant's Standard Form 2255 Motion contains four

grounds upon which defendant contends he is entitled to relief.<sup>21</sup>

Essentially, defendant Reyes claims that he received ineffective assistance of counsel from Attorney Sletvold, and, in the context of his ineffective assistance allegations, also challenges the jurisdiction of this court to preside at his trial and contends that he was denied his Sixth Amendment constitutional right to represent himself.

### **Ineffective Assistance of Counsel**

A claim of ineffective assistance of counsel requires a defendant to show that counsel's performance was constitutionally deficient and that counsel's errors prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984).

The United States Court of Appeals for the Third Circuit has noted that "[b]y its terms, Strickland applies to all manner of ineffective assistance of counsel claims." Palmer v. Hendricks, 592 F.3d 386, 398 (3d Cir. 2010).

However, as the Third Circuit also noted, the

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<sup>21</sup> In the Conclusion section of Defendant's 2255 Motion, Mr. Reyes states that he "moves this Honorable court for a grant of vacatur or set aside of his conviction, and for this court to effectuate correction, modification, or setting of retrial and any other relief which this court may deem equitable and just." (Defendant's 2255 Motion at pages 13-14.)

Strickland Court "carefully and expressly specified only two categories of ineffective assistance claims in which prejudice may be presumed: cases of '[a]ctual or constructive denial of assistance of counsel altogether' and cases in which 'counsel is burdened by an actual conflict of interest.'" Id. (quoting Strickland, 466 U.S. at 684, 104 S.Ct. 2052, 80 L.Ed.2d 674).

Claims of actual ineffectiveness of counsel which allege "a deficiency in attorney performance are subject to a general requirement that the defendant *affirmatively prove prejudice.*" Id. (quoting Strickland, 466 U.S. at 693, 104 S.Ct. 2052, 80 L.Ed.2d 674) (emphasis added by Third Circuit).

#### Conflict of Interest

In cases where a defendant alleges a conflict of interest on the part of defense counsel "the presumption of prejudice cannot operate to obviate the requisite obligation to demonstrate the existence of an actual conflict." United States v. Gambino, 788 F.2d 938, 951 (3d Cir. 1986). Rather, prejudice is presumed under Strickland only if defendant makes two predicate showings: first, that his lawyer "actively represented conflicting interests"; and second, that "an actual conflict of interests adversely affected his lawyer's performance." Id.

An actual conflict of interest is demonstrated "if,

during the course of representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action." Sullivan v. Cuyler, 723 F.2d 1077, 1086 (3d Cir. 1983). The actual conflict "*must cause some lapse in representation contrary to the defendant's interests but such lapse need not rise to the level of actual prejudice*", as would ordinarily be required by Strickland. Sullivan, 723 F.2d at 1086 (emphasis added).

First, defendant contends that defense counsel, Attorney Sletvold "was seeking employment in the prosecutor's office before he agreed to represent [defendant] at trial" and that this situation created a conflict of interest for Attorney Sletvold and violated defendant's right to due process.<sup>22</sup>

Defendant further contends that Attorney Sletvold's performance, in allegedly failing to inform defendant that he was seeking a position as a prosecutor before he agreed to represent defendant, fell below the constitutionally guaranteed standard and prejudiced defendant.<sup>23</sup>

Defendant provides neither factual allegations

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<sup>22</sup> Defendant's Standard Form 2255 Motion at page 6.

<sup>23</sup> Defendant's 2255 Motion at page 4.

supporting his contention that Attorney Sletvold "was seeking employment in the prosecutor's office before he agreed to represent [defendant] at trial", nor any allegations that Attorney Sletvold was seeking employment with any prosecutor's office during his trial.<sup>24</sup>

The government attached a letter from Attorney Sletvold to Assistant United States Attorney John M. Gallagher dated October 20, 2009 in which Attorney Sletvold states:

I was looking to change employment during the summer of 2007. Among the several avenues that I pursued was the possibility of obtaining a position [as] a prosecutor in Lehigh County. I sent the District Attorney's Office a cover letter detailing my interest as well as a resume. This was sent...near the end of July[, 2007]. I attended an event at which the District Attorney was also present on July 27, 2007 and we spoke briefly about my interest. I was told to call the next week to set up an interview. That interview was held...in either the second or third week of August, 2007. I was offered and accepted a position and started on September 10, 2007; my tenure ended October 31, 2008.<sup>25</sup>

Attorney Sletvold's October 20, 2009 letter to Attorney Gallagher was in response to inquiry from Attorney Gallagher concerning the timing of Attorney Sletvold's employment as an

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<sup>24</sup> See Defendant's Standard Form 2255 Motion at page 6.

<sup>25</sup> Government's Response, Exhibit A.

