



four months in prison followed by two years of supervised release, a \$5,000 fine, and a \$300 special assessment. (Judgment 2-6.) Petitioner’s two co-defendants were also convicted of participating in the conspiracy. Petitioner’s trial counsel was Christian C. Nduka.

Petitioner initially appealed his conviction and sentence, but later withdrew his appeal. *See United States v. Malik*, 424 F. App’x 122, 123 (3d Cir. 2011). Petitioner then filed the instant Motion under Section 2255. (Pet., ECF No. 186)<sup>1</sup> The Government filed a response. (Gov’t Resp., ECF No. 190.)

## **II. LEGAL STANDARD**

Pursuant to 28 U.S.C. § 2255, a federal prisoner may move the sentencing court to vacate, set aside, or correct a sentence “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

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<sup>1</sup> This Motion was filed by new counsel Brian J. McMonagle, Esquire. Petitioner subsequently filed a *pro se* Motion under Section 2255 (ECF No. 195). In the *pro se* Motion, Petitioner states that he was not involved in the conspiracy ring, did not commit fraud, and that many facts are missing. Petitioner then sets forth the facts that he believes are appropriate. He also observes that certain witnesses had trouble remembering. We will not address the *pro se* Motion. Petitioner filed the *pro se* Motion while he was represented by counsel. *See United States v. Turner*, 677 F.3d 570, 578-79 (3d Cir. 2012) (stating that “except in cases governed by *Anders*, parties represented by counsel may not file *pro se* briefs”); *Snyder v. United States*, No. 07-450, 2013 WL 305604, at \*1 (M.D. Pa. Jan. 25, 2013) (declining to consider the petitioner’s *pro se* habeas brief after his counsel had already filed a motion under Section 2255). In addition, because Petitioner’s counsel had already filed a Motion under Section 2255, Petitioner’s *pro se* Motion was not proper because it was not first certified by the Third Circuit. *See* 28 U.S.C. § 2255(h) (“A second or successive [section 2255] motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals . . .”). Finally, the issues raised by Petitioner, namely to advise of “facts missing” from his trial, and that certain witnesses had memory problems, are not appropriate grounds for a successive petition under Section 2255. *See* 28 U.S.C. § 2255(h) (noting the grounds for a successive or second [section 2255] motion as “(1) newly discovered evidence that, if proven . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law . . .”).

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). Relief under section 2255 is generally available “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.” *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1989).

While the court may, in its discretion, hold an evidentiary hearing on a Section 2255 petition, *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989), such a hearing need not be held if 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); *see also United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992).

### **III. DISCUSSION**

Petitioner raises two claims. First, he claims that his trial counsel was ineffective based upon the standard discussed in *United States v. Cronic*, 466 U.S. 648 (1984). Next, Petitioner claims counsel was ineffective based upon the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984).

#### **A. Ineffective Assistance of Counsel Under *Cronic***

##### *1. Legal Standard Under United States v. Cronic*

Petitioner seeks evaluation of his ineffective assistance claims pursuant to the principle articulated in *United States v. Cronic*. (Pet. 4.) In *Cronic*, the Supreme Court stated that “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” 466 U.S. at 659. Effective counsel subjects the Government’s case to “the crucible of meaningful adversarial testing,” and failure to do so constitutes a constructive

denial of counsel. *Id.* at 656.<sup>2</sup>

“A constructive denial of counsel occurs . . . in only a very narrow spectrum of cases where the circumstances leading to counsel’s ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all.” *United States v. Zemba*, No. 05-171, 2007 U.S. Dist. LEXIS 15305, at \*43-44 (W.D. Pa. Mar. 5, 2007). *Cronic* provides that in the absence of evidence “that counsel failed to function in any meaningful sense as the Government’s adversary,” the defendant can establish an ineffective assistance of counsel claim “only by pointing to specific errors made by trial counsel.” *Cronic*, 466 U.S. at 666. Such a claim is to be advanced pursuant to “the standards enunciated in *Strickland v. Washington*.” *Id.* at 666 n.41.

## 2. *Petitioner’s Claims*

Petitioner argues that his “attorney only met with him only (sic) briefly prior to trial and they never engaged in any meaningful conversation with respect to his case and defense.” (Pet. 6.) Petitioner further claims that “discreet (sic) errors” by counsel constituted a lack of meaningful adversarial performance. (*Id.*) Petitioner also points to the errors discussed in the *Strickland* portion of his Petition to bolster his argument under *Cronic*. (*Id.*) The Government responds that Petitioner’s ineffective assistance claim should be evaluated under *Strickland*, and not under *Cronic*. (Gov’t Resp. 7 n.4.) The Government states that Petitioner’s claim does not rise to the level of egregious failure required to satisfy the demanding *Cronic* standard. (*Id.* at 7-9.)

