

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

UNITED STATES

v.

RICARDO RAMOS

CRIMINAL ACTION

NO. 08-274-02

DuBOIS, J.

July 28, 2014

MEMORANDUM

I. INTRODUCTION

Presently before the Court are three Motions filed by defendant, Ricardo Ramos: (1) *pro se* Rule 33 Motion; (2) *pro se* Motion to Amend the Rule 33 Motion and Motion for Expansion of the Record; and (3) *pro se* Motion to Compel Production of Grand Jury Materials. These Motions arise out of purported newly discovered evidence that a police officer, who testified as a government witness at defendant's trial, was subject to an internal investigation at the time of his testimony.

II. BACKGROUND

a. Defendant's Trial

Defendant was indicted by a federal grand jury on May 14, 2008, and charged with the following crimes: (1) possessing with intent to distribute mixtures and substances containing detectable amounts of heroin and cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2; (2) possessing a loaded firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. §§ 924(c), 2; and (3) possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). Gov't's Resp. to Def.'s Rule 33 Mot. at 1-2. On

March 5, 2009, after a two-day trial, defendant was found guilty of possession with intent to distribute heroin and cocaine and possession of a handgun in furtherance of a drug trafficking offense. *Id.*

Defendant waived the right to a jury trial on the felon-in-possession charge. *Id.* On March 5, 2009, after a bench trial, this Court found him guilty of that crime, specifically finding that he jointly and constructively possessed a firearm, which was in close proximity to both defendant and codefendant, Frankie Burk, at the time of their arrest. *Id.* at 17 n.10.

At defendant's trial, the government presented nine witnesses and introduced twenty-eight exhibits. *Id.* at 1-2. The government's evidence established that, on March 31, 2008, police officers stopped an SUV after seeing hand-to-hand transactions out of the passenger-side window. *Id.* Inside the SUV, police saw defendant in the passenger seat, codefendant Burk in the driver's seat, packets of heroin scattered throughout the car, and the butt of a handgun protruding from a bag on the backseat. *Id.* At trial, the government called Officer Adrian Makuch, who testified regarding a latent-fingerprint-examination report that he prepared on October 9, 2008 after examining the firearm found in the SUV. *Id.* at 8 n.3. Officer Makuch testified that no fingerprints were lifted from the firearm, and he explained circumstances that might have prevented the examiner from being able to lift fingerprints from a firearm. *Id.* Two other officers also signed the latent-fingerprint-examination report. *Id.* Ex. 2.

On February 27, 2012, after being sentenced, defendant filed a Motion under 28 U.S.C. § 2255, which this Court denied by Memorandum and Order dated August 9, 2012. *United States v. Ramos*, No. 08-cr-274, No. 12-cv-124, 2012 WL 3279215 (E.D. Pa Aug. 10, 2012). On October 16, 2012, defendant filed a notice of appeal, which the U.S. Court of Appeals for the Third Circuit treated as an application for certificate of appealability under

28 U.S.C. § 2253(c)(2) and denied for substantially the same reasons stated by this Court in the August 9, 2012 Memorandum. *United States v. Ramos*, C.A. No. 12-3988, slip op. at 2 (3d Cir. May 7, 2013). On November 1, 2012, defendant filed a second motion under 28 U.S.C. § 2255, which this Court dismissed as a second or successive habeas motion by Order dated December 21, 2012. *United States v. Ramos*, No. 08-274-02, No. 12-cv-3988, op. (E.D. Pa. Dec. 21, 2012). On January 17, 2013, defendant filed the instant Rule 33 Motion for a new trial based on alleged newly discovered evidence.

b. Alleged Newly Discovered Evidence

A Philadelphia County Investigating Grand Jury was impaneled on January 21, 2009 to investigate a stalking complaint, which was filed in June 2008 against Officer Makuch. Gov't's Resp. to Def.'s Rule 33 Mot. at 8-9. An Internal Affairs Division (IAD) Investigation followed, revealing that Officer Makuch frequently "trolled" areas popular to minors and approached minor or young-adult males to ask them to participate in nude modeling. *Id.* On November 11, 2009, Officer Makuch engaged in such a conversation with an undercover officer, during which Officer Makuch solicited sexual acts in exchange for payment. *Id.* at 9. Officer Makuch was arrested on December 8, 2009 for the crimes of unlawful contact with a minor, luring a child into a motor vehicle, promoting prostitution, and related offenses. *Id.* Record of his arrest was made immediately available to the public. *Id.* at 15 n.8. Officer Makuch plead guilty on March 11, 2010. *Id.* at 9.