Deputy District Attorney for Lehigh County.<sup>26</sup> Earlier, on July 21, 2008, Attorney Sletvold filed a motion for leave to withdraw as counsel for defendant in defendant's direct appeal from his conviction and sentence on the grounds that "counsel's continued representation of appellant would present a conflict of interest as he has taken employment in a prosecutor's office".<sup>27</sup>

The record here reflects that approximately seventeen months after the jury returned its guilty verdict (on February 22, 2006) against defendant and eleven months after defendant was sentenced (on August 22, 2006),<sup>28</sup> Attorney Sletvold applied for (in late July, 2007) a position as a Deputy District Attorney for Lehigh County, which he obtained and subsequently commenced employment (on September 10, 2007) that lasted approximately thirteen months (until October 31, 2008).

Here, both Defendant's 2255 Motion and Defendant's

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<sup>26</sup> Government's Response, Exhibit A.

<sup>27</sup> Motion of Appellant's Counsel for Permission to Withdraw Pursuant to L.A.R. 109.2 filed by Attorney Sletvold on July 21, 2008 in United States Court of Appeals for the Third Circuit Case Number 06-3929.

<sup>28</sup> The electronic docket in defendant's direct appeal, United States Court of Appeals for the Third Circuit Case Number 06-3929, indicates that Attorney Sletvold filed defendant-appellant's brief on April 4, 2007. On July 27, 2007, Attorney Sletvold filed a motion for extension of time for defendant to file a supplemental brief. That motion was granted and defendant filed a supplemental reply brief pro se on October 19, 2007. Defendant's direct appeal was submitted to a three-judge panel of the appeal court on February 8, 2008, and defendant's conviction was affirmed on March 28, 2008.

Standard Form 2255 Motion offer nothing more than defendant's conclusory assertion that the prospect of future employment as a prosecutor created a conflict of interest for Attorney Sletvold in his representation of defendant and defendant's equally conclusory assertion that he was prejudiced by that alleged conflict.<sup>29</sup>

The United States Supreme Court has stated that "unless a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333, 347 (1980).

The fact that Attorney Sletvold applied for and took a position as a Deputy District Attorney for Lehigh County many months after he commenced representing defendant in this matter and well after the trial does not demonstrate that Attorney Sletvold actively represented conflicting interests in this matter. Rather, the record reflects that Attorney Sletvold pursued defendant's interest exclusively in this matter despite the substantial evidence against defendant.

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<sup>29</sup> Defendant's 2255 Motion at page 5.

In short, the factual allegations in defendants respective 2255 motions and the record in this case do not demonstrate that Attorney Sletvold labored under an actual conflict of interest based upon his future application for, and employment by, the Lehigh County District Attorney's Office.

Moreover, even if an actual conflict of interest arose between Attorney Sletvold and defendant Reyes, neither defendant's respective 2255 motions, nor the record in this case, demonstrate that consideration of potential future employment as a prosecutor caused "some lapse" in Attorney Sletvold's representation of defendant Reyes. Sullivan, 723 F.2d at 1086. Accordingly, defendant Reyes' 2255 motions based upon Attorney Sletvold's alleged conflict of interest are denied.

*Allegedly Deficient Performance*

Second, defendant Reyes contends that his trial and direct-appeal counsel, Attorney Sletvold, provided ineffective assistance in a number of respects. In Defendant's Standard Form 2255 Motion, Mr. Reyes asserts that Attorney Sletvold was ineffective in allegedly failing to challenge the authenticity of the "wiretap tapes".<sup>30</sup>

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<sup>30</sup> Defendant's Standard Form 2255 Motion at page 6.

*Purported Wire-Tap Recordings*

Defendant Reyes contends that his Fourth Amendment rights were violated because "the wiretap tapes were obtained illegally" and that Attorney Sletvold did not object and/or challenge said violation".<sup>31</sup>

Specifically, Mr. Reyes contends that it was error for Attorney Sletvold not to object during trial to the admissibility of the "wiretaps" which defendant contends were "seized...without a search warrant".<sup>32</sup> Defendant further contends that the use of the so-called "wiretaps" at trial violated his Fourth Amendment right to be free from unreasonable searches and that Attorney Sletvold's failure to object to the admission of the "wiretaps" into evidence violated Mr. Reyes' right to effective assistance of counsel.<sup>33</sup>

Defendant claims that Attorney Sletvold provided ineffective assistance because he "refused to file motion(s) attacking the search warrant[s]".<sup>34</sup> This claim is meritless and contradicted by the record. Attorney Sletvold, on defendant's

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<sup>31</sup> Defendant's Standard Form 2255 Motion at page 6.

<sup>32</sup> Defendant's 2255 Motion at page 6.

<sup>33</sup> Defendant's 2255 Motion at page 7.