The situations that invite a finding of per se prejudice under *Cronic* are few. *See, e.g.,*

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<sup>2</sup> Petitioner concedes that the other bases *Cronic* provides for determining counsel to be ineffective, including situations where “surrounding circumstances” make it impossible for counsel to effectively assist a defendant, do not apply here. (Pet. 5 n.1.)

*Rickman v. Bell*, 131 F.3d 1150, 1156-60 (6th Cir. 1997) (applying *Cronic* where counsel “combined a total failure to actively advocate his client’s cause with repeated expressions of contempt for his client”); *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (applying *Cronic* where defense counsel slept through large portions of trial, stating that “unconscious counsel equates to no counsel at all”). Courts have found that “maladroit performance” differs from “non-performance,” and that “*Strickland* controls inquiries concerning counsel’s actual performance at trial.” *Scarpa v. DuBois*, 38 F.3d 1, 12-15 (1st Cir. 1994).

Relief under *Cronic* requires a collapse in the adversarial process. Petitioner cannot point to such a collapse. Petitioner’s counsel filed motions and briefs, cross-examined witnesses, and provided his client with advice. Such performance is satisfactory for *Cronic* purposes. It is clear that Petitioner’s counsel provided, at the least, sufficient representation to challenge the Government’s presentation of its case-in-chief and subject it to meaningful adversarial testing.

Petitioner cannot show that there was “an actual breakdown of the adversarial process during the trial of this case.” *Cronic*, 466 U.S. at 657-58. His claims relate to specific alleged deficiencies in the performance of counsel. Accordingly, Petitioner’s request for relief under *Cronic* will be denied. We will evaluate Petitioner’s ineffective assistance claim under *Strickland*.

**B. Ineffective Assistance of Counsel Under *Strickland***

*1. Legal Standard Under Strickland v. Washington*

To establish ineffective assistance of counsel in violation of the Sixth Amendment, a defendant must show that: 1) his or her attorney’s performance was deficient; and 2) the deficient performance prejudiced his or her defense. *Strickland v. Washington*, 466 U.S. at 687. To

establish deficient representation, a defendant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." *Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir. 1999) (citing *Strickland*, 466 U.S. at 688). To establish prejudice, a defendant must show that "counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 694. Rather, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 695. Under *Strickland*, counsel is presumed to have acted within the range of "reasonable professional assistance," and the defendant bears the burden of "overcoming the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (citation omitted). While a defendant has the right to effective assistance of counsel, courts have explained that the Constitution does not guarantee the right to a perfect trial. *See Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002) ("[T]he court is not engaging in a prophylactic exercise to guarantee each defendant a perfect trial with optimally proficient counsel, but [] to guarantee each defendant a fair trial, with constitutionally competent counsel."). "Judicial scrutiny of counsel's performance must be highly deferential" as "there are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689.

Since "failure to satisfy either prong defeats an ineffective assistance claim, and because it is preferable to avoid passing judgment on counsel's performance when possible," we often ask if Petitioner can establish that he suffered prejudice prior to evaluating the minutiae of counsel's performance. *United States v. Cross*, 308 F.3d 308, 315 (3d Cir. 2002).

## 2. *Counsel's Alleged Errors*

Petitioner points to five specific errors which he argues constituted ineffective assistance by trial counsel. First, Petitioner argues that counsel failed to call witnesses attesting to Petitioner's good character. (Pet. 7.) Second, Petitioner claims that counsel was deficient for remarking during his opening statement that Petitioner would testify, when Petitioner ultimately did not. (*Id.* at 10.) Third, Petitioner contends that counsel was ineffective for failing to request a colloquy with his client regarding Petitioner's election not to exercise his right to testify. (*Id.* at 13.) Fourth, Petitioner claims that Petitioner failed to make timely objections at trial. (*Id.* at 14.) Finally, Petitioner claims that counsel's representation of his client between the jury's verdict and the Court's announcement of sentence was deficient. (*Id.* at 16.)

### i. Failure to Call Character Witnesses

Petitioner claims that counsel was ineffective because he did not call witnesses to testify to Petitioner's good character. (Pet. 7.) Petitioner includes a number of affidavits by family, friends, colleagues, and former patients that attest to their willingness to testify to Petitioner's character. (Pet. Ex. A.) The Government responds that counsel's decision to not call character witnesses constituted a "sound trial strategy," and was not deficient performance under the first prong of *Strickland*. (Gov't Resp. 12.)

