

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

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL ACTION NO. 09-245  
 :  
 PHILLIP PARROTT : CIVIL ACTION NO. 13-712  
 :

**MEMORANDUM**

**SURRICK, J.**

**JULY 10, 2015**

Presently before the Court is Phillip Parrott's *pro se* Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (ECF No. 75.) For the following reasons, the Motion will be denied.<sup>1</sup>

**I. FACTUAL BACKGROUND**

At approximately 1:30 a.m. on November 30, 2008, Philadelphia Police Officers Jones and Pacell responded to a call about a man with a gun on the 3600 block of North Bouvier Street in Philadelphia.<sup>2</sup> As they approached the location, they saw Petitioner Parrott standing in front of the house at 3631 North Bouvier Street. They saw that Parrott was holding a sawed-off shotgun. The officers exited the police car and commanded him to drop it. Parrott did not drop the gun. Instead, he ran into the house. The officers requested backup and established a perimeter around the house to ensure that Parrott did not escape.

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<sup>1</sup> Parrott is a *pro se* litigant, and so we construe his pleadings liberally. *United States v. Miller*, 197 F.3d 644, 648 (3d Cir. 1999).

<sup>2</sup> The factual background is set forth in this Court's opinion denying Parrott's motion for a new trial, and in the Third Circuit's opinion affirming his conviction. *See United States v. Parrott*, 450 F. App'x 228, 229-30 (3d Cir. 2011); *United States v. Parrott*, No. 09-245, 2010 WL 760388, at \*1-2 (E.D. Pa. Mar. 4, 2010).

Shortly thereafter, Parrott's wife leaned out of an upstairs window and asked what was happening. The officers said that a man had run into the house, and they asked where he was. Initially, Parrott's wife responded that no one had entered the house. Later she stated that a man had run into the house and out the back door. Officer Pacell was stationed at the rear of the house and did not see anyone exit.

Eventually, Parrott's wife came out the front door, along with several other people. She stated that there was no one else in the house. Shortly thereafter, Parrott appeared at the top of the staircase, which was visible from the front door. Parrott said that he had been sleeping and asked what was happening. The officers identified him as the person they had seen holding the gun and he was arrested. Officer Jones then executed a warrantless search of the house and found the sawed-off shotgun that she had seen Parrott holding. At the time of this incident, Parrott had three prior convictions in Pennsylvania state court: one for robbery; one for possession of heroin with intent to deliver; and one for possession of cocaine with intent to deliver. (Gov't's Resp., ECF No. 79, Exhs. 1-3.)

## **II. PROCEDURAL BACKGROUND**

In April 2009, Parrott was charged with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). *United States v. Parrott*, No. 09-245, 2009 WL 4043292, at \*1 (E.D. Pa. Nov. 20, 2009). In September 2009, he filed a motion to suppress evidence, specifically the shotgun found in the basement. *Id.* After a hearing on the motion, the motion was denied. *Id.* The case proceeded to trial by jury. After Officer Pacell testified, Parrott requested that the Court reconsider the denial of the motion to suppress. The request to reconsider was denied. *Parrott*, 2010 WL 760388, at \*1, 4.

On November 24, 2009, a jury found Parrott guilty of possession of a firearm by a convicted felon. Parrott filed a motion for judgment of acquittal and a motion for new trial. Those motions were denied by Memorandum and Order dated March 4, 2010. (ECF Nos. 60 and 61.) On March 12, 2010, based upon Parrott's three prior convictions, which qualified him as an Armed Career Criminal, Parrott was sentenced to 262 months in prison to be followed by five years of supervised release. Parrott filed a notice of appeal in the Court of Appeals for the Third Circuit. On November 10, 2011, the Third Circuit affirmed the Judgment of Sentence. *Parrott*, 450 F. App'x at 230. On February 8, 2012, Parrott filed the instant Motion to Vacate/Set Aside/Correct Sentence under 28 U.S.C. § 2255. (Mot., ECF No. 75.) The Government filed its response on April 12, 2013. (Gov't's Resp., ECF No. 79.) Parrott filed a reply on April 26, 2013. (Reply, ECF No. 80.)

### **III. LEGAL STANDARD**

Under § 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 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 this provision 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 § 2255 motion — *see 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).