<sup>34</sup> Defendant's 2255 Motion at page 11.

behalf, filed a Pretrial Motion to Suppress Evidence on November 14, 2005 which sought to suppress evidence seized during the execution of multiple search warrants on the ground that those warrants were not supported by probable cause. That motion to suppress was dismissed as moot after the government represented, on the record at a pretrial motion hearing, that it would not seek to admit at trial any of the evidence seized pursuant to the warrants which Attorney Sletvold had challenged.

Defendant's contentions that his Fourth Amendment rights were violated by the admission of allegedly-illegal wiretap evidence and that Attorney Sletvold was ineffective for failing to challenge the wiretap evidence are each doomed by the fact that no wiretap evidence was presented or admitted at the trial of this case.

Audio-recorded conversations, together with transcripts of those recordings, were indeed presented by the government and admitted into evidence at Mr. Reyes' trial.<sup>35</sup> However, the audio

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<sup>35</sup> Transcript of Trial, February 22, 2006 ("N.T. 2/22/06") at pages 39-42 (admission of audio and transcript of February 25, 2005 conversation between defendant and Berks County Detective Geraldo Martinez); id. at pages 66-67 (admission of audio and transcript of April 5, 2005 conversation between defendant and Berks County Detective Geraldo Martinez); id. at pages 87-88 (admission of audio and transcript of April 7, 2005 conversations between, among others, defendant and Berks County Detective Geraldo Martinez).

recordings and transcripts were not produced from wiretap intercepts of communications between defendant and third-parties where no party to the conversation was aware of, or consented to, the recording.

Rather, the audio recordings and transcripts admitted into evidence at defendant's trial were conversations to which Berks County Detective Geraldo Martinez, working undercover, was a party.<sup>36</sup>

The statute governing the interception and disclosure of wire, oral, or electronic communications provides, in pertinent part, that "it shall not be unlawful under this chapter for a person acting under color of state law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c).

A warrantless recording of a conversation may be admitted into evidence in a federal prosecution if one of the parties to that conversation consented to the recording, United States v. Seibert, 779 F.Supp. 366, 369 (E.D.Pa. 1991) (Van

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<sup>36</sup> Detective Martinez participated in the recorded conversations in an undercover capacity posing as an out-of-town drug dealer seeking additional supply in the Reading, Pennsylvania area.

Antwerpen, J.) (citing United States v. Armocida, 515 F.2d 49, 52 (3d Cir. 1975)), and if the government produces clear and convincing evidence of the authenticity and accuracy of the recording. Id. (citing United States v. Starks, 515 F.2d 112, 121 (3d Cir. 1975)).

Here, Detective Martinez testified that, on each occasion when defendant was recorded, Detective Martinez knew that his conversation with defendant was being recorded and that Detective Martinez consented to such recording.

Detective Martinez also testified that the audio recordings of Detective Martinez's and defendant's conversations on February 25, 2005 and April 5, 2005 were made using a Sony mini-disk recorder located in Detective Martinez's unmarked vehicle as well as a Kell transmitter located in Detective Martinez's vehicle which transmitted a signal to a receiver-recorder located in a nearby surveillance van.<sup>37</sup> Detective Martinez testified that both the February 25, 2005 and April 5, 2005 conversations took place in his unmarked Dodge Intrepid sedan and that he and defendant were the only people in the

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<sup>37</sup> N.T. 2/22/06 at pages 36-37 (February 25, 2005 conversation) and 64-65 (April 5, 2005 conversation).

vehicle.<sup>38</sup>

On April 7, 2012, the date on which the kilogram deal was to be consummated, the Sony mini-disk recorder and Kell recording equipment were again used.<sup>39</sup> However, as Detective Martinez testified, the quality of the audio recording from April 7, 2005 was lower than the previous two recordings because of "radio interference" and because the recording equipment was located in Detective Martinez's unmarked car and some of the conversations took place outside of the vehicle.

Nonetheless, Detective Martinez, who was a party to the recorded conversation on each date, and who is fluent in both English and Spanish,<sup>40</sup> testified that he reviewed the audio tapes, that he transcribed the tapes, that he reviewed both the tapes and transcript from each date, and that both the tapes and transcripts accurately represent the conversations held each date.<sup>41</sup>

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<sup>38</sup> Id.

<sup>39</sup> N.T. 2/22/06 at page 86.

<sup>40</sup> N.T. 2/22/06 at page 39.

<sup>41</sup> N.T. 2/22/06 at pages 38-39, 65-66, and 85-88.

Because Detective Martinez was a party to the recorded conversations and because the government produced clear and convincing evidence that the audio recordings and transcripts were authentic and accurate, I conclude that defendant's contention that the admission of the audio tapes and transcripts into evidence at trial violated his Fourth Amendment right to be free from warrantless search is without merit.

Accordingly, defendant's contention that Attorney Sletvold was ineffective for not challenging the admissibility of the tapes and transcripts is also without merit because "there can be no Sixth Amendment deprivation of effective assistance of counsel based on an attorney's failure to raise a meritless argument." United States v. Saunders, 165 F.3d 248, 253 (3d Cir. 1985).