We need not determine whether counsel's choice of trial strategy was, in fact, correct. Even if we were to judge counsel's performance to be deficient, the lack of testimony about Petitioner's character cannot be said to have prejudiced Petitioner. Even though we note the opinions of those individuals who attest to both his honesty and his compassionate practice of medicine, those opinions would not have negated the overwhelming government evidence that

Petitioner committed a crime. We cannot say that such testimony would have undermined the Government's powerful case. There is simply no reason to believe that testimony about Petitioner's good character would have affected the jury's assessment of the evidence pointing to Petitioner's involvement in the naturalization fraud conspiracy. Counsel's failure to call character witnesses does not undermine our confidence in the jury's verdict. Petitioner was convicted on the basis of documentary evidence, including naturalization forms that he had filled out, as well as witness testimony connecting him to his co-conspirator Malik. We will not speculate that general character evidence, unrelated to material issues in the trial, would have led to a different result. Petitioner cannot demonstrate that he suffered prejudice as a result of counsel's decision not to call character witnesses. Accordingly, we reject Petitioner's first ineffectiveness claim.

ii. Allusion to Petitioner's Intent to Testify

Petitioner claims that counsel was ineffective because, in his opening statement, counsel stated that Petitioner would testify in his own defense. (Pet. 10.) According to Petitioner, counsel twice mentioned that Petitioner would testify. (*Id.* at 12.) Petitioner spends considerable time explaining why counsel's performance was "outside the range of competent professional assistance." (*Id.* at 13.) However, Petitioner fails to connect counsel's alleged deficient performance with the outcome of the trial, and relies instead on a conclusory statement that "Petitioner was prejudiced by this error." (*Id.*)

Petitioner relies, in part, on *United States ex rel. Johnson v. Johnson*, for the proposition that a lawyer who claims, in an opening statement, that a witness will testify is ineffective. 531

F.2d 169, 177 (3d Cir. 1976).<sup>3</sup> *Johnson* is easily distinguished. The attorney in *Johnson* promised that both his client and other witnesses would testify to his client’s alibi, but admitted that, at the time he made such a statement, he knew that no such other witnesses existed and that his client would not testify. *Johnson*, 531 F.2d at 177. That is not the case here. Petitioner cannot demonstrate that counsel affirmatively knew that Petitioner would not testify when he alluded to Petitioner as a potential witness. In addition, the nature of the testimony that was promised in *Johnson*—evidence of an alibi for a client accused of murder—was both far more powerful and potentially exculpatory. Here, counsel merely stated that Petitioner would testify that he did not always sign fraudulent naturalization papers. (Pet. 12.) Finally, even if *Johnson* stands for the proposition that such performance is deficient, we note that the *Johnson* court actually rejected the defendant’s Sixth Amendment claim, finding a lack of prejudice because counsel’s statements were “harmless beyond a reasonable doubt.” *Johnson*, 531 F.2d at 177.

Petitioner also cites *Chruby v. Gillis*, 54 F. App’x 520 (3d Cir. 2002). In *Chruby*, the petitioner—a defendant convicted in state court of first-degree murder—did not testify despite the fact that his attorney promised, on four separate occasions in his opening statement, that he would do so. *Id.* at 522. *Chruby* is also easily distinguished. Counsel in *Chruby* made such comments during an opening statement delivered after the prosecution had concluded its case-in-chief. The Third Circuit noted that counsel, knowing that his client would not testify, “probably should not have promised” that he would do so. *Id.* at 525. Here, counsel’s opening statement was delivered at the beginning of trial, prior to the Government’s presentation of evidence. Moreover, in

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<sup>3</sup> The *Johnson* Court noted that “a lawyer of normal competence” could “promise to produce evidence in his opening statement and then change his mind during the course of the trial.” *Id.* at 177 n.19.

*Chruby*, the Third Circuit determined that counsel’s conduct, even if unreasonable, was not prejudicial, given the overwhelming evidence of Chruby’s guilt.

Petitioner essentially argues that counsel’s two offhand references to Petitioner’s potential testimony constituted prejudice warranting a new trial. We reject this argument. Petitioner was convicted, as discussed above, based on overwhelming evidence. Mere allusion to possible testimony by counsel is not, in this instance, sufficiently prejudicial to justify granting a new trial. Accordingly, we will reject Petitioner’s second ineffective assistance claim.

