

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

<b>UNITED STATES OF AMERICA</b>	:	
	:	<b>CRIMINAL ACTION NO. 05-333-01</b>
v.		:
	:	<b>CIVIL ACTION NO. 11-1255</b>
<b>KEVIN ABBOTT</b>		:

**MEMORANDUM OPINION**

**Rufe, J.**

**April 11, 2013**

Defendant, Kevin Abbot, has filed a petition seeking *habeas corpus* relief pursuant to 28 U.S.C. § 2255 and requesting a new sentencing proceeding. The Government opposes the petition.

**I. INTRODUCTION**

After a jury trial, Defendant was convicted of conspiracy to possess with intent to distribute a controlled substance (Count One), possession of, and aiding and abetting possession of, more than five grams of cocaine base with intent to distribute (Count Two), possession of, and aiding and abetting possession of, a firearm in furtherance of a drug trafficking crime (Count Three), and possession of a firearm by a convicted felon (Count Four). Defendant was sentenced to a total of 240 months of imprisonment: 120 months on Counts One and Two, and 180 months on Count Four, with these sentences running concurrently; and 60 months on Count Three, consecutive to the other sentences.

Defendant appealed from the judgment of conviction and sentence, and the Court of

Appeals affirmed in all respects.<sup>1</sup> Defendant then petitioned the United States Supreme Court for a writ of *certiorari*; the Supreme Court granted the petition on an issue of consecutive sentencing for the firearm offense, and affirmed the sentence.<sup>2</sup> Defendant then filed a *pro se* petition pursuant to 28 U.S.C. § 2255. Counsel was appointed, and the issues have been refined to one: whether Defendant's attorney at sentencing was ineffective for failing to advance the argument that his prior convictions did not qualify Defendant as an Armed Career Criminal subject to a fifteen-year mandatory minimum sentence on Count Three.<sup>3</sup>

## II. LEGAL STANDARD

---

<sup>1</sup> United States v. Abbott, 574 F.3d 203 (3d Cir. 2009).

<sup>2</sup> Abbott v. United States, 131 S. Ct. 18 (2010).

<sup>3</sup> 18 U.S.C. § 924(e).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a prisoner serving a sentence in federal custody may petition the court which imposed the sentence to vacate, set aside, or correct the sentence by asserting 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.”<sup>4</sup> “Habeas corpus relief is generally available only to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.”<sup>5</sup> “The question of whether to order a hearing is committed to the sound discretion of the district court. In exercising that discretion the court must accept the truth of the movant’s factual allegations unless they are clearly frivolous on the basis of the existing record. Further, the court must order an evidentiary hearing to determine the facts unless the motion and files and records of the case show conclusively that the movant is not entitled to relief. . . .”<sup>6</sup>

When assessing a claim of ineffective assistance of counsel, the Court applies the standard established by the Supreme Court in Strickland v. Washington.<sup>7</sup> Defendant bears the burden of demonstrating that his trial attorney’s performance was deficient and that the deficiency caused him prejudice.<sup>8</sup> An attorney’s performance is deficient only if it falls “below an objective standard of reasonableness, and that there is a reasonable probability that, but for the counsel’s

---

<sup>4</sup> 28 U.S.C. § 2255(a).

<sup>5</sup> United States v. DeLuca, 889 F.2d 503, 506 (3d Cir. 1989).

<sup>6</sup> Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989) (citation omitted). See 28 U.S.C. § 2255(b).

<sup>7</sup> 466 U.S. 668 (1984).

<sup>8</sup> United States v. Shedrick, 493 F.3d 292, 299 (3d Cir. 2007) (citing Strickland, 466 U.S. at 687).

unprofessional errors, the result of the proceeding would have been different.”<sup>9</sup>

### **III. DISCUSSION**

---

<sup>9</sup> Id. (internal citations and quotations omitted).

Defendant is an Armed Career Criminal if, before he was found in possession of a firearm, he had been convicted of three predicate offenses, either a “violent felony” or, as is relevant here, a “serious drug offense.”<sup>10</sup> There is no dispute that two of Defendant’s four prior convictions qualify as serious drug offenses under the law, and that another conviction, for simple assault, is neither a violent felony nor a serious drug offense. At issue is Defendant’s 2000 conviction for violation of a Pennsylvania statute prohibiting “the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.”<sup>11</sup> According to the certified copy of the case record, on April 12, 1999, Defendant was charged in a Bill of Information in the Court of Common Pleas of Philadelphia County with violation of the statute; the alleged violation occurred on January 14, 1999, and the substance at issue was “crack cocaine.”<sup>12</sup> On September 14, 2000, Defendant was “adjudged guilty” after a waiver (non-jury) trial in the Court of Common Pleas, and on October 24, 2001, he was sentenced to four years reporting probation, consecutive to a sentence in another case in which Defendant was serving a sentence of incarceration with probation to follow.<sup>13</sup>

---

<sup>10</sup> 18 U.S.C. § 924(e). A “serious drug offense” is one that involves “manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii).