#### *Motion to Suppress*

Defendant Reyes contends that he received ineffective assistance of counsel because Attorney Sletvold did not "[f]ile a motion for hearing on the lack of probable cause as it pertains to the local police and [their] investigation and arrest" of defendant.<sup>42</sup>

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<sup>42</sup> Defendant's 2255 Motion at page 8.

Defendant Reyes' contention that Berks County law enforcement officers lacked probable cause to arrest him on April 7, 2005 at the Fairgrounds Square Mall is wholly without merit based upon the evidence presented, and the testimony elicited, at trial.

Moreover, Attorney Sletvold did in fact file a motion attacking the legality of searches of several locations which were carried out at the same time the April 7, 2005 transaction was unfolding.

Specifically, Attorney Sletvold filed a motion to suppress evidence recovered during those searches on the ground that the warrants authorizing the searches were not supported by probable cause.<sup>43</sup> The evidence that Attorney Sletvold moved to suppress included scales and \$100,015 cash recovered from 617 Weiser Street, Reading, Pennsylvania which the government initially indicated it intended to introduce at trial.

However, at the subsequent pretrial motion hearing Assistant United States Attorney Gallagher amended the government's position and stated on the record that the government would not seek introduction at trial of any evidence

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<sup>43</sup> See Pretrial Motion to Suppress Evidence filed by Attorney Sletvold, on behalf of defendant, November 14, 2005 (Document 53).

gained from the searches executed simultaneously with the April 7, 2005 transaction which ended in defendant's arrest. Based on the government's commitment -- subsequently honored at trial -- that it would not seek to admit the evidence recovered during the April 7, 2005 searches, by agreement of counsel, and upon the government's oral motion, I dismissed defendant's Pretrial Motion to Suppress Evidence as moot.<sup>44</sup>

This was certainly a positive outcome for defendant and he was in no way prejudiced by that disposition of the Pretrial Motion to Suppress Evidence. More importantly, Attorney Sletvold can hardly be said to have been ineffective by filing a pretrial motion which resulted in a commitment from the government that certain incriminating evidence, including scales and more than \$100,000 cash, would not be offered against defendant at trial.

*Marisol Lucas*

Defendant Reyes contends that Attorney Sletvold was ineffective because he failed to "interview and subpoena Ms. Marisol E. Lucas" who was "a party to, and a material witness of, the facts of my arrest" to testify for defendant at his

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<sup>44</sup> Order dated January 19, 2006 and filed January 20, 2006 (Document 76).

trial.<sup>45</sup> Defendant contends that Ms. Lucas was charged as his co-defendant and co-conspirator in state court, but that she was not subsequently charged in the federal Indictment.

Initially, I note that although defendant Reyes contends that Ms. Lucas was "a party to" his arrest, the testimony and evidence presented at the trial of Mr. Reyes indicates that Ms. Lucas was not present at the time of defendant's arrest on April 7, 2005.

Moreover, defendant provides no facts concerning what information Ms. Lucas would have provided to Attorney Sletvold had he interviewed her or subpoenaed her to testify and called her as a defense witness at trial.

Rather, the trial transcript and record in this case reflect that Attorney Sletvold made a strategic decision not to call Ms. Lucas as a defense witness at trial. Ms. Lucas was defendant's girlfriend at the times relevant to this case. Attorney Sletvold stated, at a recorded sidebar conference during trial, that he would not be calling Ms. Lucas as a defense witness to offer testimony that defendant was not involved in the sale of narcotics because her testimony to that effect would open

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<sup>45</sup> Defendant's 2255 Motion at page 9.

the door for the government to introduce evidence seized during the April 7, 2005 searches in order to rebut Ms. Lucas testimony.<sup>46</sup>

In short, Attorney Sletvold provided an objectively reasonable rationale for his decision not to call Ms. Lucas as a defense witness. Moreover, defendant's two habeas motions each fail to provide any factual allegations concerning what, if anything, Ms. Lucas would have testified to, or that there is any likelihood that the outcome of the trial would have differed had she testified. Because defendant fails to show either constitutionally deficient performance or prejudice as a result of Attorney Sletvold's strategic decisions concerning Marisol Lucas, defendant's ineffective assistance claim based on those decisions fails.

*Fairgrounds Square Mall Video*

Defendant Reyes contends that Attorney Sletvold provided ineffective assistance by failing to collect "the videotape of the fair grounds parking lot...where the alleged drug transaction took place to be used at trial...[and] had the jury had the opportunity to view said tape the outcome of the

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<sup>46</sup> N.T. 2/23/06 at pages 159-160.

