

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

**UNITED STATES**

**CRIMINAL ACTION**

**v.**

**JAMAL EZELL**

**NO. 02-815-01**

**DuBois, J.**

**August 18, 2015**

**MEMORANDUM**

**I. INTRODUCTION**

On May 6, 2005, after a jury trial, defendant Jamal Ezell was convicted of six counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and aiding and abetting, in violation of 18 U.S.C. § 2, and six counts of carrying and using a firearm during a crime of violence, and aiding and abetting, in violation of 18 U.S.C. §§ 924(c) and (2). Ezell was thereafter sentenced to, inter alia, a term of imprisonment of 7 years on the first § 924(c) count; consecutive terms of 25 years on each of the remaining five § 924(c) counts, pursuant to the statute's mandatory minimum sentencing provision; and one day for all counts of Hobbs Act robbery. Ezell's term of imprisonment for the six § 924(c) counts totaled 132 years. Presently before the Court is Ezell's Pro Se Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 ("pro se § 2255 Motion) and Counsel's Amended Motion Pursuant to Title 28 U.S.C. § 2255 ("Amended § 2255 Motion"). For the following reasons, the Court denies Ezell's pro se and Amended § 2255 Motions.

**II. BACKGROUND**

This case arose out of a two-week period in March 2002, when Ezell and his associates robbed six commercial establishments at gunpoint in three counties in and around Philadelphia.

There were three armed robberies in Upper Merion Township (Wine and Spirits Shop, Peoples Cleaners, and Hooters Restaurant), one in Upper Darby Township (ABC Auto Parts), and two in Philadelphia (Wine and Spirits Shop and Pizzeria Uno).

**A. Ezell's arrest and pretrial proceedings**

On May 17, 2002, Ezell was arrested by Philadelphia Police detectives and charged with the March 12, 2002 armed robbery of a Wine and Spirits Shop located at 1100 South Delaware Avenue in Philadelphia, Pennsylvania. At the time of his arrest, Ezell gave a statement confessing to this armed robbery and the March 5, 2002 armed robbery of a Wine and Spirits Shop in Upper Merion Township. On May 30, 2002, Ezell was transferred from the Philadelphia Prison System to Upper Merion Township and arrested by Upper Merion Township police detectives in connection with the armed robbery of the Upper Merion Township Wine and Spirits Shop. At that time, he confessed to that robbery, the armed robbery of a Peoples Cleaners on March 10, 2002, and the armed robbery of a Hooters Restaurant on March 15, 2002.

Subsequently, Ezell's case was adopted federally, at which time Ezell gave a proffer statement to FBI Special Agent Vito Roselli, admitting to his involvement in two additional robberies at issue in this case — the ABC Auto Parts in Upper Darby Township and the Pizzeria Uno in Philadelphia.<sup>1</sup> On December 17, 2002, a federal grand jury in the Eastern District of Pennsylvania returned a twelve-count indictment against Ezell, charging him with six counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and aiding and abetting, in violation of 18

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<sup>1</sup> The proffer agreement provided that if Ezell or his attorney took a factual position at trial which was different from or inconsistent with what Ezell told the Government in his proffer, then the Government could call Agent Roselli to testify at trial as to the contents of Ezell's proffer. (Ev. Hr'g Tr., Apr. 30, 2015, 43:9–16 (testimony of trial counsel Christopher Warren).)

U.S.C. § 2, and six counts of carrying and using a firearm during a crime of violence, and aiding and abetting, in violation of 18 U.S.C. §§ 924(c) and (2).

Prior to trial, Ezell was represented by a succession of three appointed attorneys: Eric Vos, Mark Cedrone, and Christopher Warren. Both Cedrone and Warren pursued plea negotiations with the Government on Ezell's behalf. At the time that Ezell was represented by Warren, the Government informed Warren that they were willing to offer Ezell a plea agreement of 32 years imprisonment without a requirement of cooperation. Warren conveyed the oral plea offer to Ezell, but Ezell declined to accept it and instead elected to proceed to trial. (Ev. Hr'g Tr., Apr. 30, 2015, 59:5–18.) Consequently, Warren never obtained a written plea offer from the Government to present to Ezell. (Id. at 60:3–11.)

## **B. Trial**

Trial was held from May 2 to May 6, 2005. Ezell was represented by Warren. At trial, Warren took the position that the Court lacked jurisdiction over the charged offenses because the robberies did not affect interstate commerce, as required under the Hobbs Act.<sup>2</sup> On this issue, he cross-examined witnesses to show that no customer transactions were being conducted at the time the robberies occurred and argued that, consequently, the robberies had an insufficient

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<sup>2</sup> The Hobbs Act, 18 U.S.C. § 1951(a), provides that, “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 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.” (emphasis added).

Pursuant to 18 U.S.C. § 1951(b)(3), the term “commerce” refers to “commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.”

effect on interstate commerce to support federal jurisdiction. This was the only defense that Warren presented at trial. To establish the robberies' effect on interstate commerce, the Government called witnesses from each establishment that was robbed to testify that the businesses obtained goods and services transported in interstate commerce.

In making its case against Ezell, the Government also introduced, inter alia, a number of photo line-ups during which five employees from three of the businesses that were robbed independently identified Ezell as a participant in the robberies; photo prints from a surveillance video showing Ezell and an associate at the time of the robbery of the Delaware Avenue Wine and Spirits Shop; photo prints of Ezell and an associate from a surveillance video of a Motel 6, which Ezell and his associate cased immediately before a robbery elsewhere; the testimony of two of Ezell's associates regarding the robberies and Ezell's role in them; and Ezell's two written confessions, covering four of the six robberies.<sup>3</sup> On May 6, 2005, the jury found Ezell guilty on all counts of the Indictment.