iii. Failure to Request Colloquy

Petitioner claims that counsel failed to request a colloquy so the Court could advise him of his right to testify in his own defense. (Pet. 13.) Petitioner notes that his co-defendant, Habeeb Malik, received such a colloquy, and that his co-defendant Ira Weiner testified in his own defense. (*Id.*) The Government responds that “it is ridiculous to suggest that [Petitioner] was not aware of his own right to testify, whether or not trial counsel advised him of this right.” (Gov’t Resp. 13.) The Government also notes that Petitioner does not, in fact, claim that “trial counsel overpowered [Petitioner’s] desire to testify.” (*Id.*)

“It is well established that the right of a defendant to testify on his or her behalf at his or her own criminal trial is rooted in the Constitution.” *United States v. Pennycooke*, 65 F.3d 9, 10 (3d Cir. 1995). However, since a defendant also has a right *not* to testify, a court is not required to conduct a colloquy about a defendant’s right to testify, since doing so might be “awkward” or “inadvertently . . . cause the defendant to think that the court believes the defense has been insufficient.” *Id.* at 11. “The trial court is not required to elicit an on-the-record, knowing and intelligent waiver of that right,” unless specific, extraordinary circumstances apply. *Id.* at 12-13.

“The duty of providing such advice and of ensuring that any waiver is knowing and intelligent rests with defense counsel.” *Id.* at 13. Petitioner argues here that “counsel was ineffective for failing to colloquy him,” and states that counsel did not “inform him of his rights himself.” (Pet. 13.) The Government notes that Petitioner never claims that his waiver of his right to testify was not intelligent or voluntary. (Gov’t Resp. 15.)

There is no reason to believe that the lack of colloquy here prejudiced Petitioner. Petitioner witnessed the Court’s colloquy with his co-defendant Malik on this subject, and he observed his co-defendant Weiner’s testimony. Petitioner does not claim that he was unaware of his right to testify, nor does he argue that he would have testified had he been given the opportunity to do so. Any competent attorney could reasonably not request a colloquy under these circumstances. Petitioner does not claim that had counsel requested, and had he received, a colloquy from the Court, he would have exercised his right. Furthermore, Petitioner does not articulate what the substance of his testimony would have been, and how that testimony might have affected the outcome of the trial. We cannot conclude that Petitioner was denied the ability to testify because of counsel’s actions, or that such denial prejudiced Petitioner to a point that justifies vacating Petitioner’s conviction. Accordingly, Petitioner’s third ineffectiveness claim will be denied.

iv. Failure to Object at Trial

Petitioner alleges that counsel failed to object to the Government’s witnesses, citing “only eleven (11) total instances in which [counsel] objected during his trial.” (Pet. 14.) Petitioner notes that nine of these objections “were entered only after his co-defendant’s attorney’s (sic) first objected.” (*Id.*) Six of these objections were shared by both co-defendants’ attorneys. (*Id.*)

Petitioner, however, only cites one specific objection that counsel should have made. He claims counsel should have objected to alleged speculation by Government witness Sophy Phork. (*Id.*)

Petitioner's claim is meritless. There is no magic number of objections that an attorney must make during the course of a trial. Petitioner himself notes that "a majority of the testimony presented by the Government pertained to his co-defendants and not to him." (*Id.*) Petitioner's attempt to argue that his attorney was deficient because his co-defendants' attorneys objected first is ridiculous. In a trial with three defendants and three defense attorneys, one attorney will always object first. This does not mean that the other two attorneys are incompetent. Counsel objected to witness testimony, joined other attorneys' meritorious objections, and otherwise performed satisfactorily at trial. In any event, Petitioner cannot connect the failure to object to the alleged speculation by a minor Government witness to the material facts surrounding Petitioner's conviction.<sup>4</sup>

In addition, Petitioner references an incident in which Mr. Nduka stood up during the course of a witness's testimony and excused himself to use the restroom. (Pet. 15-16; July 14, 2009 Trial Tr. 2.45, ECF No. 121.) The Court immediately called Mr. Nduka to sidebar, suspended the proceedings, and permitted counsel to use the restroom. (Trial Tr. 2.45, July 14, 2009.) Petitioner claims that this event "demonstrates [counsel's] complete lack of familiarity with the criminal trial process and inability to effectively advocate on behalf of his client." (Pet.

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<sup>4</sup> Petitioner refers to testimony taken on July 15, 2009. (July 15, 2009 Trial Tr. 3.146, ECF No. 122.) Having reviewed Ms. Phork's testimony, we assume that Ms. Phork's "speculation" refers to her statements related to what Petitioner did with his patients while physically examining them. We cannot say whether Ms. Phork's testimony was, in fact, speculative, but we are confident that even if it was, its exclusion would have had no effect on the outcome of the trial.

16.)