[defendant's] trial would have been extremely different".<sup>47</sup>

However, Defendant Reyes makes no factual allegations suggesting that such a tape existed. Moreover, he make no factual allegations concerning what such a tape would have shown and how, if at all, it would have varied from the accounts provided by the eyewitnesses Detectives Martinez and Romig and Investigator Santiago at trial. In other words, even if such a tape did exist, defendant's conclusory allegations do not suggest that he was prejudiced in any way by Attorney Sletvold's failure to seek out the tape and/or offer it as evidence at trial. For those reasons, defendant's ineffective assistance on this ground is without merit.

#### *Law Enforcement Arrest Records*

Defendant Reyes asserts that Attorney Sletvold provided ineffective assistance by failing to "[r]equest a copy of the arrest records of the agents, both State and Federal, involved in [his] arrest".<sup>48</sup>

As with the alleged surveillance tape from the Fairground Square Mall parking lot where defendant was arrested, defendant offers no explanation or factual allegations

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<sup>47</sup> Defendant's 2255 Motion at page 9.

<sup>48</sup> Defendant's 2255 Motion at page 9.

demonstrating how he was prejudiced by Attorney Sletvold's purported failure to obtain certain law enforcement arrest records. For that reason, his ineffective assistance claim on this ground fails.

*Hispanic Translator*

Defendant Reyes contends that Attorney Sletvold provided ineffective assistance by failing to "[c]hallenge the voice on the wiretap tapes and to obtain a[n] expert Hispanic translator to interpret the recorded voices, and have the tapes reviewed for their authenticity".<sup>49</sup>

First, I note that full interpretation services were made available to defendant on the first and second day of trial. At the conclusion of the second day of trial, after a thorough colloquy of the two interpreters who -- as a team -- provided interpretation services to defendant during the first two days of trial, and for the reasons expressed on the record at that time,<sup>50</sup> I excused the interpreters from further participation in the trial. I did so because defendant was fully understanding everything that transpired at the trial, in English, including but not limited to, the testimony of all witnesses, without the

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<sup>49</sup> Defendant's 2255 Motion at page 10.

<sup>50</sup> N.T. 2/22/06 at pages 130-140.

services of the interpreters. For that reason, he did not require, and was not utilizing, the services of the interpreters.

It was on day two of trial, February 22, 2006, that the government successfully admitted the audio recordings and transcripts from February 25, 2005, April 5, 2005, and April 7, 2005 into evidence and played the tapes to the jury. In laying a foundation for the admission of the tapes and transcripts, the government elicited testimony from Detective Martinez that he was fluent in both Spanish and English, that he had transcribed the audio recordings -- both the portions in English and those in Spanish -- and that those transcripts were accurate translations of the contents of the audio recordings.

Although defendant Reyes contends that Attorney Sletvold was ineffective because he did not challenge the translation and authenticity of the audio tapes and transcripts, defendant does not assert either that (1) the tapes were not what Detective Martinez testified that they were, (2) it was not defendant's voice on those tapes, or (3) the tapes were inaccurately translated from Spanish to English.

Even assuming, arguendo, that Attorney Sletvold was ineffective in not having the tapes independently transcribed, defendant's habeas motions provide no factual assertions which

demonstrate a reasonable likelihood that the outcome of defendant's trial likely would have been different if Attorney Sletvold had done so. In short, defendant's ineffective assistance claim concerning the translation and authenticity of the tapes fail because they fail to demonstrate any prejudice to defendant.

#### *Pretrial Discovery*

Defendant claims ineffective assistance of counsel based on Attorney Sletvold's alleged failure to provide defendant with copies of certain discovery. First, defendant does not specify what discovery he is referring to. Second, defendant offers no explanation of how he was prejudiced by not having copies of that unspecified discovery in his possession prior to trial. For these reasons, defendant's ineffective assistance claim asserted on that basis is denied.

#### *Pretrial Habeas Petitions*

Defendant claims ineffective assistance of counsel based upon Attorney Sletvold's alleged failure to, at defendant's request, file habeas corpus petitions seeking defendant's release based on (1) "the fact that [he] was injured during [his] arrest and was denied prompt and adequate medical care while in pre-trial incarceration", and (2) because "the indictment failed on

its face because the charge [was/is] contrary to the Congressional Enactment in actual bill".<sup>51</sup>

With respect to the latter contention, I am unable to discern what specific facial defect defendant contends appears on his Indictment. With respect to the former contention, nothing in either of defendant's pending habeas corpus motions demonstrates how defendant's release from pre-trial detention because of any medical issue would likely have affected the outcome of his trial. In short, defendant's allegations again fail to show any prejudice resulting from his counsel's alleged ineffectiveness.

*Speedy Trial Motion*

Defendant claims ineffective assistance of counsel based upon Attorney Sletvold's refusal to file a motion to dismiss the indictment pursuant to the Speedy Trial Act, 18 U.S.C. § 3161.