### **C. Sentencing**

On March 3, 2006, the Court sentenced Ezell to, inter alia, 132 years imprisonment on the six § 924(c) counts and one day imprisonment on all counts of Hobbs Act robbery.

A first conviction under 18 U.S.C. § 924(c) for carrying and using a firearm in furtherance of a crime of violence provides, inter alia, for a mandatory consecutive sentence of at least five years imprisonment. The penalty for that crime is increased to a mandatory consecutive sentence of at least seven years imprisonment if the defendant "brandishes" the firearm. Second

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<sup>3</sup> Prior to trial, Ezell filed a motion to suppress each of his two signed confessions. The Court denied the motion by Order dated August 31, 2004.

or subsequent convictions under § 924(c) require a consecutive sentence of at least 25 years imprisonment for each conviction.

On the first § 924(c) count, the Court sentenced Ezell to a term of imprisonment of seven years, as opposed to five years, because the Court determined that Ezell brandished a firearm during the commission of the offense. With respect to the second through sixth § 924(c) counts, the Court determined that, due to the first § 924(c) conviction, it was required under the statute to sentence Ezell to a term of imprisonment of 25 years for each second and subsequent § 924(c) conviction, to be served consecutively. Thus, under the statute, the Court was required to enter a sentence of 132 years imprisonment against Ezell for the six § 924(c) convictions. In its Memorandum on sentencing, the Court expressed its concern over the unduly harsh nature of this sentence, concluding that “sentencing Mr. Ezell to prison for longer than the remainder of his life is far in excess of what is required to accomplish all of the goals of sentencing.” United States v. Ezell, 417 F. Supp. 2d 667, 671 (E.D. Pa. 2006), aff’d 265 F. App’x 70 (3d Cir. 2008).

However, the Court reluctantly concluded that Ezell had presented no grounds for reducing the 132-year mandatory sentence and that it was bound by law to impose this sentence. Id. at 672.

#### **D. Procedural Background**

Ezell subsequently appealed his conviction and sentence to the U.S. Court of Appeals for the Third Circuit. That court affirmed the conviction and sentence on March 12, 2008. Ezell filed a Petition for Writ of Certiorari to the U.S. Supreme Court, which was denied on December 1, 2008.

Following his direct appeal, Ezell filed a Pro Se Motion to Alter or Amend the Judgment, on August 19, 2009. Ezell also moved the Court, in a letter filed September 17, 2009, to allow

him to proceed in forma pauperis and to appoint counsel to represent him in pursuing the Motion to Alter or Amend the Judgment. The Court granted Ezell's motions to proceed in forma pauperis and for appointment of counsel by order dated September 21, 2009. On the same date, by separate order, the Court appointed counsel NiaLena Caravasos to represent Ezell in all matters pending before the Court.

On November 20, 2009, Ezell filed his Pro Se Habeas Corpus Motion Under 28 U.S.C. § 2255. Between 2009 and 2012, counsel Caravasos represented Ezell before the Court; however, in October 2012, Caravasos filed a Motion for Leave to Withdraw on the ground that Ezell wished to pursue a strategy that presented counsel with a non-waivable conflict. Following a hearing on May 9, 2013, the Court granted Caravasos's Motion for Leave to Withdraw and appointed attorney Luther E. Weaver, III to represent Ezell with respect to his pending motions.

On September 17, 2013, Weaver filed Counsel's Amended Motion Pursuant to 28 U.S.C. § 2255. The Court held an evidentiary hearing on Ezell's pro se § 2255 Motion and Amended § 2255 Motion, on April 30, 2015, at which both Ezell and defense counsel Warren testified. Following the hearing, both Ezell and the Government submitted proposed findings of fact and conclusions of law to the Court with respect to the pro se § 2255 Motion and Amended § 2255 Motion. On May 28, 2015, the Court approved Ezell's request to withdraw his Pro Se Motion to Alter or Amend and proceed solely with his pro se § 2255 Motion and Amended § 2255 Motion.

### **III. DISCUSSION**

Presently before the Court is Ezell's Pro Se Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 and Counsel's Amended Motion Pursuant to Title 28 U.S.C. § 2255. In his pro se § 2255 Motion, Ezell asserted ineffective assistance of counsel claims

against defense counsel Eric Vos, Mark Cedrone, and Christopher Warren. Ezell formally withdrew all pro se claims against Vos and Cedrone at the April 30, 2015 evidentiary hearing. Only the pro se claims as to defense counsel Christopher Warren (hereinafter “defense counsel”) remain, namely that defense counsel provided ineffective assistance of counsel by: (1) failing to investigate the maximum and minimum sentence that Ezell was facing if convicted; (2) refusing to inform the Court of Ezell’s willingness to plead guilty, or to plead guilty only to certain elements of the charged offenses; (3) assuring Ezell that he could “beat this case”; and (4) failing to develop a theory of the case that would lessen Ezell’s role in the offense.

Ezell also brings four ineffective assistance of counsel claims against defense counsel in his Amended § 2255 Motion. These claims are: that defense counsel provided ineffective assistance at trial by (1) failing to object to the admissibility of bad acts evidence against Ezell, (2) pursuing a jurisdictional defense that defense counsel knew was contrary to law, and (3) presenting ineffective opening and closing arguments to the jury; defense counsel provided ineffective assistance of counsel during the plea bargaining process; and counsel’s overall performance denied Ezell a fair trial.