The Investigating Grand Jury was impaneled after defendant was indicted on May 14, 2008 and after Officer Makuch prepared the latent-fingerprint-examination report on October 9, 2008. Officer Makuch was under IAD investigation when he testified at defendant's trial. He was arrested eight months after defendant's conviction.

On January 17, 2013, defendant filed the instant Rule 33 Motion for a new trial based on the “newly discovered evidence” of Officer Makuch’s IAD investigation and sexual crimes. Defendant claims in this Motion that he discovered such evidence “late into 2012,” and he alleges prosecutorial misconduct and violations of the Fifth Amendment pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) (“*Brady* claims”) based on the prosecution’s failure to disclose this evidence to the defense. *Id.* at 9. On October 18, 2013, defendant filed a Motion to Compel Production of Grand Jury Material in order to “perfect his appeal.” Mot. to Compel Produc. of Grand Jury Material at 2. He subsequently filed a Motion to Amend the Rule 33 Motion and Motion for Expansion of Record on November 6, 2013, in which he quotes from the transcript of Officer Makuch’s sentencing hearing. To the extent that defendant seeks to amend or supplement his Rule 33 Motion and expand the record, that request is granted, and the Court considers all of defendant’s arguments.

III. DISCUSSION

a. Second or Successive § 2255 Motion

Defendant alleges prosecutorial misconduct and *Brady* claims based on the prosecution’s failure to disclose evidence of Officer Makuch’s IAD investigation. Rule 33 Mot. at 9. Because such claims collaterally attack defendant’s underlying conviction, they constitute a habeas motion. *See United States v. Bales*, No. 95-cr-149, 1997 WL 825245, at *6 (E.D. Pa. Dec. 19, 1997) (“Rule 33 is not the proper vehicle for [a prosecutorial misconduct] challenge.”); *United States v. Davis*, No. 06-cr-020, 2012 WL 1313498, at *4 n. 3 (M.D. Pa. Apr. 17, 2012) (“[A] *Brady* claim is not an appropriate ground for a Rule 33 motion because it constitutes a collateral attack on a conviction that must be brought in a motion under 28 U.S.C. § 2255.” (internal quotation marks omitted)); *see also United States v. Bryant*, 186 F. App’x. 298, 300 (3d Cir.

2006) (“A Rule 33 motion, even if timely, may not be used to do an end-run around the time limitations of a § 2255.”). Before this Court can consider a second or successive § 2255 motion, a defendant must apply to the U.S. Court of Appeals for the Third Circuit for authorization to file such a motion. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). As defendant has not done so, the Court dismisses that part of defendant’s Rule 33 Motion raising prosecutorial misconduct and *Brady* claims.

b. Rule 33 Motion for a New Trial

Federal Rule of Criminal Procedure 33(b)(1) requires that a motion for a new trial grounded on newly discovered evidence be filed within three years of a finding of guilt. In this case, defendant was convicted on March 5, 2009. He thus had until March 5, 2012 to file the instant Rule 33 Motion, but he did not do so until January 17, 2013. Accordingly, that part of defendant’s Rule 33 Motion that seeks a new trial is denied as untimely.

Even assuming *arguendo*, that defendant’s Rule 33 Motion is timely, the alleged “new evidence” is insufficient to warrant granting of a motion for a new trial pursuant to Rule 33. Rule 33 motions are disfavored and should be granted only in exceptional cases. *United States v. Miller*, No. 10-cr-663, 2012 WL 2094068, at *1 (E.D. Pa. June 11, 2012). Before a district court will order a new trial for newly discovered evidence, a defendant must show, *inter alia*, that the evidence is such that, if defendant is granted a new trial, it would probably produce an acquittal. *United States v. Iannelli*, 528 F.2d 1290, 1292 (3d Cir. 1976). The burden on the defendant is very high, and if “newly discovered evidence fails to meet the third prong of a *Brady* violation—i.e., that there is a *reasonable* probability that . . . the result of the proceeding would have been different—the evidence necessarily must also fail [this] prong of the Rule 33 test.” *United States v. Isaac*, No. 05-576-01, 2014 WL 2048119, at *5 (E.D. Pa. May 16, 2014) (emphasis added).