#### **IV. DISCUSSION**

Parrott advances a number of arguments in support of his Motion. We will first discuss the timeliness of the Motion.

##### **A. Timeliness**

Section 2255 motions are subject to a one-year statute of limitations. Under subsection (f), that one-year clock starts to run from the latest of the following dates:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

A conviction becomes final in the context of § 2255(f)(1) when the period for filing a timely petition for certiorari review expires. *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999). The Third Circuit denied Parrott’s appeal on November 10, 2011. *Parrott*, 450 F. App’x at 230. The period for filing a timely petition for certiorari review expired 90 days later, on February 8, 2012. *See Kapral*, 166 F.3d at 577; Sup. Ct. R. 13. Under § 2255(f)(1), Parrott had one year from February 8, 2012 to file a motion to correct or set aside his sentence. Parrott filed the instant Motion on February 8, 2013. The Motion is therefore timely.

## **B. Fourth Amendment Issues**

Parrott devotes a substantial portion of his briefs to attacking the constitutionality of the warrantless search of 3631 North Bouvier Street. (Pet'r's Br. 1-10, ECF No. 75; Reply 1-5, ECF No. 81.) However, Fourth Amendment issues are not cognizable in habeas if the petitioner has had a full and fair opportunity to litigate his claims. *Stone v. Powell*, 428 U.S. 465, 494-95 (1976); *United States v. Martinson*, Nos. 97-3030, 92-228, 1997 WL 798256, at \*2 (E.D. Pa. Dec. 15, 1997); *see also United States v. Brown*, Crim. No. 99-730, Civil No. 04-4121, 2005 WL 1532538, at \*5-6 (E.D. Pa. June 28, 2005); *Strube v. United States*, 206 F. Supp. 2d 677, 681 (E.D. Pa. 2002). Between the motion to suppress, the hearing that followed, the Memorandum explaining the denial of the motion, the post-trial motions which focused on the suppression issue and the Memorandum denying those motions, the appeal to the Third Circuit and the Third Circuit's opinion, which focused entirely on the motion to suppress, clearly Parrott has had a full and fair opportunity to litigate the suppression issue. He may not now re-litigate his Fourth Amendment claims. *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993); *United States v. Colon*, Crim. No. 99-291, Civil No. 01-2771, 2002 WL 32351175, at \*7 (E.D. Pa. Aug. 12, 2002). Moreover, even if we permitted re-litigation of the suppression issue it would be to no avail.<sup>3</sup>

To the extent that Parrott casts his Fourth Amendment complaints in the guise of an ineffective assistance of counsel claim, such a claim *is* cognizable on collateral review. *Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986); *Martinson*, 1997 WL 798256, at \*2. It will be discussed in Part D., *infra*.

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<sup>3</sup> *See Parrott*, 450 F. App'x 228; *Parrott*, 2010 WL 760388; *Parrott*, 2009 WL 4043292.

### **C. Prosecutorial Misconduct**

Parrott argues that the prosecutor committed misconduct at trial. (Pet’r’s Br. 2.) Specifically, Parrott contends (1) that Officer Jones falsely testified that she received a second call about shots fired at the location; (2) the prosecutor possessed discovery proving the falsity of that testimony, and (3) the prosecutor failed to correct that testimony. (*Id.* 3-4.) Parrott also argues that the prosecutor’s closing comment that the gun was found loaded with four live rounds constituted misconduct. (*Id.* 2, 7-8.)

These arguments were never raised in prior proceedings. They are therefore procedurally defaulted at this stage. *See, e.g., United States v. Stillis*, No. 04-680-03, 2015 WL 2333010, at \*6 (E.D. Pa. May 14, 2015); *Drummond v. United States*, Crim. No. 01-94, Civil No. 04-1352, 2007 WL 3378447, at \*9 (D. Del. Nov. 14, 2007). Nevertheless, Parrott’s Motion could be construed to cast the prosecutorial misconduct claims within the framework of a larger ineffective assistance of counsel argument — namely, that counsel was ineffective for failing to raise the prosecutorial misconduct claims below. *See United States v. Wolfe*, Crim. No. 05-322, Civil No. 09-1248, 2010 WL 1372448, at \*2-3 (W.D. Pa. Apr. 5, 2010). We address that ineffective assistance argument in Part D., *infra*.