Finally, Ezell claims in his Amended § 2255 Motion that his sentence was imposed in violation of the Sixth Amendment because the Court determined two factual issues, which Ezell contends were required to be submitted to the jury pursuant to Alleyne v. United States, 133 S Ct. 2151 (2013): (1) that Ezell “brandished” a firearm pursuant to 18 U.S.C. § 924(c)(1)(A)(ii); and (2) that Ezell had a first § 924(c) conviction.<sup>4</sup> The Court addresses these claims in turn.

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<sup>4</sup> The Court notes that, although both of these claims are raised in Ezell’s counseled, amended § 2255 Motion, the second claim is asserted by Ezell pro se.

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

“Strickland v. Washington supplies the standard for addressing a claim of ineffective assistance of counsel.” United States v. Smack, 347 F.3d 533, 537 (3d Cir. 2003). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984).

The Strickland standard requires a two-part inquiry. “First, the defendant must show that counsel’s performance was deficient,” id. at 687, that is, “that counsel’s representation fell below an objective standard of reasonableness,” id. at 688. The measure for counsel’s performance under the first prong is “whether counsel’s assistance was reasonable considering all the circumstances,” including “[p]revailing norms of practice.” Id. “Second, the defendant must show that [counsel’s] deficient performance prejudiced the defense.” Id. at 687. With respect to the prejudice prong, the defendant is required to demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A “reasonable probability” is one that is “sufficient to undermine confidence in the outcome.” Id. Furthermore, “[t]he effect of counsel’s inadequate performance must be evaluated in light of the totality of the evidence at trial: ‘a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.’” United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) (quoting Strickland, 466 U.S. at 696).

### **1. Pro Se § 2255 Motion**

The Court first addresses the ineffective assistance of counsel claims against defense

counsel that Ezell raised pro se. Ezell claims that defense counsel provided ineffective assistance of counsel by: (1) failing to investigate the maximum and minimum sentence that Ezell was facing if convicted; (2) refusing to inform the Court of Ezell's willingness to plead guilty, or to plead guilty only to certain elements of the charged offenses; (3) assuring Ezell that he could "beat this case" and that Ezell "had nothing to worry about"; and (4) failing to develop a theory of the case that would lessen Ezell's role in the offense.

The Court notes that Ezell's fourth pro se claim overlaps with the claim in his Amended § 2255 Motion that defense counsel provided ineffective assistance by pursuing a jurisdictional defense that he knew was contrary to the law, and thus the Court addresses these claims together in Part III(A)(2)(c). As to the other claims, the Court concludes that none has merit. First, the record demonstrates that defense counsel did indeed investigate the minimum and maximum sentence that Ezell faced upon conviction. Defense counsel testified at the evidentiary hearing of April 30, 2015 that he informed Ezell as to his potential sentence, including the fact that he faced a mandatory minimum sentence of 132 years imprisonment if convicted, (Ev. Hr'g Tr. 57:5–12), and Ezell conceded that defense counsel discussed the mandatory minimum sentence with him prior to trial. (Id. at 91:22–25.)

Second, there is no support in the record for Ezell's claim that defense counsel failed to inform the Court of Ezell's willingness to plead guilty. Instead, the record demonstrates that defense counsel pursued plea negotiations with the Government on Ezell's behalf, but Ezell rejected the Government's oral plea offer and instead choose to proceed to trial. (See id. at 58–60.) Thus, plea negotiations never reached the stage where a plea agreement would have been presented to the Court.

Finally, defense counsel testified that he never informed Ezell that he could “beat this case” or that Ezell “had nothing to worry about”; instead, he told Ezell that, if he proceeded to trial, he would certainly be convicted. (Id. at 75:5–25.) At the evidentiary hearing, Ezell conceded that defense counsel informed him prior to trial that the evidence against him was overwhelming. (Id. at 100:11–15.) In short, the record demonstrates that defense counsel advised Ezell that he faced an uphill battle at trial.

For these reasons, the Court concludes that defense counsel was not constitutionally deficient with respect to these pro se claims, and thus denies Ezell’s pro se § 2255 Motion with respect to these three claims. The Court next turns to the claims in Ezell’s Amended § 2255 Motion and his remaining pro se ineffective assistance of counsel claim.

## **2. Counsel’s Amended § 2255 Motion<sup>5</sup>**

### **a) Timeliness of claims**

The Government first contends that two of Ezell’s counseled claims — that defense counsel provided ineffective assistance in failing to object to inadmissible bad acts testimony at trial and that defense counsel provided ineffective assistance in presenting his opening and closing statements — should be dismissed as untimely. The Government argues that these claims were raised for the first time in Ezell’s Amended § 2255 Motion of September 17, 2013, more than one year after Ezell’s judgment of conviction became final, and thus were raised after the one-year statute of limitations under 28 U.S.C. § 2255 had run. See 28 U.S.C. § 2255(f)(1) (“A 1-year period of limitation shall apply to a motion under this section....”). Furthermore, the

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<sup>5</sup> The Court includes in this discussion Ezell’s related remaining pro se ineffective assistance of counsel claim. See infra Part III(A)(2)(c).

Government contends that these claims do not relate back to the timely-filed pro se § 2255 Motion under Federal Rule of Civil Procedure 15(c). See Frazier v. United States, No. 02-186, 2009 WL 161691, at \*7 (W.D. Pa. Jan. 22, 2009) (noting that petitioner’s motion to amend his § 2255 motion was filed after the one-year statute of limitations had run but that the amended claims would not be time-barred if they related back to the original § 2255 motion). Ezell’s judgment of conviction became final on December 1, 2008, when the U.S. Supreme Court denied his Petition for Writ of Certiorari, and Ezell’s Amended § 2255 Motion was filed well after the one-year limitations period expired on December 1, 2009. However, the Court concludes that these amended claims relate back to those raised in Ezell’s original pro se filing and are therefore timely.

