

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

UNITED STATES OF AMERICA	:	
	:	CIVIL ACTION
v.	:	
	:	No. 13-cv-2427
CLARENCE POWELL,	:	
	:	
Defendant.	:	CRIMINAL ACTION
	:	
	:	No. 09-cr-574-03
	:	

**MEMORANDUM AND ORDER**

**Joyner, J.**

**August 28, 2013**

This case is now before the Court on Defendant/Petitioner's Habeas Corpus Motion Under 28 U.S.C. § 2255 (ECF No. 201). For the reasons set forth below, the Petitioner's Motion is DENIED.

**I. BACKGROUND**

In February 2011, a jury returned a guilty verdict against the Petitioner, Clarence Powell, of all counts of an indictment which charged him with conspiracy to interfere with interstate commerce by robbery, in violation of 18 U.S.C. § 1951(a), two counts of interference with interstate commerce by robbery, in violation of 18 U.S.C. § 1951(a), and two counts of using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). On May 24, 2011, this Court sentenced the Petitioner to a total of 697 months imprisonment, a \$500 special assessment, \$20,762.55 in restitution, and 60 months of supervised release.

The Petitioner noticed his appeal of his conviction and sentence to the Third Circuit Court of Appeals on May 24, 2011. In his appeal, the Petitioner argued that insufficient evidence supported the effect on interstate commerce element required for conviction under 18 U.S.C. § 1951 and that this Court improperly instructed the jury about this element. The Third Circuit rejected the Petitioner's arguments and affirmed his conviction and sentence on August 30, 2012. See generally United States v. Powell, 693 F.3d 398 (3d Cir. 2012). The Petitioner filed a writ of certiorari with the Supreme Court of the United States on November 16, 2012, and the Supreme Court denied certiorari on January 7, 2013. Powell v. United States, 133 S. Ct. 901 (2013).

On May 2, 2013, the Petitioner filed this petition for habeas corpus relief pursuant to 28 U.S.C. § 2255 with this Court. In the petition, he asserts a Sixth Amendment ineffective assistance of counsel claim based on a number of purported failings of his trial counsel. The Petitioner asserts that his counsel rendered ineffective assistance when he failed to raise certain arguments, namely: (1) the indictment did not contain an essential element of the offense charged pursuant to 18 U.S.C. § 1951; and (2) this Court improperly included in the jury instructions references to the "possession and in furtherance of" language in 18 U.S.C. § 924(c) instead of limiting the instructions solely to the "during and in relation to any crime

of violence or drug trafficking crime . . . uses or carries a firearm" language in the statute.

The charges against the Petitioner stemmed from two robberies of Philadelphia business owners. The trial evidence showed that the Petitioner and another man followed the business owners to their homes, then robbed the business owners at gunpoint, stealing, among other things, proceeds of the businesses. A grand jury subsequently indicted the Petitioner, previously convicted of several crimes including at least one prior violation of 18 U.S.C. § 924(c), with two counts of robbery, one count of conspiracy, and two counts of violating 18 U.S.C. § 924(c). The jury ultimately found the Petitioner guilty on all counts charged in the indictment.

## **II. STANDARD**

Section 2255 of Title 28 of the United States Code provides an avenue for individuals under federal custody to challenge their sentences. To succeed in such a challenge, the petitioner must demonstrate 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." 28 U.S.C. § 2255(a). The Petitioner's constitutional claims stem from an alleged Sixth Amendment violation. The Supreme Court of the United States has

long recognized that the right to counsel under the Sixth Amendment and the Due Process Clauses is crucial to protecting the fundamental constitutional guarantee of a fair trial. See Strickland v. Washington, 466 U.S. 668, 684-85 (1984). In order to establish that counsel's assistance was indeed ineffective, a petitioner must meet both elements of the two-pronged test established in Strickland. First, a petitioner must establish that counsel not only erred, but that counsel's errors were considerable enough to undermine the proceedings to such an extent that the outcome cannot be relied upon as fair and just. Id. at 687. Second, it must also be established that counsel's actions prejudiced the defendant and deprived defendant of a fair and reliable trial. Id. at 687. "Not every 'error by counsel, even if professionally unreasonable, . . . warrant[s] setting aside the judgment of a criminal proceeding.'" Rainey v. Varner, 603 F.3d 189, 197 (3d Cir. 2010) (quoting Strickland, 466 U.S. at 691). A petitioner must demonstrate that counsel's error was prejudicial and that there is a reasonable probability that were it not for the error the outcome of the proceeding would have been different. Id. at 197-98.

### **III. DISCUSSION**

The Petitioner asserts that his Sixth Amendment rights were violated through several instances of deficient performance by his counsel. None of the Petitioner's claims has merit, so we

deny him habeas corpus relief. We discuss each of the Petitioner's claims in turn.

A. Failure to Challenge Indictment

The Petitioner alleges that his counsel provided constitutionally deficient assistance because he did not argue that the operative indictment, a second superseding indictment filed on March 16, 2010, failed to allege that the Petitioner committed or threatened violence in furtherance of a plan to violate 18 U.S.C. § 1951. This argument does not warrant habeas relief.