### **D. Ineffective Assistance of Counsel**

#### *1. Standard*

Ineffective assistance of counsel claims may be raised for the first time in § 2255 motions. *Massaro v. United States*, 538 U.S. 500, 509 (2003). To succeed on such a claim, a petitioner must demonstrate that an attorney’s error was both professionally unreasonable *and* prejudicial to the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687-698 (1984). Although not insurmountable, this is a high bar. “[A] court must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." *Id.* at 689; *see also Harrington v. Richter*, 562 U.S. 86, 105 (2011). The deference is particularly strong with respect to counsel's strategic choices, e.g., those involving juror selection, witness selection, how to conduct cross-examinations, and which motions to file. *Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1433-34 (3d Cir. 1996). Even if a petitioner establishes that an attorney's error was professionally unreasonable, he must also demonstrate a reasonable probability that, but for that error, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694.<sup>4</sup>

## 2. Trial Issues

Parrott faults his counsel for multiple errors during trial. None of these alleged errors constitute ineffective assistance under *Strickland*.

First, Parrott claims that counsel was ineffective for failing to attack testimony about a second radio call, received while the officers were en route to North Bouvier Street, which indicated that shots had been fired at the location. (Pet'r's Br. 4, 16.) The choice of whether and how to cross-examine witnesses falls squarely within the realm of trial strategy, which means the presumption in the attorney's favor is particularly strong. *Strickland*, 466 U.S. at 694; *Weatherwax*, 77 F.3d at 1433-34. Parrott has not shown that the testimony about a second radio

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<sup>4</sup> Citing *United States v. Cronin*, 466 U.S. 648 (1984), Parrott argues that he need not prove prejudice to succeed on his ineffective assistance claims. (Pet'r's Br. 20-25.) He is mistaken. In *Cronin*, the Supreme Court held that ineffective assistance of counsel may be presumed, without proof of particular error or prejudice, in three specific situations: (1) where there was a complete denial of counsel at a critical stage of the trial; (2) where counsel entirely failed to subject the prosecution's case to meaningful adversarial testing; and (3) where the surrounding circumstances made it impossible for any lawyer to provide effective assistance (e.g., where counsel was not appointed until the day of trial). *Cronin*, 466 U.S. at 657-662, 665 n.37. Clearly none of those circumstances exist here.

call was false, nor has he shown that it is inconsistent with any other evidence.<sup>5</sup> *See Colon*, 2002 WL 32351175, at \*7. Furthermore, he has not shown how questioning the testimony about the second radio call would have changed the outcome of the trial.<sup>6</sup> *See United States v. Noble*, Crim. No. 06-10, Civil No. 11-21, 2013 WL 3392443, at \*12 (W.D. Pa. July 8, 2013). Parrott's ineffective assistance of counsel claim fails.

Parrott next claims that counsel was ineffective for not attacking the officers' testimony that Parrott was the last person to exit the house. He argues that counsel should have highlighted a comment in the Investigation Report stating that Parrott exited "almost last from upstairs." (Pet'r's Br. 5, 18.) The Government observes that the Investigative Report referred to was authored not by the testifying officers, but by a detective who was not present at the scene and had no personal knowledge of the situation. Under the circumstances, impeachment of Officer Jones or Officer Pacell with this statement would have been valueless. (Gov't's Resp. 14.) Moreover, counsel's approach to cross was a tactical choice, and tactical choices do not become constitutionally deficient simply because there may have been a different or even better option. *United States v. Merritt*, Crim. No. 05-35, Civil No. 06-4619, 2007 WL 2022098, at \*4 (E.D. Pa.

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<sup>5</sup> Officer Jones testified at the suppression hearing that she and her partner received a call reporting an individual with a gun on the 3600 block of North Bouvier Street. (Oct. 26, 2009 Hr'g Tr. at 6.) She further testified that they then received a second call indicating shots had been fired at the location. (*Id.*) The initial dispatch report produced by the Government reflected the report of a person with a gun, but did not reflect a report of shots heard. (Pet'r's Exh. A1.) After the hearing, Parrott's counsel requested that the government look into whether there were any other dispatch reports generated with respect to the incident. (Gov't's Resp. 12.) The government did so, and produced to the defense a second dispatch report indicating that 5 to 6 shots had been heard. (Pet'r's Exh. A2.) Jones's testimony is not inconsistent with the evidence.