An amended habeas motion relates back to a timely-filed original motion where the “original and amended [motion] state claims that are tied to a common core of operative facts.” Mayle v. Felix, 545 U.S. 644, 664 (2005). In making this determination, the Court examines whether amendments to the § 2255 motion “restate the original claim with greater particularity or amplify the factual circumstances surrounding the pertinent conduct.” Glover v. F.D.I.C., 698 F.3d 139, 145–46 (3d Cir. 2012). Relation back does not exist where “the new claims depend upon events separate in both time and type from the originally raised episodes.” Mayle, 545 U.S. at 657.

In his original pro se § 2255 Motion, Ezell challenges defense counsel’s competence at trial, including what Ezell contends was counsel’s execution of a deficient trial strategy. Ezell’s amended claims simply “amplify the factual circumstances” surrounding defense counsel’s performance at trial by focusing on defense counsel’s presentation of his trial strategy to the jury

in his opening and closing arguments and his decision not to object to the introduction of certain evidence that Ezell contends was inadmissible. As the original and amended motions share a common core of operative fact, the Court concludes that the challenged claims relate back to the timely-filed original pro se § 2255 Motion. Thus, the Court proceeds to address these claims on the merits.

**b) Failure to object to inadmissible bad acts evidence**

In his Amended § 2255 Motion, Ezell claims that defense counsel provided ineffective assistance of counsel in failing to object at trial to the introduction of evidence of Ezell’s prior bad acts and that this failure prejudiced him as the evidence “would tend to establish in the minds of the jury that [Ezell] suffered prior arrests, possibly prior convictions, and that he was then currently imprisoned.” (Pet.’s Proposed Findings of Fact & Conclusions of Law 30.)

At trial, the jury heard testimony from Upper Darby Township Police Detective Donald Beese and Upper Merion Township Police Detective James Godby, in which the detectives explained how they put together the photo arrays that were shown to the robbery victims and used to identify Ezell as a participant in the robberies. In particular, Detective Beese testified that he put together a photo array that included a photo of Ezell he located in the Philadelphia Police Department database, (Trial Tr., May 5, 2005, 16:11–15), and Detective Godby testified that he located Ezell’s photo through the Criminal Photo Identification Network (“CPIN”), which he testified included anyone who was arrested in Pennsylvania in the preceding five years, (id. at 44:11–16, 45:14–20). Detective Godby also testified that, after he identified Ezell as a suspect in the robberies, he arranged for Ezell to be brought in “from the Philadelphia prison system” so

that he could be arrested in Montgomery County. (Id. at 51:22–24.) Defense counsel did not object to any of this testimony or request a curative instruction.

Ezell argues that this testimony suggested to the jury that he had prior arrests and convictions and was inadmissible under Federal Rule of Evidence (“FRE”) 404(b), which prohibits the introduction at trial of “[e]vidence of a crime, wrong or other act . . . to prove a person’s character in order to show that on a particular occasion the person acted in accordance with that character.” Fed. R. Ev. 404(b)(1). Although FRE 404(b) permits the introduction of such “bad acts” evidence for non-propensity purposes, “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident,” id. 404(b)(2), Ezell contends that this testimony served no permissible purpose: Ezell did not challenge his identity in the photographs and thus it was unnecessary for the Government to elicit testimony to prove the source of the photographs. (Am. § 2255 Mot. ¶¶ 22, 27–28.) As such, Ezell contends that defense counsel was constitutionally deficient in (1) failing to take steps prior to trial to determine whether the Government intended to introduce evidence of his prior arrests or convictions, and (2) failing to object to the detectives’ testimony or request a curative instruction at trial.

In response, the Government argues that defense counsel pursued a permissible trial strategy as he believed that the detectives’ statements were admissible for a non-propensity purpose under FRE 404(b), namely, to demonstrate how the photo arrays were put together. (Ev. Hr’g Tr., Apr. 30, 2015, 20:11–12.) The Government also points to defense counsel’s testimony at the evidentiary hearing that he did not object to the detectives’ statements because he did not wish to further highlight “anything about arrests.” (Id. at 31:1–6.) Finally, the Government

argues that Ezell was not prejudiced by defense counsel's failure to object to the testimony as the evidence presented against him at trial was overwhelming.

With respect to the first prong of Strickland, the Court recognizes that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. The Court, however, need not decide whether counsel's strategic decisions in this regard amounted to reasonable professional assistance, as the Court determines that counsel's performance did not prejudice Ezell. See Marshall v. Hendricks, 307 F.3d 36, 86–87 (3d Cir. 2002) ("[T]here is no reason for a court deciding an ineffective assistance claim ... even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

The evidence against Ezell was overwhelming: at trial, the Government introduced, inter alia, photo line-ups during which five employees from three of the businesses that were robbed independently identified Ezell as a participant in the robberies; testimony from two of Ezell's associates, who participated in the robberies and described Ezell's role in the robberies; surveillance photos of Ezell just before and during the commission of two robberies; and Ezell's written confessions to four of the six charged robberies. The Court concludes that, based on the formidable evidence presented at trial, there is no reasonable probability that the result of the proceeding would have been different had counsel inquired prior to trial as to whether the Government planned to introduce FRE 404(b) evidence or, at trial, objected to the detectives' testimony or requested a curative instruction. See, e.g., United States v. Martin, 262 F. App'x 392, 400 (3d Cir. 2008) (finding no prejudice in light of the "overwhelming evidence" against petitioner, including surveillance photos and the identification testimony of eyewitnesses); Baez

v. Grace, No. 06-5629, 2008 WL 2246312, at \*6 (E.D. Pa. May 29, 2008) (finding no prejudice in light of substantial evidence against petitioner, including petitioner’s incriminating statement to the police and eyewitness testimony against him). For this reason, the Court concludes that counsel’s performance in this regard did not prejudice Ezell, and thus the Court denies Ezell’s Amended § 2255 Motion with respect to this claim.