The Speedy Trial Act requires, in pertinent part, that:

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the

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<sup>51</sup> Defendant's 2255 Motion at page 10.

defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c) (1).

Attorney Sletvold cannot be found ineffective for refusing to file a meritless motion. United States v. Saunders, 165 F.3d 248, 253 (3d Cir. 1985). A motion to dismiss based on the Speedy Trial Act would have been meritless in this case, and Attorney Sletvold acted responsibly in refusing to file one.

The Indictment charging Mr. Reyes and his three co-defendants was filed under seal on September 15, 2005. The Indictment was unsealed on September 20, 2005. Defendant had his initial appearance and arraignment before United States Magistrate Judge Arnold C. Rapoport on October 3, 2005, at which time Attorney Sletvold was appointed to represent defendant.

Accordingly, defendant's 70-day speedy trial clock began to run on October 4, 2005 and his original 70-day speedy trial deadline was December 13, 2005. See 18 U.S.C. § 3161(c) (1) (West 2005); Fed.R.Crim.P. 45(a) (1) (A) (West 2005).<sup>52</sup>

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<sup>52</sup> Rule 45 applies "in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time." Rule 45(a) (1) (A) specifically "exclude[s] the day of the event that triggers the period". Here, October 3, 2005 (the date of defendant's initial appearance and arraignment) triggered the speedy trial period. Because the Speedy Trial Act does not specify an alternative method for computing time, defendant's speedy trial clock began

The Speedy Trial Act also provides for the exclusion of certain time periods from the 70-day speedy trial calculation, which, in this case, operated to extend defendant's speedy trial deadline.

The Speedy Trial Act excludes "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to...delay resulting from any pretrial motion, from the filing of the motion through the conclusion of any hearing on, or other prompt disposition of, such motion". 18 U.S.C. § 3161(h) (1) (F) (West 2005). Additionally, a period of delay caused by a continuance is excluded if "the ends of justice served [by the continuance] outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(8) (A) (West 2005).

Defendant filed a motion on October 19, 2005 seeking to extend the time to file pretrial motions, thereby tolling the speedy trial clock until that motion was granted by my Order dated and filed November 3, 2005. Moreover, my Order dated October 25, 2005 and filed October 26, 2005 declared this case complex and, based on my finding that the ends of justice were

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ticking on October 4, 2005.

best served by continuing trial and outweighed the public's and defendant's right under the Speedy Trial Act, continued the trial until February 21, 2006 and excluded the 120-day period from and including October 25, 2005 through and including February 21, 2006 from the 70-day speedy trial period. Jury selection

commenced on February 21, 2006 and counsel gave opening statements on February 22, 2006.

At the time defendant's speedy trial clock was tolled on October 19, 2005, only 15 days of defendant's 70-day period had expired (from October 4 to 19, 2005), and the remainder of time between October 19, 2005 and the start of trial was excluded. Accordingly, defendant suffered no speedy trial violation, and a motion to dismiss the Indictment on that ground would have been meritless. Therefore, defendant's claim of ineffective assistance based on that ground is denied.

*Motion for Acquittal or New Trial*

Defendant Reyes claims ineffective assistance of counsel based on Attorney Sletvold's failure to file a post-trial motion for acquittal or a new trial. Defendant Reyes contends that such a motion should have been based on "the government's failure to provide adequate proof of the crimes charged" and the

jury's alleged inability to remain impartial because "the jury did see [him] during trial matter and listened to discussions between the government and the government's witnesses, [defendant's] Attorney, and [defendant]" and "at this time [defendant] was handcuffed".<sup>53</sup>

Concerning the evidence presented by the government at trial, review of the trial transcripts and evidence submitted at trial clearly demonstrates that it was more than "adequate" to convict defendant of the single count in the Indictment, Possession with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), and aiding and abetting that offense in violation of 18 U.S.C. § 2. Indeed, the jury unanimously found defendant guilty beyond a reasonable doubt of the offense charged, and the United States Court of Appeals for the Third Circuit affirmed defendant's conviction on direct appeal.

Defendant's second proffered basis for an acquittal or new trial is that the jury saw him handcuffed and may have overheard some supposedly-ongoing conversation and therefore could not remain impartial. This assertion is an attempt by

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<sup>53</sup> Defendant's 2255 Motion at page 11.

defendant to re-litigate the grounds for the oral motion for a mistrial which Attorney Sletvold made at defendant's behest on February 23, 2006.

I denied defendant's oral motion for a mistrial for the reasons expressed contemporaneously on the record at trial on February 23, 2006.<sup>54</sup> In explaining my reasons for denying defendant's oral motion, I specifically found that, at the time the jury began to enter the courtroom prematurely after an afternoon recess on February 22, 2006, defendant "was not in handcuffs" and "was not in the process of having the handcuffs taken off of him."<sup>55</sup> Moreover, government counsel stated, and I accepted as credible his statement, that he was not conferring with the case agent or any witness at the time the jury began to enter the courtroom before I called them back from the afternoon recess.<sup>56</sup> Because defendant's contentions concerning this ineffective assistance claim are contradicted by the trial record, I deny his ineffective assistance claim premised on these grounds.