Evidence of an incomplete investigation of a government witness is not sufficient to meet this standard when the government's other evidence clearly establishes the defendant's guilt. *See United States v. Johnson*, 380 F. Supp. 2d 660, 675 (E.D. Pa. 2005), *aff'd*, 195 F. App'x. 52 (3d Cir. 2005) (holding that the suppression of evidence of the investigation of a government witness would not, with reasonable probability, have changed the outcome of the proceeding because of the strength of the government's other evidence). In this case, evidence of the investigation of Officer Makuch amounted to nothing more than a stalking complaint at the time of defendant's trial. Gov't's Resp. to Def.'s Rule 33 Mot. at 17-18. Such evidence does not raise a "reasonable probability" of an acquittal because his testimony was not a crucial part of the government's evidence, which included eight additional witnesses and twenty-eight exhibits. *Id.* at 1-2. Moreover, Officer Makuch testified only as to his latent-fingerprint-examination report, which was signed by two other officers, *id.* at Ex. 2, either of whom could have been called to give the same testimony had Officer Makuch been impeached at trial.

Defendant argues that evidence of the IAD investigation would have changed the result of his proceeding because it proves that Officer Makuch destroyed codefendant Burk's fingerprints on the firearm and scripted his testimony to avoid his own prosecution.¹ Rule 33 Mot. at 7. The Court rejects this argument because destroying Burk's fingerprints would have no impact on Officer Makuch's prosecution. First, there is no evidence to suggest that Officer Makuch was aware of his own investigation until his arrest, more than eight months after he testified at defendant's trial, as he stated he was "surprised" when he was arrested. Gov't's Resp. To Def.'s Rule 33 Mot. at Ex. 1. Second, finding Burk's fingerprints on the firearm would

¹ Defendant contends that finding Burk's fingerprints on the firearm would acquit him of the possession charge because it "would support [Burk's] sole ownership of the gun." Rule 33 Mot. at 7. The Court rejects this argument.

not, with reasonable probability, have changed the outcome of defendant's case, as defendant was found guilty of possessing a firearm under the theory of joint and constructive possession. *Id.* at 17 n.10. "Constructive possession exists if an individual 'knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person.'" *United States v. Iafelice*, 978 F.2d 92, 96 (3d. Cir. 1992) (quoting *United States v. Blackston*, 940 F.2d 877, 883 (3d. Cir. 1991)). If a firearm is within "arm's reach" of a defendant at the time of his arrest, a factfinder can infer that the defendant was in constructive possession of that weapon. *United States v. Peoples*, 370 F. App'x. 276, 278 (3d. Cir. 2010); *see also United States v. Keyes*, No. 07-cv-3453, No. 03-cr-487, 2008 WL 2736392, at *5 (E.D. Pa. July 11, 2008). In this case, the loaded firearm was found on the backseat of the SUV, protruding from a bag and within arm's reach of both defendants. Gov't's Resp. to Def.'s Rule 33 Mot. at 18. Even if codefendant Burk's fingerprints had been found on the gun, a reasonable factfinder could still conclude that defendant constructively possessed the firearm.²

Defendant's argument also fails because Rule 33 requires, *inter alia*, that the alleged new evidence must not be merely cumulative or impeaching. *United States v. Quiles*, 618 F.3d 383, 394-95 (3d. Cir. 2010). When a witness is later charged with crimes that bear no relation to his involvement in the defendant's case and do not demonstrate a tendency toward untruthfulness under oath, evidence of that witness's crimes is merely impeaching and insufficient to grant a new trial. *See id.* (holding that a key government witness's later convictions for child rape and other sexual crimes did not warrant a new trial because the crimes were completely unrelated to

² Constructive possession of a firearm is sufficient to support convictions for both of defendant's firearm charges: (1) possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c), *see, e.g., United States v. Walker*, 657 F.3d 160, 172-73 (3d Cir. 2011); and (2) possession of a firearm after being convicted of a felony in violation of 18 U.S.C. § 922(g)(1), *see, e.g., United States v. Godson*, 298 F. App'x. 171, 173 (3d Cir. 2008).

his testimony at defendant's trial). In this case, Officer Makuch's stalking and sexual crimes are entirely unrelated to his testimony about the latent-fingerprint-examination report, and, thus, evidence of the IAD investigation is merely impeaching and not sufficient to warrant a new trial.