**c) Ineffective assistance of counsel in pursuing jurisdictional defense**

Ezell next claims that defense counsel provided ineffective assistance in pursuing a jurisdictional argument at trial that he knew was contrary to binding Third Circuit precedent. The Court also addresses Ezell’s related pro se claim that defense counsel provided ineffective assistance by failing to develop a theory of the case that would lessen Ezell’s role in the offense.

As discussed above, to establish the crime of robbery under the Hobbs Act, the Government must show, inter alia, that the robbery “obstructs, delays, or affects” interstate commerce. 18 U.S.C. § 1951(a). In United States v. Urban, the Third Circuit concluded that a jury could find an effect on interstate commerce for purposes of the Hobbs Act from the fact that the business in question purchased goods in interstate commerce and was deprived of funds by the prohibited act.<sup>6</sup> 404 F.3d 754 (3d Cir. 2005). At trial, however, defense counsel argued that none of the six robberies affected interstate commerce as the robbers, by design, robbed each of the commercial establishments when there were no customers inside transacting business; in other words, as the establishments were not conducting business at the time of the robberies, they

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<sup>6</sup> The Court instructed the jury as to the legal standard set forth in Urban. (See Trial Tr., May 6, 2005, 98:10–99:6.)

were not engaging in interstate commerce and thus the jurisdictional element of the Hobbs Act was not satisfied.

During the charging conference, defense counsel acknowledged that Urban was the controlling law on this issue. (Trial Tr., May 5, 2005, 89:4–5.) Defense counsel testified at the evidentiary hearing, however, that he believed the issue of whether the robberies had an effect on interstate commerce was a question of fact for the jury and thus the jurisdictional argument was a reasonable defense strategy. (Ev. Hr’g Tr., Apr. 30, 2015, 68:14–69:3.) Defense counsel also testified that he believed the jurisdictional argument to be the only viable defense given the evidence against Ezell, and that he was constrained from pursuing other defenses because any denial of factual guilt would have rendered admissible Agent Roselli’s testimony as to Ezell’s proffer statement, in which Ezell confessed to two additional robberies not included in his confessions to the state authorities. (Id. at 40:6–16, 43:9–16.)

Again, the Court need not reach the question of whether defense counsel’s choice of trial strategy was constitutionally deficient as the Court concludes that defense counsel’s reliance on a jurisdictional defense did not prejudice Ezell. The Third Circuit has instructed that, “[w]here the magnitude of the evidence against the defendant is such that he cannot show he was deprived of a reliable trial result, prejudice under Strickland is not met.” United States v. Calhoun, 600 F. App’x 842, 844–45 (3d Cir. 2015). As discussed above, the evidence against Ezell was overwhelming. Given the strength of the evidence against him, Ezell cannot show that counsel’s defense strategy deprived him of a reliable trial result or that there was a reasonable probability that any other defense strategy supported by the evidence would have produced a different result.

For these reasons, the Court denies Ezell's § 2255 Motions with respect to his pro se and counseled claims concerning counsel's jurisdictional defense.

**d) Ineffective opening and closing statements**

Ezell claims that defense counsel provided ineffective assistance of counsel in presenting his opening and closing statements at trial as he “essentially ... conceded” Ezell's guilt, (Am. § 2255 Mot. ¶ 34), and lent credibility to testimony presented against Ezell. Ezell makes a number of arguments with respect to this claim. First, Ezell contends that by presenting his jurisdictional strategy to the jury in his opening argument, defense counsel communicated to the jury that Ezell was indeed guilty of the robberies.<sup>7</sup> Second, Ezell argues that defense counsel conceded his guilt in his closing argument by reiterating that Ezell confessed to some of the robberies while in state custody; arguing to the jury that Ezell's associates who testified against him “embellished” his role in the robberies; telling the jury that they did not have to determine that Ezell was an “innocent man,” simply that the federal court did not have jurisdiction over the case; and failing to specifically request that the jury return a verdict of “not guilty.”

The Court first concludes that defense counsel was not constitutionally deficient in referencing Ezell's confessions in his closing argument or arguing that Ezell's associates had “embellished” his role in the robberies in their testimony. At the evidentiary hearing, defense counsel testified that he referenced Ezell's confessions — which had been read into evidence and testified to by multiple witnesses — in an attempt to present an argument that the jury would find

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<sup>7</sup> See Trial Tr., May 3, 2005, 29:20–25 (Defense Counsel: “And I suggest to you at the end of this case when you look at the evidence [the Government] present[s] and the way in which [these robberies] were planned and executed, you're going to come to the conclusion that this was not a Federal crime. A crime committed, a State crime, but not a Federal crime.”).

credible in the face of overwhelming evidence against Ezell. (Ev. Hr'g Tr., Apr. 30, 2015, 40–41.) With respect to his statement that Ezell's associates "embellished" Ezell's role in the robberies, defense counsel asserted that he was trying to make a credible argument that would diminish the weight of their testimony in the eyes of the jurors. (Id. at 46:9–14, 47:12–17, 51:10–16.) Counsel's strategic decisions in this regard are "precisely the sort of calculated risk that lies at the heart of an advocate's discretion." Yarborough v. Gentry, 540 U.S. 1, 9 (2003). Defense counsel's closing arguments, which acknowledged key pieces of undisputed evidence in the case, "might have built credibility with the jury and persuaded it to focus on" what defense counsel believed were the relevant issues, and as such, did not amount to constitutionally deficient performance. Id.