*Presentence Investigation Report*

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<sup>54</sup> N.T. 2./23/2006 at pages 48-49.

<sup>55</sup> N.T. 2/23/2006 at page 49.

<sup>56</sup> N.T. 2/23/2006 at pages 48 and 51-52.

Defendant claims ineffective assistance of counsel based upon Attorney Sletvold's alleged failure to object to defendant's Presentence Investigation Report on the grounds that the report prepared in this case was "based on the State presentence report".<sup>57</sup> Defendant does not provide any allegations concerning inaccurate or inappropriate information allegedly included in the Presentence Investigation Report and considered by the court at sentencing. Accordingly, defendant has not demonstrated any prejudice cause by Attorney Sletvold's alleged ineffectiveness at sentencing. Accordingly, defendant's ineffective assistance claim premised upon that alleged deficiency is denied.

#### Self-Representation

Contained within the Mr. Reyes' various allegations of ineffectiveness by Attorney Sletvold, is defendant's assertion that he requested, in open court, that he be permitted to represent himself, and that this court violated his Sixth Amendment rights by denying him the opportunity to represent himself.<sup>58</sup>

Mr. Reyes does not state when he made his purported

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<sup>57</sup> Defendant's 2255 Motion at page 11.

<sup>58</sup> Defendant's 2255 Motion at page 12.

request to represent himself. During the on-the-record pretrial conference in this matter, Mr. Reyes made an oral motion, pro se, to have Attorney Sletvold removed as his counsel based upon Attorney Sletvold's alleged ineffectiveness.<sup>59</sup>

However, review of the transcript from defendant Reyes' February 7, 2006 pretrial conference reveals that defendant moved for appointment of a new attorney to represent him based upon defendant's views concerning Attorney Sletvold's purported failings. Because Mr. Reyes requested replacement counsel, and did not request to represent himself at trial, his contention that his Sixth Amendment right to represent himself was violated, or that Attorney Sletvold played any part in such a violation, is without merit.

In short, this court did not violate Mr. Reyes' Sixth Amendment right to represent himself because Mr. Reyes did not assert that right in this case. Accordingly, defendant's 2255 motions based on this purported violation of his Sixth Amendment right to self-representation are denied.

#### Lack of Jurisdiction

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<sup>59</sup> N.T. 2/7/2006 at page 14.

Finally, defendant contends that this court lacked jurisdiction to hear this case. Specifically, defendant asserts that defendant's "arrest of April Seventh in the Year of Two Thousand and Five (04/07/05) was found in/on a state magistrate -- thereby not conferring jurisdiction on the Federal Government."<sup>60</sup> Defendant further contends that Attorney Sletvold was ineffective because he "failed to challenge the jurisdiction of the Federal Court by way of a [M]otion to Dismiss Indictment".<sup>61</sup>

Title 18, Section 3231 of the United States Code governs the jurisdiction of the district courts in criminal matters and provides:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

28 U.S.C. § 3231.

Here, defendant was charged with, and convicted of,

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<sup>60</sup> Defendant's Standard Form 2255 Motion at page 7.

<sup>61</sup> Defendant's 2255 Motion at page 7.

Possession of 500 grams or more of cocaine with the intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), and aiding and abetting that offense in violation of 18 U.S.C. § 2. Because defendant was charged with an offense against the laws of the United States, the federal district courts had jurisdiction over his federal charges. The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this matter because defendant's offense was committed in Berks County, Pennsylvania, which is located within this judicial district. See 28 U.S.C. § 3232; Fed.R.Crim.P. 19.

In short, the fact that defendant was investigated and arrested by Berks County Detectives and was held in the Berks County Prison while state charges were pending and before his case was adopted by the United States Attorney for the Eastern District of Pennsylvania for federal prosecution in no way deprives this court of jurisdiction to adjudicate the federal charges against him.

Indeed, under the dual sovereigns doctrine, even if defendant had been tried and convicted or acquitted in state court on charges arising from the events which occurred on (and leading up to) April 7, 2005, his state court prosecution and conviction would not have deprived this court of jurisdiction

over the federal charges arising from those same events, nor would such federal prosecution violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. United States v. Berry, 164 F.3d 844, 846 (3d Cir. 1999) (citing United States v. Wheeler, 435 U.S. 313, 316-317, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)).

Accordingly, I deny defendant's claim that this court lacked jurisdiction over his case, as well as defendant's claim that Attorney Sletvold was ineffective in not challenging this court's jurisdiction.