The argument which the Petitioner faults his counsel for not raising would not have succeeded. "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974). The statute under which the Government charged the Petitioner provides:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). Here, the indictment adequately alleged the elements of obstructing or affecting commerce by means of robbery. (See generally Second Superseding Indictment.) Because Congress drafted the statute in the alternative, the indictment need not have alleged that the Petitioner acted in furtherance of a plan to violate 18 U.S.C. § 1951(a) if it also alleged that he obstructed or affected commerce by means of robbery. See 18 U.S.C. § 1951(a).

Accordingly, the argument the Petitioner faults his counsel for not making stood no chance of altering the outcome of the trial, and counsel acted reasonably in not making it. The Petitioner has therefore not established that his counsel was ineffective pursuant to Strickland.

#### B. Failure to Object to Jury Charge

The Petitioner claims that his counsel was constitutionally ineffective because he failed to object to this Court's jury instructions which, he claims, erroneously instructed that the jury could find the Petitioner guilty of violating 18 U.S.C. § 924(c) if it concluded that the Petitioner "during and in relation to any crime of violence or drug trafficking crime . . . use[d] or carrie[d] a firearm" or that the Petitioner "in furtherance of any such crime, possesse[d] a firearm." See 18 U.S.C. § 924(c). The Petitioner contends that this instruction prejudiced him because the addition of language pertaining to the

"in furtherance" prong impermissibly broadened the grounds upon which he could be found guilty from those pleaded in the indictment, which had only mentioned the "use[d] or carrie[d]" language. We deny relief on this basis.

The argument which the Petitioner faults his counsel for not raising would not have succeeded. Even assuming that certain parts of the jury instructions in this matter pertained to the "in furtherance" prong of the statute in error, the resulting error caused the Petitioner no prejudice. "Congress may well have intended 'in furtherance' to impose a more stringent standard than 'in relation to,'" United States v. Loney, 219 F.3d 281, 287 (3d Cir. 2000), and therefore "the 'in furtherance' language effectively narrow[s] the possible grounds for conviction because it suggests a higher standard of conduct than that required by the 'during and in relation to' language." United States v. Scott, 463 F. App'x 85, 88 (3d Cir. 2012) (citing Loney, 219 F.3d at 287). Counsel therefore acted reasonably in not raising this argument, and, even assuming that counsel unreasonably failed to raise this argument, such failure caused the Petitioner no prejudice. Habeas relief is not proper on this basis.

### C. Mandatory Minimum Sentence

In a supplement to his original habeas corpus petition, the Petitioner argues that Alleyne v. United States, 133 S. Ct. 2151

(2013), requires that we grant him habeas relief because the jury never concluded that he "brandish[ed]" a firearm during the course of his criminal conduct, a fact which, he contends, increased the minimum sentence which applied to him. See 18 U.S.C. § 924(c)(1)(A)(ii). The element of "brandish[ing]," see id., had no role in this matter because 18 U.S.C. § 924(c)(1)(C), governing mandatory minimum sentences for those, like the Petitioner, previously convicted of a violation of 18 U.S.C. § 924(c), mandated a 300 month consecutive sentence on each count of a 18 U.S.C. § 924(c) violation of which the jury convicted the Petitioner. See 18 U.S.C. § 924(c)(1)(C); Powell, 693 F.3d at 401 n.4. Because Alleyne does not disturb the rule that the right to have a jury find facts which increase the applicable minimum sentence does not extend to the fact of a prior conviction, 133 S. Ct. at 2160 n.1, the Petitioner's argument has no merit. Habeas relief on this basis is denied.

#### **IV. EVIDENTIARY HEARING**

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b). Based on the analysis above, we conclude that the motion, files, and records of this

matter conclusively show that the Petitioner is not entitled to relief on any of his claims of ineffective assistance of counsel. Accordingly, we dispose of the petition without need for an evidentiary hearing.

#### **V. CERTIFICATE OF APPEALABILITY**

Finally, the Court must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate Rule 22.2. A certificate of appealability is appropriate only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). In this case, we conclude that reasonable jurists could not find the resolution of Petitioners's Strickland claims debatable or wrong. Accordingly, the Court will not grant the Petitioner a certificate of appealability with respect to his ineffective assistance of counsel claims.

#### **VI. CONCLUSION**

As discussed above, the Petitioner has no viable claim for ineffective assistance of counsel on any of the grounds raised. Therefore, the Petitioner's request for habeas relief is denied. An order follows.

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**ORDER**

AND NOW, this 28th day of August, 2013, upon consideration of the Petitioner's Habeas Corpus Motion Under 28 U.S.C. § 2255 (ECF No. 201), and responses thereto, it is hereby ORDERED, for the reasons contained in the attached Memorandum, that the Motion is DENIED. Further, this Court will not issue a certificate of appealability, as, for the reasons contained in this Memorandum, the Petitioner has not made a substantial showing of the denial of a constitutional right.

The Petitioner's Motion to Supplement the Petition (ECF No. 206) is GRANTED, and we considered the arguments the Petitioner made in the supplemental materials in this Memorandum. Construing the Petitioner's Letter (ECF No. 203) as a Motion to Appoint Counsel, it is hereby ORDERED that the Motion is DENIED as, for the reasons stated in this Memorandum, the Petitioner has no colorable claim for habeas corpus relief.

BY THE COURT:

s/J. Curtis Joyner  
J. CURTIS JOYNER, J.