Second, with respect to Ezell's claim that defense counsel was ineffective in failing to explicitly request the jury to return a verdict for Ezell, the Court notes that the U.S. Supreme Court has held that it is not constitutionally deficient for defense counsel to only make a "passive request that the jury reach some verdict, rather than an express demand for acquittal." Id. at 10. For that reason, the Court concludes that defense counsel was not constitutionally deficient in this regard.

Finally, to the extent that Ezell's claim challenges the propriety of defense counsel's decision to pursue a jurisdictional defense, and his presentation of this defense in opening and closing argument, the Court reiterates its conclusion, supra, that defense counsel's choice of trial strategy did not prejudice Ezell's defense. Nor did defense counsel's other statements, discussed above, prejudice Ezell. In light of the formidable evidence presented at trial, there is no reasonable possibility that if defense counsel had presented a more artful opening or closing

statement the result of the proceeding would have been different. For these reasons, the Court denies Ezell's Amended § 2255 Motion with respect to his claims concerning defense counsel's opening and closing arguments.

**e) Ineffective assistance of counsel during plea negotiations**

Ezell claims that defense counsel provided ineffective assistance of counsel during plea negotiations, which led him to reject an oral plea offer of 32 years without cooperation, proceed to trial, and thereafter receive a sentence of 132 years and one day imprisonment. At the evidentiary hearing, Ezell testified that he declined to accept an oral plea offer of 32 years imprisonment because defense counsel did not provide him with the full discovery in his case and did not show him the surveillance videos from the Wine and Spirits Shop and Motel 6, images which were admitted in evidence at trial. (Ev. Hr'g Tr. 99:19–100:3, 106:24–107:4, 108:5–12.) Ezell further claims that defense counsel provided ineffective assistance during plea bargaining by (1) failing to secure a firm plea offer from the Government, (2) failing to obtain a proposed written plea agreement, and (3) advising Ezell that he could possibly win the case based on the jurisdictional defense. (Am. § 2255 Mot. ¶ 66.) For the following reasons, the Court concludes that defense counsel did not provide ineffective assistance of counsel during the plea bargaining process.

Defendants are “entitled to the effective assistance of competent counsel” during plea negotiations. Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012). Claims of ineffective assistance of counsel during the plea bargaining process are evaluated under the Strickland two-part test. See Hill v. Lockhart, 474 U.S. 52, 57 (1985); Frye, 132 S. Ct. at 1405. With respect to the performance prong of Strickland, defendant must show

“that counsel’s representation [during plea bargaining] fell below an objective standard of reasonableness.” Lafler, 132 S. Ct. at 1384. To establish the prejudice prong of Strickland, a defendant must show that “but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.” Id. at 1385.

The Court need not reach the prejudice prong of Strickland, as the Court determines that defense counsel was not constitutionally deficient in advising Ezell during the plea bargaining process. At the evidentiary hearing, defense counsel testified that, although he could not recall watching the surveillance videos with Ezell, he discussed all of the evidence, including the contents of the videos, with him. (Ev. Hr’g Tr., Apr. 30, 2015, 121:9–25.) He further stated that Ezell never told him that he would be in a better position to evaluate a plea offer if he could see the videotapes, and that, if he had, defense counsel would have “moved heaven and earth to let him see [the videos].” (Id. at 122:2–6.) Defense counsel also testified that he urged Ezell to accept the oral plea offer of 32 years imprisonment, advised him that he could not win his case, and told him that he would be convicted and sentenced to prison for 132 years if he proceeded to trial. (Id. at 75:7–76:4.) At the evidentiary hearing, Ezell conceded that defense counsel informed him that the evidence against him was overwhelming, and that, if convicted, he would be sentenced to a minimum of 132 years imprisonment. (Id. at 100:11–15, 104:18–22.)

In short, defense counsel’s conduct during the plea bargaining process was not constitutionally deficient as he fully informed Ezell of the evidence against him, including the contents of the surveillance videos; he informed Ezell that the evidence against him was overwhelming and that he would likely be convicted if he proceeded to trial; he warned Ezell of the sentence he would face if he declined to accept the oral plea offer and proceeded to trial; and he urged Ezell to accept the 32-year oral plea offer. Furthermore, as Ezell declined to accept the 32-year plea offer, negotiations never reached a stage where defense counsel could secure a firm offer or a written plea agreement. (*Id.* at 60:3–11.) For these reasons, the Court denies Ezell’s Amended § 2255 Motion with respect to his claims of ineffective assistance of counsel in the plea bargaining process.

**f) Counsel’s overall performance denied Ezell a fair trial**

Ezell next contends that defense counsel’s overall performance was so deficient that it denied him a fair trial. As discussed above, counsel’s performance, regardless of whether it amounted to reasonable professional assistance under the first prong of *Strickland*, did not prejudice Ezell so as to “deprive [him] of a reliable trial result.” *Calhoun*, 600 F. App’x at 844–45. Ezell faced overwhelming evidence against him, including, *inter alia*, his written confessions to four of the six robberies, identification of Ezell as a participant in the robberies by multiple eyewitnesses, and the testimony of two of his associates who participated in the robberies. Given this evidence, there is no reasonable probability that, if counsel had altered any of the strategic decisions discussed above, the jury would have returned a verdict for Ezell. For these reasons, the Court concludes that counsel’s overall performance did not prejudice Ezell and thus denies Ezell’s Amended § 2255 Motion as to this claim.