<sup>6</sup> Whether Parrott fired the gun or whether shots were fired by someone else in the area is of little consequence. Parrott was only charged with simple *possession* of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Firing the weapon is not an element of this offense.

July 9, 2007); *United States v. Bellinger*, Crim. No. 02-644, Civil No. 09-4555, 2010 WL 3364335, at \*5 (E.D. Pa. Aug. 24, 2010) (“Decisions regarding cross examination, including the extent and manner, are generally considered strategic in nature and will not support an ineffective assistance of counsel claim.”); *see also Strickland*, 466 U.S. at 694; *Weatherwax*, 77 F.3d at 1433-34. Parrott has not overcome the strong presumption that counsel acted within professional norms, and so this claim fails. *See Strickland*, 466 U.S. at 689; *Bellinger*, 2010 WL 3364335, at \*5; *Merritt*, 2007 WL 2022098, at \*4.

Next, Parrott seems to argue that counsel was ineffective for failing to raise the prosecutorial misconduct claims described above. (Pet’r’s Br. 2-4, 7-8, 13-16.) This was a strategic choice, and we accord heavy deference to it. *Strickland*, 466 U.S. at 694; *Weatherwax*, 77 F.3d at 1433-34. Parrott contends that the prosecutor should have identified the officers’ testimony about a second radio call as perjury; but again, without showing that this testimony was either untrue or inconsistent with any other evidence, Parrott does not begin to approach the high bar *Strickland* sets for ineffective assistance. *See, e.g., Drummond*, 2007 WL 3378447, at \*9-10; *Colon*, 2002 WL 32351175, at \*7.

Equally meritless is Parrott’s complaint about the shotgun shells comment. The prosecutor stated in his closing argument that the shotgun was loaded with four shells when it was found. (Nov. 23, 2009 Trial Tr. (p.m.) at 61.) Parrott represents that because the gun had a defective shell stop, it was not capable of holding any rounds. Therefore the prosecutor’s statement was false, and counsel was ineffective for failing to address this untruth. (Pet’r’s Br. 7, 16.) Initially we note that there is nothing in the record that establishes that Parrott’s representation in this regard is true. Moreover, once again, counsel’s choice of which objections to advance is accorded heavy deference; and in any event, the prosecutor’s comment was not

prejudicial. It is irrelevant whether the gun was loaded since that is not an element of the crime charged. *See* 18 U.S.C. § 922(g)(1); *see also United States v. Meza*, 701 F.3d 411, 425 (5th Cir. 2012) (“[Section] 922(g) does not distinguish between loaded and unloaded firearms.”); *United States v. Matthews*, 520 F.3d 806, 810-11 (7th Cir. 2008) (holding that a felon’s momentary possession of even an unloaded, inoperable gun violates § 922(g) because that approach is consistent with the purpose of the law, “to divorce completely convicted felons from the use or possession of weapons”). The comment could not have affected the outcome of the trial, and therefore failing to attack it could not constitute ineffective assistance.<sup>7</sup> *See, e.g., Jurbala v. United States*, No. 08-47, 2011 WL 767175, at \*9-10 (D. Del. Feb. 25, 2011); *Drummond*, 2007 WL 3378447, at \*7.

Next, Parrott faults his counsel for waiting until after trial to subpoena evidence from the Philadelphia prison that documents the clothing Parrott wore at the time of his arrest. (Pet’r’s Br. 16-17.) This was ineffective, Parrot argues, because the clothing card indicates he was wearing “underpants, color-multicolor[,] condition-fair[,] comments-PJ,” while Officer Jones testified that Parrott was wearing gray sweatpants at the time of arrest. (*Id.*) To the extent that this evidence is inconsistent, the record makes clear that it was not determinative. The officers did not identify Parrott by his clothing. They identified him by his face. The officers testified that as soon as Parrott exited the house they recognized him as the person who had run into the house with the gun. The identification was positive. (Nov. 23, 2009 Trial Tr. (a.m.) at 60, 120). Absent a reasonable probability that the outcome of the trial would have been different, this

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<sup>7</sup> Nor is there merit to Parrott’s contention that counsel was ineffective for stipulating that the recovered gun was “a weapon which will or is designed or may be readily converted to expel a projectile by the action of an explosive” and was “loaded with four shotgun shells.” (Pet’r’s Br. 19; Nov. 23, 2009 Trial Tr. (p.m.) at 23.) Such stipulations are commonplace.

ineffective assistance claim fails.<sup>8</sup> See *United States v. Gayle*, No. 11-6067, 2012 WL 2362340, at \*5 (E.D. Pa. June 20, 2012); see also *United States v. Fisher*, 43 F. App'x 507, 511 (3d Cir. 2002); *Doganieri v. United States*, 914 F.2d 165, 168 (9th Cir. 1990).