For the foregoing reasons, that part of defendant's Rule 33 Motion seeking a new trial is denied.

c. Motion to Compel Production of Grand Jury Materials

Defendant requests that the Court release transcripts from the grand jury proceedings of his May 14, 2008 Indictment because he seeks "exculpatory evidence" in connection with such proceedings in order to "perfect[] his appeal" and "perfect his post-conviction remedies." Mot. to Compel Production of Grand Jury Material at 2. The importance of preserving the secrecy of the grand jury has long been established and should not be broken unless there is a "compelling necessity." See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). To establish "compelling necessity," a defendant must show that without the release of the grand jury materials, his "defense would be greatly prejudiced or . . . an injustice would be done." *Id.* "[T]he burden of demonstrating this balance rests upon the [] party seeking disclosure." *United States v. Smith*, 123 F.3d 140, 148 (3d. Cir. 1997) (quoting *Douglas Oil Co. of Ca. v. Petrol Shops Nw.*, 441 U.S. 211, 223 (1997)).

Defendant has not satisfied his high burden of showing "compelling necessity" to warrant production of the grand jury testimony because the only alleged error he asserts is that the prosecutor never disclosed the allegedly exculpatory evidence of Officer Makuch's investigation to the grand jury. Such an allegation, even if true, does not demonstrate error, as prosecutors have no legal duty to present exculpatory evidence to the grand jury. See *Untied States v. Williams*, 504 U.S. 36, 52 (1992). Moreover, Officer Makuch was not yet under investigation at

the time of the grand jury proceedings in defendant's case, so there was no such exculpatory evidence to disclose at that time. Thus, the alleged prejudicial defect during the grand jury proceedings was both factually impossible and not required by law. Accordingly, the Court denies defendant's Motion to Compel Production of Grand Jury Material.

IV. CONCLUSION

For the foregoing reasons, that part of defendant's Rule 33 Motion asserting claims of prosecutorial misconduct and *Brady* violations constitutes a second or successive habeas motion and is dismissed. Defendant's Motion to Amend the Rule 33 Motion and Motion for Expansion of the Record is granted to the extent that defendant seeks to amend or supplement his Rule 33 Motion, and his Rule 33 Motion seeking a new trial, as amended and supplemented, is denied. Further, defendant's Motion to Compel Production of Grand Jury Material is denied. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
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UNITED STATES

CRIMINAL ACTION

v.

RICARDO RAMOS

NO. 08-274-02

ORDER

AND NOW, this 28 day of July, 2014, upon consideration of (1) defendant Ricardo Ramos's *pro se* Rule 33 Motion (Document No. 215, filed Jan. 17, 2013), (2) Government's Response to Defendant's Rule 33 Motion (Document No. 220, filed Apr. 9, 2013), (3) *pro se* Petitioner's Response to the Government's Opposition Response to the Rule 33 Motion for Relief Under Brady Material Violation (Document No. 223, filed May 9, 2013); (4) *pro se* Motion to Compel Production of Grand Jury Material (Document No. 225, filed Oct. 18, 2013), (5) *pro se* Motion to Amend the Rule 33 Motion and Motion for Expansion of the Record (Document No. 229, filed Nov. 6, 2013), and (6) Government's Response to Defendant's *Pro Se* Pleadings (Document No. 231, filed Feb. 3, 2014), for the reasons stated in the Memorandum dated July 28, 2014, **IT IS ORDERED** as follows:

1. Defendant's *pro se* Motion to Amend the Rule 33 Motion and Motion for Expansion of the Record is **GRANTED** to the extent that it seeks to supplement his Rule 33 Motion, and the Motion to Amend the Rule 33 Motion and Motion for Expansion of the Record is **DENIED** in all other respects;

2. That part of defendant's *pro se* Rule 33 Motion asserting claims of prosecutorial misconduct and *Brady* violations constitutes a second or successive habeas corpus motion under 28 U.S.C. § 2255 and is **DISMISSED WITHOUT PREJUDICE** to defendant's right to seek

authorization to proceed in this Court from the United States Court of Appeal for the Third Circuit pursuant to 28 U.S.C. § 2255(h);

3. That part of defendant's *pro se* Rule 33 Motion seeking a new trial is **DENIED**; and,

4. Defendant's *pro se* Motion to Compel Production of Grand Jury Materials is **DENIED**.

IT IS FUTHER ORDERED that an evidentiary hearing will not be held because “the motion[s] and files and records of the case show conclusively that the movant is not entitled to relief.” *United States v. Lilly*, 536 F.3d 190, 195 (3d Cir. 2008) (citations omitted).

IT IS FURTHER ORDERED that a certificate of appealability will not issue because reasonable jurists would not debate this Court's decision that defendant's *pro se* Rule 33 Motion and *pro se* Motion to Compel Production of Grand Jury Materials do not state valid claims of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

BY THE COURT:

/s/ Hon. Jan E. DuBois
DuBOIS, JAN E., J.