## **B. Denial of Sixth Amendment Right to Trial by Jury**

Finally, Ezell claims that his sentence was imposed in violation of the Sixth Amendment because the Court failed to submit to the jury two factual issues, the determination of which resulted in an increase in Ezell's sentence: (1) that Ezell "brandished" a firearm pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), which resulted in the Court imposing a mandatory minimum seven year sentence for the first § 924(c) conviction; and (2) that Ezell had a first § 924(c) conviction, which resulted in the Court imposing a mandatory minimum sentence of 25 years for each of the second and subsequent § 924(c) convictions.<sup>8</sup> Ezell contends that the Court was required to submit these issues to the jury for determination pursuant to Alleyne v. United States, 133 S Ct. 2151 (2013). Ezell also argues that his defense counsel provided ineffective assistance in not objecting to the Court, rather than the jury, making the determination that he had a first § 924(c) conviction. The Court rejects these arguments.

In Alleyne, the U.S. Supreme Court overturned its prior ruling in Harris v. United States, 536 U.S. 545 (2002), and held that under the Sixth Amendment, "any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime" and must be found beyond a reasonable doubt by the jury. 133 S. Ct. at 2160. However, the Third Circuit has held that Alleyne announced a new rule of criminal procedure that does not apply retroactively to cases on collateral review. United States v. Reyes, 755 F.3d 210, 212 (3d

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<sup>8</sup> Ezell raises both of these claims in his counseled Amended § 2255 Motion, but the second claim is brought pro se, while the first claim is counseled. (Am. § 2255 Mot. 22 n.5.)

Cir. 2014); United States v. Winkelman, 746 F.3d 134 (3d Cir. 2014).<sup>9</sup> Ezell’s conviction and sentence became final on December 1, 2008, when the U.S. Supreme Court denied his Petition for Writ of Certiorari; Alleyne was not decided until June 17, 2013. As Alleyne does not apply retroactively to cases on collateral review, Ezell is not entitled to rely on it and thus Ezell’s Alleyne claims fail.

Furthermore, Alleyne “do[es] nothing to restrict the established exception under Almendarez–Torres [v. United States], 523 U.S. 224 (1998)” which allows “a judge, rather than a jury, [to] determine the fact of a prior conviction.” United States v. Blair, 734 F.3d 218, 227 (3d Cir. 2013) (citation and internal quotation marks omitted). Thus, the Court properly determined the fact of Ezell’s first § 924(c) conviction, rather than submitting it to the jury. As “[c]ounsel cannot be deemed to have violated professional norms by failing to raise a meritless objection,” United States v. Mainor, No. 12-85, 2014 WL 1632188, at \*6 (E.D. Pa. Apr. 24, 2014), the Court also concludes that Ezell’s defense counsel was not constitutionally deficient in not objecting to the Court’s determination that Ezell had a first § 924(c) conviction.

For these reasons, the Court denies Ezell’s Amended § 2255 Motion as to these claims.

#### **IV. FINAL THOUGHTS**

In 2006, the Court expressed its reluctance to sentence Ezell to a prison term that would far exceed the remainder of his young life, and voiced its regret that such an unduly harsh sentence was the minimum required by law. The Court continues to be troubled by this grossly disproportionate and unjust sentence.

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<sup>9</sup> Ezell raised these claims in 2013, in his counseled Amended § 2255 Motion, prior to the Third Circuit ruling that Alleyne did not apply retroactively to cases on collateral review.

Ezell was twenty-one years old at the time he was first arrested by state authorities in connection with the robberies in this case; to date, he has spent almost 13 years in federal custody, and he will spend the rest of his life there. Ezell's situation is the result of three aspects of § 924(c): First, the statute provides for mandatory minimum sentences, which constrains the Court's usual discretion to adjust a sentence in a particular case in the interests of justice. Second, the statute requires the Court to impose a sentence of at least 25 years for each of a defendant's second or subsequent § 924(c) convictions, even when the first conviction is in the same case. Third, the mandatory sentences under § 924(c) must be served consecutively to each other and all other sentences in the case, a practice known as "stacking." In cases like Ezell's, where a defendant faces multiple §924(c) counts in the same proceeding, these provisions vastly increase the defendant's sentencing exposure, often in disproportion to the underlying offense.

Section 924(c)'s mandatory sentencing provisions are coming under increasing scrutiny, and rightly so. In 2011, the U.S. Sentencing Commission submitted a report urging Congress to consider amending the penalties for second or subsequent § 924(c) convictions to provide for lesser terms and to amend the statute to eliminate the statute's "stacking" requirement and give the sentencing court discretion to impose concurrent sentences for multiple violations of § 924(c). See U.S. Sentencing Comm'n, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, at 368 (Oct. 2011), available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_12.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf).

Significantly, in some federal districts, prosecutors have exercised their discretion to agree to a reduction of overly harsh mandatory sentences, in the § 924(c) context and others.<sup>10</sup> Perhaps most notably, in United States v. Holloway, Judge Gleeson of the Eastern District of New York, recognizing the excessive nature of defendant’s sentence on three § 924(c) convictions and defendant’s efforts to better himself while in prison, called on the U.S. Attorney’s Office to agree to an order vacating two of the three § 924(c) convictions so that Holloway could face a “more just resentencing.”<sup>11</sup> 68 F. Supp. 3d 310, 314 (E.D.N.Y. 2014). The U.S. Attorney’s Office, under the leadership of now-U.S. Attorney General Loretta Lynch, ultimately agreed to the Court’s vacatur of two of the three § 924(c) convictions, and the court proceeded to resentence Holloway on the remaining § 924(c) count. The Court believes that a similar exercise of prosecutorial discretion would be just and fair in Ezell’s case.