Petitioner asks us to make a logical leap which we are unwilling to do. Petitioner's counsel was clearly wrong to excuse himself without the Court's permission. However, this does not reflect on his entire representation of Petitioner. We will not make blanket judgments based on this single incident. Furthermore, this single incident could not have prejudiced Petitioner. Counsel was not absent from the courtroom during any testimony. Petitioner cannot demonstrate that the outcome of his trial would have been different if this incident had not occurred. Since Petitioner is unable to show that counsel's actions prejudiced him, his fourth ineffectiveness claim will be denied.

v. Deficient Performance Prior to Sentencing

Finally, Petitioner points to two specific deficiencies in counsel's performance prior to sentencing. First, Petitioner claims that counsel failed to solicit or "present any letters on [Petitioner's] behalf for the Court's consideration in fashioning an appropriate sentence in this case." (Pet. 16.) Second, Petitioner argues that "the Sentencing Memorandum filed by counsel was anemic," failed to address legal issues under the United States Sentencing Guidelines ("Guidelines"), and "appears to be a recitation of counsel's arguments at trial and a plea for leniency." (*Id.*) In evaluating a claim of ineffective assistance in the sentencing context, a petitioner can show prejudice by demonstrating that an increased sentence resulted from counsel's deficient performance. *Glover v. United States*, 531 U.S. 198, 203 (2001).

Petitioner is unable to show that prejudice resulted from counsel's performance. Petitioner was sentenced to twenty-four months in prison. This sentence was within the Guideline range of twenty-one to twenty-seven months. (Pre-Sentence Investigation Report

¶ 82.) Petitioner was sentenced to pay a fine of \$5,000, the low end of the range of \$5,000 to \$50,000. (*Id.* at ¶ 93.) There is no basis upon which to conclude that had counsel acted differently, Petitioner's sentence would have been different.

Petitioner's character references, as found in Exhibit A to his Petition, would not have changed this Court's sentencing decision. The Court was aware of the fact that Petitioner was a practicing physician and had no prior criminal history. The Court was also aware of Petitioner's age and infirmity. It is unclear how the inclusion of character letters in the record would have affected Petitioner's sentence. The Court imposed a sentence within the Guideline range because Petitioner's offense involved a serious violation of the federal naturalization laws. The nature of the crime demanded a Guideline sentence.

Petitioner's argument that counsel's Sentencing Memorandum (ECF No. 133) was anemic also fails. Although it is true that the Sentencing Memorandum consisted largely of a plea for leniency, the primary reason for this was that Petitioner's best arguments for a downward departure were his age and infirmity. Petitioner had been found guilty of three felony counts. Given Petitioner's lack of criminal history, and the fact that he was assessed only a single adjustment—for his role in the offense—to his base offense level, it is unclear that any legal or factual arguments other than age and infirmity would have justified a different sentence for Petitioner. Furthermore, Petitioner does not suggest a single specific argument which counsel might have presented. The Guideline sentence imposed on Petitioner was perfectly appropriate under all of the circumstances.

Accordingly, Petitioner's fifth claim of ineffective assistance of sentencing counsel is denied.

### **C. Certificate of Appealability**

The Third Circuit's Local Appellate Rules instruct:

At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge will make a determination as to whether a certificate of appealability should issue. If the district judge issues a certificate, the judge must state the specific issue or issues that satisfy the criteria of 28 U.S.C. § 2253. If an order denying a petition under § 2254 or § 2255 is accompanied by an opinion or a magistrate judge's report, it is sufficient if the order denying the certificate references the opinion or report.

Third Circuit L.A.R. 22.2. Under 28 U.S.C. § 2253, a petitioner seeking a certificate of appealability 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). Defendant has raised no viable claims. No reasonable jurist could disagree with this assessment. Therefore, a certificate of appealability will not issue.

### **IV. CONCLUSION**

For the foregoing reasons, Petitioner's Motion is denied. This Court finds no basis to hold an evidentiary hearing or issue a certificate of appealability.

An appropriate Order follows.

**BY THE COURT:**



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**R. BARCLAY SURRICK, J.**

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

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL ACTION NO. 08-614-3  
 :  
 THONGCHAI VORASINGHA : CIVIL ACTION NOS . 10-3211  
 : 11-3820

**ORDER**

**AND NOW**, this 16th day of May, 2014, upon consideration of  
Petitioner's Motion Under 28 U.S.C. § 2255 (ECF No. 186), and all documents submitted in  
support thereof and in opposition thereto, it is **ORDERED** as follows:

1. Defendant's Habeas Corpus Motion Under 28 U.S.C. § 2255 is **DENIED**;
2. No Certificate of Appealability shall issue.

**IT IS SO ORDERED.**

**BY THE COURT:**



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**R. BARCLAY SURRECK, J.**