Parrott raises two more meritless arguments in this arena. First, that counsel was ineffective for failing to investigate the anonymous tipster who called 911 about a person with a gun at the location. (Pet'r's Br. 16.) Second, that counsel was ineffective for not objecting to Officer Jones's misidentification of Parrott's sister as Parrott's wife at the suppression hearing. (*Id.* 18.) It is not at all apparent how identifying the anonymous caller would have affected the outcome of the trial. See *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991) (“[A habeas petitioner] cannot meet his burden to show that counsel made errors so serious that his representation fell below an objective standard of reasonableness based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense.”). Moreover, the fact that Officer Jones may have mistaken Parrott's sister for Parrott's wife at the suppression hearing almost a year after the incident is of no consequence. What is important is the conversation that Jones had with the woman in the window at 3631 Bouvier Street on the night in question and the lie that the woman told the officers with regard to the whereabouts of Parrott. The decisions made by counsel regarding the anonymous tipster and the misidentification were strategic choices for which counsel is accorded substantial deference. There is nothing in this record to suggest that different decisions by counsel would have led to a

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<sup>8</sup> Parrott further argues that the initial incident report stated that police observed Parrott with an “unknown dark weapon,” and he argues this is inconsistent with the officers' later testimony that they observed Parrott with a gun. (Pet'r's Br. 15.) He seems to contend that counsel should have attacked this alleged inconsistency. To the extent that “dark weapon” and “gun” are inconsistent at all, the inconsistency is minor and non-prejudicial.

different result. They do not constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 694; *Weatherwax*, 77 F.3d at 1433-34.<sup>9</sup>

### 3. Sentencing Issues

Parrott faults his counsel for multiple errors during sentencing. None of these alleged errors constitute ineffective assistance under *Strickland*.<sup>10</sup>

First, Parrott claims that his counsel was ineffective for failing to argue that the District Court lacked jurisdiction to consider Sentencing Guidelines factors in determining his sentence. (Mot. 10; Pet'r's Br. 26.) Specifically, Parrott claims that district courts have jurisdiction "over all offenses against the laws of the United States," but that sentencing factors are not laws. (*Id.*) This claim is ridiculous. *Gallaway v. United States*, No. 11-780, 2011 WL 6000889, at \*3 (D.N.J. Nov. 28, 2011). Courts are required to calculate a defendant's sentence under the Sentencing Guidelines as the first step in the sentencing process. 18 U.S.C. § 3553(a) ("The court, in determining the particular sentence to be imposed, shall consider . . . the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines."); *United States v. Ali*, 508 F.3d 136, 142 (3d Cir. 2007). Because Parrott's proposed argument is silly, his counsel was not ineffective for failing

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<sup>9</sup> Parrott also includes a passing, one-sentence statement that counsel was ineffective for not objecting to the jury instructions at trial. (Pet'r's Br. 19.) Parrott does not indicate which jury instruction(s) he considers objectionable, or why. We cannot evaluate such a naked assertion, and it fails accordingly. See *United States v. Thomas*, 221 F.3d 430, 437 (3d Cir. 2000) ("[V]ague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation by the District Court.").

<sup>10</sup> We note that claims of error under the sentencing guidelines, in and of themselves, are generally not cognizable under § 2255. *United States v. Walker*, No. 94-488, 2000 WL 378532, at \*11 (E.D. Pa. Apr. 4, 2000) (collecting cases). But as with Parrott's Fourth and Fifth Amendment claims, we view the sentencing arguments as part of a larger framework of ineffective assistance of counsel claims.

to advance it. *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999) (“There can be no Sixth Amendment deprivation of effective counsel based on an attorney’s failure to raise a meritless argument.”).