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<sup>10</sup> See, e.g., United States v. Williams, No. 12-cr-8 (D. Mont. Dec. 18, 2012) (approving with consent of the government dismissal of three of the four § 924(c) counts on which defendant had been convicted at trial); United States v. Hungerford, No. 03-cr-74 (D. Mont. Oct. 27, 2010) (upon agreement of the parties, granting Government’s motion to dismiss all but two counts of conviction, including six of seven § 924(c) counts); United States v. Martinez-Blanco, No. 06-cr-396 (N.D. Ga. Mar. 31, 2014) (order granting the joint motion of the parties to reduce mandatory sentence of life imprisonment, imposed pursuant to the Government’s filing of a notice under 21 U.S.C. §851, to a 25-year term); United States v. Washington, No. 11-cr-605, at \*12 (S.D.N.Y. July 31, 2014) (prior to sentencing, questioning the justice of imposing a 52-year mandatory sentence on defendant and urging the Government to consider “whether this is a sentence and an exercise of prosecutorial discretion worthy of the public’s trust and confidence”; the Government ultimately withdrew one § 924(c) count and the Court sentenced defendant to 27 years imprisonment).

<sup>11</sup> These events were precipitated by Holloway’s filing, in 2012, of a motion to reopen his § 2255 motion under Federal Rule of Civil Procedure 60(b). The U.S. Attorney’s Office ultimately agreed not to oppose the Rule 60(b) motion and stated on the record that they would not oppose the granting of the underlying § 2255 motion “for the purpose of vesting the court with authority to vacate two of the 924(c) convictions, and to proceed to resentence....” United States v. Holloway, 68 F. Supp. 3d 310, 315 (E.D.N.Y. 2014).

While the Court does not doubt the serious nature of the crimes for which Ezell was convicted and sentenced, and agrees that he deserved a lengthy prison sentence, Ezell is serving a sentence that far exceeds the average sentence faced by those who commit even more serious crimes of violence: In Fiscal Year 2014, for example, the average sentence in federal court for murder was just under 23 years — a stark contrast to the 132 years that Ezell is serving. See U.S. Sentencing Comm’n, 2014 Sourcebook of Federal Sentencing Statistics, tbl. 13 (2014), available at <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2014/sourcebook-2014>. Like Holloway, Ezell has also taken steps to better himself while in prison: Ezell reported to the Court in November 2014 that he had not had an incident report in prison in eight years and he had taken steps to pursue his education in prison, including earning his GED.

And yet the Court remains powerless under the law to ensure that justice is done in Ezell’s case. That power lies with the prosecutors involved in this case, at all levels, who are in a position to reconsider whether Ezell’s sentence “is a sentence and an exercise of prosecutorial discretion worthy of the public’s trust and confidence.” United States v. Washington, No. 11-605, slip op., at 12 (S.D.N.Y. July 31, 2014) (Sullivan, J.). As Judge Gleeson stated in the Holloway case, “It is the power to seek justice even after all appeals and collateral attacks have been exhausted and there is neither a claim of innocence nor any defect in the conviction or sentence. Even in those circumstances, a prosecutor can do justice by the simple act of going back into court and agreeing that justice should be done.” F. Supp. 3d at 311. The Court now calls on the Government to consider pursuing a joint motion of the parties to reduce Ezell’s sentence to a term of imprisonment that would better serve the interests of justice. The Court would welcome such an opportunity to see justice done in this case.

## V. CONCLUSION

For the reasons stated above, the Court denies Ezell's Pro Se Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 and Counsel's Amended Motion Pursuant to Title 28 U.S.C. § 2255. A certificate of appealability will not issue for any of Ezell's claims because reasonable jurists would not debate whether the petition states a valid claim of the denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2). See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

An appropriate order follows.

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

**UNITED STATES**

**CRIMINAL ACTION**

**v.**

**JAMAL EZELL**

**NO. 02-815-01**

**ORDER**

**AND NOW**, this 18th day of August, 2015, upon consideration of Pro Se Motion to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 (Document No. 196, filed November 20, 2009); Counsel’s Amended Motion Pursuant to Title 28 U.S.C. § 2255 (Document No. 225, filed September 17, 2013); Government’s Response to Petitioner’s Amended Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Document No. 231, filed February 18, 2014); Petitioner’s Memorandum in Reply to the Government’s Response to Petitioner’s Original and Amended Motions to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Document No. 233, filed March 25, 2014); Petitioner’s Proposed Findings of Fact and Conclusions of Law in Support of Petitioner’s Pro Se Motion and Counsel’s Amended Motion Pursuant to Title 28 U.S.C. § 2255 (Document No. 250, filed June 8, 2015); and Government’s Proposed Findings of Fact and Conclusions of Law

(Document No. 252, filed July 24, 2015), the Court having conducted an evidentiary hearing on April 30, 2015, for the reasons stated in the accompanying Memorandum dated August 18, 2015, **IT IS ORDERED** that the Pro Se Motion to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 and Counsel's Amended Motion Pursuant to Title 28 U.S.C. § 2255 are **DENIED**.

**IT IS FURTHER ORDERED** that a certificate of appealability will not issue because reasonable jurists would not debate whether the petition states a valid claim of the denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2). See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

**BY THE COURT:**

/s/ Hon. Jan E. DuBois

**DuBOIS, JAN E., J.**