<sup>11</sup> 35 P.S. § 780-113(a)(30).

<sup>12</sup> Commonwealth v. Abbott, No. CP-51-CR-0401121-1999 (Phila. Ct. Comm. Pleas) (the certified record has been provided by the Government).

<sup>13</sup> According to the record, Defendant was also charged in with violation of 35 P.S. § 780-113(a)(16); adjudged guilty, and sentenced to “no further penalty” on that charge. Only the conviction pursuant to 35 P.S. § 780-113(a)(30) is at issue.

Defendant argues that the state-court record does not establish that the crime of which he was convicted was punishable by a maximum term of imprisonment of ten years, as it must be before it may be considered a predicate offense. The maximum term of imprisonment for a violation of 35 P.S. § 780-113(a)(30) depends upon which controlled substance Defendant was convicted of possessing with intent to deliver: for cocaine, the statutory maximum is ten years, while for other controlled substances, the statutory maximum ranges from one to ten years.<sup>14</sup> Because the statutory language alone is inconclusive, the Court may look to the charging document and to jury instructions, the plea agreement, or “some comparable judicial record” to determine if the elements of the predicate offense have been established.<sup>15</sup>

In this case, the Court does not have before it a certified judicial record that states the basis for conviction, other than the charging document, the Bill of Information.<sup>16</sup> “Charging papers alone are determinative only if they show ‘that the [fact-finder] necessarily had to find the elements’ of the federal predicate in order to convict.”<sup>17</sup> Because the Bill of Information specified that the drug at issue was crack cocaine, “the trial judge was actually required to find that [Defendant] possessed cocaine in order to convict.”<sup>18</sup> Therefore, the 2000 conviction qualifies

---

<sup>14</sup> United States v. Tucker, 703 F.3d 205, 210 (3d Cir. 2013); 35 P.S. § 780-113(f).

<sup>15</sup> Shepard v. United States, 544 U.S. 13, 26 (2005). “This limited inquiry into the necessary elements of a prior conviction has come to be known as the modified categorical approach.” Tucker, 703 F.3d at 210 (internal quotation omitted).

<sup>16</sup> Defendant’s counseled sentencing memorandum did include an excerpt of a trial transcript indicating that the parties stipulated that the substance in question was crack cocaine, but the Court has not relied on this partial, uncertified document in ruling on the petition.

<sup>17</sup> Id. at 215 (quoting United States v. Richardson, 313 F.3d 121, 127 (3d Cir. 2002)) (alteration in original).

<sup>18</sup> Id.

as a serious drug offense.<sup>19</sup> Any failure by counsel to object at sentencing to the inclusion of this offense cannot have prejudiced Defendant, as the outcome would not have changed. The petition will be denied without a hearing.

#### **IV. CONCLUSION**

---

<sup>19</sup> Id.

Defendant's 2000 conviction was properly considered a predicate offense, and therefore, Defendant suffered no prejudice from any failure of counsel to object at sentencing. Defendant requests that a certificate of appealability issue, because the Supreme Court is considering a case where the question presented is "[w]hether the Ninth Circuit's ruling . . . that a state conviction for burglary where the statute is missing an element of the generic crime, may be subject to the modified categorical approach, even though most other Circuit Courts of Appeal would not allow it."<sup>20</sup> Although it does not appear that any ruling by the Supreme Court necessarily would affect the Third Circuit's interpretation of the modified categorical approach, this Court finds that the issue raised by Defendant may warrant further consideration in light of the Supreme Court's pending decision, and therefore will grant a certificate of appealability on that basis.<sup>21</sup> An order will be entered.

---

<sup>20</sup> Descamps v. United States, No. 11-9540 (U.S.) (argued Jan. 7, 2013).

<sup>21</sup> See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Pursuant to Local Appellate Rule 22.2, at the time of a final order denying a habeas petition, a district judge is required to determine whether a certificate of appealability should issue. Such a certificate should not be issued unless "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Id. at 484 (internal quotation marks omitted).

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

**UNITED STATES OF AMERICA**

v.

**KEVIN ABBOTT**

:  
: **CRIMINAL ACTION NO. 05-333-01**  
:  
: **CIVIL ACTION NO. 11-1255**  
:

**ORDER**

**AND NOW**, this 11th day of April 2013, upon consideration of Defendant's *Habeas Corpus* Motion under 28 U.S.C. § 2255 and the briefing in support thereof and the Government's opposition thereto, and for the reasons stated in the accompanying Memorandum, it is hereby

**ORDERED** that:

1. The Motion is **DENIED**; and
2. The Court **ISSUES** a certificate of appealability on the issue of whether the United States Supreme Court's pending decision in Descamps v. United States, No. 11-9540 (U.S.) (argued Jan. 7, 2013), affects the application of the modified categorical approach in this case.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

\_\_\_\_\_  
CYNTHIA M. RUFÉ, J.