Second, Parrott contends that the prior convictions used to qualify him as an Armed Career Criminal (“ACC”) were never proven to the jury beyond a reasonable doubt, that the resulting sentence was therefore unjustified,<sup>11</sup> and that counsel was ineffective for not contesting it. (Pet’r’s Br. 27.) Parrott’s proposed argument is meritless. Prior convictions that increase the statutory minimum for a § 924(e) offense are not elements of the offense, and may be determined by the District Court by a preponderance of the evidence. *United States v. Coleman*, 451 F.3d 154, 159 & n.4 (3d Cir. 2006); *see also United States v. Blair*, 734 F.3d 218, 225 n.7 (3d Cir. 2013). Counsel cannot be ineffective for failing to advance a meritless argument. *Sanders*, 165 F.3d at 253.

Parrott next argues that the District Court erred when it employed the “modified categorical approach” to conclude that his prior convictions qualified him as an armed career criminal, and that his counsel was ineffective for failing to contest that error. (Pet’r’s Br. 29, 32-35.) The Third Circuit dismissed a virtually identical argument in *United States v. Abbott*, 748 F.3d 154 (3d Cir. 2014). Generally, a sentencing court may look only to the elements of a defendant’s prior conviction when determining whether a previous conviction qualifies as a

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<sup>11</sup> The Armed Career Criminal Act (“ACCA”) imposes a minimum prison term of 15 years on a felon in possession of a firearm who has three prior convictions for a “violent felony or a serious drug offense.” 18 U.S.C. § 924(e)(1); *Chambers v. United States*, 555 U.S. 122, 122 (2009). In light of Parrott’s designation as an ACC, the District Court also considered, in addition to this statutory minimum, U.S.S.G. § 4B1.4. It calculated a recommended sentencing range of 262-327 months of imprisonment for Parrott. Considering the factors set forth in 18 U.S.C. § 3553(a), the Court ultimately sentenced him to the lowest point of the recommended range, which was 262 months in prison. (Mar. 12, 2010 Hr’g Tr. at 20-23); *see also Coleman*, 451 F.3d 154, 156 (3d Cir. 2006).

“violent felony or serious drug offense” under the ACCA. *Id.* at 157. However, when a statute underlying a prior conviction lists multiple, alternative elements (when the statute is “divisible”), a sentencing court may look to the charging document to determine which of the alternative elements was involved in the defendant’s conviction. *Id.* at 157-58.

Parrott’s prior convictions were for: (1) robbery; (2) possession of cocaine with intent to deliver, in violation of 35 Pa. Stat. Ann. § 780-113(a)(30); and (3) possession of heroin with intent to deliver, also in violation of § 780-113(a)(30).<sup>12</sup> (Gov’t’s Resp. Exs. 1-3.) Section 780-113(a)(30) is divisible: it prohibits “the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance,” and the punishment for violation of the section depends on the type of controlled substance. *Abbott*, 748 F.3d at 159. Since § 780-113(a)(30) is a divisible statute, it was entirely appropriate for the District Court to look to the charging documents to determine whether Parrott’s prior convictions were for serious drug offenses. *Id.* at 158-59. The charging documents made clear that they were.<sup>13</sup> Parrott’s proposed argument is therefore meritless, and his counsel was not ineffective for not declining to raise it. *Sanders*, 165 F.3d at 253.

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<sup>12</sup> Parrott does not contest the propriety of the robbery conviction as a predicate offense.

<sup>13</sup> Under the ACCA, a “serious drug offense” is one that involves the “manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), 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). Parrott had convictions for possession with intent to deliver cocaine and heroin. (Gov’t’s Resp. Exs. 1-3.) Cocaine and heroin are both controlled substances under the Controlled Substances Act. 21 U.S.C. §§ 806, 812; *see also Abbott*, 748 F.3d at 159 n.6; *United States v. Medina*, No. 99-141, 2006 WL 3511754, at \*8 (E.D. Pa. Dec. 5, 2006). Possession with intent to deliver cocaine carries a maximum term of imprisonment of 10 years (under 35 Pa. Stat. Ann. § 780-113(a)(30), (f)(ii)), and possession with intent to deliver heroin carries a maximum incarceration term of 15 years (under 35 Pa. Stat. Ann. § 780-113(a)(30), (f)(i)). Parrott’s convictions therefore qualify as “serious drug offenses” under the ACCA.