#### Evidentiary Hearing

Defendant requests an evidentiary hearing in this matter.<sup>62</sup> "[B]ald assertions and conclusory allegations do not afford a sufficient ground for an evidentiary hearing" on a motion pursuant to section 2255. Palmer v. Hendricks, 592 F.3d 386, 395 (3d Cir. 2010). Where a motion for habeas relief "contains no factual matter regarding Strickland's prejudice prong" and contains "unadorned legal conclusion[s] ...without supporting factual allegations", that motion is "insufficient to warrant an evidentiary hearing." Id.

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<sup>62</sup> Defendant's 2255 Motion at pages 12-13.

The Third Circuit has specifically noted that evidentiary hearings regarding defense counsel's trial strategy will not be necessary in all habeas cases involving alleged ineffective assistance of counsel, particularly where the objective reasonableness of counsel's challenged decision or the prejudice analysis obviates that need. Varner, 428 F.3d at 501 n.10.

Accepting the veracity of defendant's allegations, I conclude, as discussed above, that defendant Reyes cannot establish an actual conflict of interest or deficient performance on of the various grounds identified in his habeas corpus motion. Accordingly, I conclude that he fails on both grounds to satisfy Strickland, and therefore an evidentiary hearing is not required.

#### Certificate of Appealability

The Third Circuit Local Appellate Rules require that "[a]t the time a final order denying a petition under 28 U.S.C. § 2244 or § 2255 is issued, the district judge will make a determination as to whether a certificate of appealability should issue." 3d Cir. L.A.R. 22.2 (2011). A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2).

Here, I conclude that jurists of reason would not debate the conclusion that defendant's respective section 2255 motions fail to state a valid claim of the denial of a constitutional right. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1603, 146 L.Ed.2d 542, 554 (2000). Accordingly, a certificate of appealability is denied.

#### CONCLUSION

For all of the foregoing reasons, I deny both Defendant's 2255 Motion and the Standard Form 2255 Motion filed by defendant. Moreover, defendant Reyes' request for an evidentiary hearing and a certificate of appealability are also each denied.

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

UNITED STATES OF AMERICA	)	Criminal Action
	)	No. 05-cr-00534-01
v.	)	
	)	
EFRAIN REYES,	)	Civil Action
	)	No. 09-cv-01809
Defendant	)	

**O R D E R**

NOW, this 28th day of September, 2012, upon  
consideration of the following documents:

- (1) Motion to Vacate, Set Aside, or Set for New Trial Pursuant to 28 U.S.C. § 2255, filed by defendant pro se on April 20, 2009 (Document 178) ("Defendant's 2255 Motion");<sup>63</sup>
- (2) Motion to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody, a Habeas Corpus Motion filed under 28 U.S.C. § 2255 by defendant pro se on June 12, 2009 (Document 180) ("Standard Form 2255 Motion");<sup>64</sup>

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<sup>63</sup> Although the docket entries reflect that the Motion to Vacate, Set Aside, or Set for New Trial Pursuant to 28 U.S.C. § 2255 was filed April 24, 2009, defendant certifies that "this document was given to prison officials on 4-20-2009 A.D., for forwarding to the U.S. District Court [f]or the Eastern District of Pennsylvania." (See Petition, page 13.) Pursuant to the prison mailbox rule, this court will consider the date of filing as April 20, 2009. The prison mailbox rule deems a motion to have been filed on the date the petitioner delivered his petition to prison officials to mail. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1997).

<sup>64</sup> On April 20, 2009, defendant originally filed his habeas petition on the incorrect form. Pursuant to my Order dated May 18, 2009 and filed May 21, 2009 directing that defendant be provided with the proper form, he executed his habeas petition on the correct form on June 5, 2009. However, because the grounds raised in Defendant's 2255 Motion and Standard Form 2255 Motion, I jointly consider defendant's arguments made in both documents.

(3) Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to Title 28 U.S.C. § 2255, which response was filed December 11, 2009 (Document 186); and

(4) Petitioner's Response to the Government's Motion, which response was filed by defendant pro se on October 15, 2010 (Document 189);

and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that the Motion to Vacate, Set Aside, or Set for New Trial Pursuant to 28 U.S.C. § 2255, filed by defendant pro se on April 20, 2009, is denied without an evidentiary hearing.

IT IS FURTHER ORDERED that the Motion to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody, a Habeas Corpus Motion filed under 28 U.S.C. § 2255 by defendant pro se on June 12, 2009, is denied without an evidentiary hearing.

IT IS FURTHER ORDERED that a certificate of appealability is denied because jurists of reason would not debate the conclusion that defendant's respective section 2255 motions fail to state a valid claim of the denial of a constitutional right.

IT IS FURTHER ORDERED that the Clerk of Court shall

mark this case closed for statistical purposes.

BY THE COURT:

/s/ JAMES KNOLL GARDNER  
James Knoll Gardner  
United States District Judge