In a similar vein, Parrott argues that the District Court should have employed the “hypothetical federal felony approach” or the “minimum culpability” standard in determining his sentence, and he implies that his counsel was ineffective for failing to advance that argument. (Mot. 10; Pet’r’s Br. 35-38.) The hypothetical federal felony approach is a route by which courts have considered whether an alien’s state conviction is an “aggravated felony” for which removability is warranted under the immigration laws. *See, e.g., Jeune v. Attorney General of United States*, 476 F.3d 199, 200-01, 204-05 (3d Cir. 2007); *Borrome v. Attorney General of United States*, 687 F.3d 150, 152-59 (3d Cir. 2012). The hypothetical federal felony approach, therefore, has no application here.

The cases Parrott cites on the minimum culpability approach likewise do not apply. They concern whether an alien’s previous conviction constitutes a “crime of violence” under § 2L1.2 of the Sentencing Guidelines for unlawfully entering or remaining in the United States, and whether a conviction constitutes a crime of moral turpitude under the immigration laws. *See, e.g., United States v. Gonzalez-Ramirez*, 477 F.3d 310, 320 (5th Cir. 2007); *Joseph v. Attorney General of United States*, 465 F.3d 123, 124-28 (3d Cir. 2006); *Partyka v. Attorney General of United States*, 417 F.3d 408, 409-16 (3d Cir. 2005). Obviously, these are not issues in Parrott’s case. In the context of the ACCA, a “serious drug offense” is clearly defined, and Parrott’s convictions for cocaine and heroin possession with intent to distribute do qualify as predicate offenses.<sup>14</sup> *See supra* 10-11 and *supra* n.12. Parrott’s counsel was not ineffective for failing to cite caselaw that does not apply. *Sanders*, 165 F.3d at 253.

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<sup>14</sup> We note that we have reviewed the recently-published Supreme Court decision, *Johnson v. United States*, No. 13-7120, 2015 WL 2473450, at \*2-11 (2015), a case concerning the Armed Career Criminal Act. *Johnson* is inapplicable here, since its holding relates solely to the “residual clause” of the Act — 18 U.S.C. § 924(e)(2)(B) — which is not an issue in this Motion.

Lastly, Parrott argues that his guilty plea for the cocaine offense was not intelligent or voluntary, that it therefore should not have been used to qualify him as an Armed Career Criminal, and that counsel was ineffective for failing to raise that alleged error.<sup>15</sup> (Mot. 10; Pet'r's Br. 28-29.) However, there is no indication that Parrott ever challenged that guilty plea or the resulting 2004 conviction. Now, over ten years later, such a motion would be untimely. *See* § 2255(f). Once the door to collateral review has been closed, “the conviction becomes final and the defendant is not entitled to another bite at the apple simply because that conviction is later used to enhance another sentence.” *Daniels v. United States*, 532 U.S. 374, 383 (2001). Parrott's 2004 conviction for possession with intent to distribute cocaine is facially valid and was an appropriate predicate offense to enhance his sentence for this § 922(g) conviction. *See id.* at 382-84. Parrott's proposed argument to the contrary is meritless, and his counsel was not ineffective for declining to raise a meritless claim. *Sanders*, 165 F.3d at 253.

#### **E. Certificate of Appealability**

To qualify for a certificate of appealability, a habeas litigant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Since no reasonable jurist could disagree with the conclusion that Parrott's Motion lacks merit, no certificate of appealability can issue. *See id.*

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<sup>15</sup> In his brief, Parrott argues that “both guilty pleas for the prior convictions for the controlled substance offenses” were involuntary and unintelligent. (Pet'r's Br. 28.) But the record indicates that only the cocaine conviction was the result of a guilty plea; the heroin conviction was the result of a bench trial. (Gov't's Resp. Exs. 2-3.)

**V. CONCLUSION**

For the foregoing reasons, the Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is denied and no certificate of appealability will issue.

An appropriate order follows.

**BY THE COURT:**

A handwritten signature in black ink, appearing to read "R. Surrick", is written over a faint, illegible stamp or watermark.

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**R. BARCLAY SURRICK, J.**

