

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

UNITED STATES OF AMERICA)	
)	Criminal Action
v.)	No. 09-cr-00212
)	
TIMOTHY SNARD,)	Civil Action
)	No. 13-cv-05630
Defendant)	

* * *

APPEARANCES:

NANCY E. POTTS, ESQUIRE
Assistant United States Attorney
On behalf of the United States of America

TIMOTHY SNARD
Defendant Pro Se

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

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This matter is before the court on several miscellaneous motions filed by defendant Timothy Snard, Pro Se, including a habeas corpus motion; two motions to amend the habeas corpus motions; and requests for transcripts, defense counsel notes, an evidentiary hearing, and a stay of his habeas corpus motion. For the reasons expressed, below, I grant defendant's initial motion to amend and deny his second motion to amend. I also deny defendant's habeas corpus motion, and requests for transcripts, defense counsel notes, a stay, and a Certificate of Appealability.

INTRODUCTION

This matter is before the court on the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Section 2255 Motion")(Document 88), together with defendant's Memorandum of Law in Support of Petitioner's 28 U.S.C. § 2255 ("Defendant's Memorandum"), filed by defendant Timothy Snard¹ pro se on September 25, 2013 (Document 88-1). The motion also requests that the court hold an evidentiary hearing on the within claims.

¹ Timothy Snard is one of defendant's several aliases and the name under which he was convicted in this case. Defendant's birth name is Victor Nathaniel Brewington. Presentence Investigation Report ("PSR") at page 2.

On October 25, 2013 defendant pro se also filed a Motion to Amend and/or Clarify Petitioner's § 2255 Pursuant to Fed.R.Civil.P. Rule 15(a) and (c) ("Motion to Amend") (Document 89).² On February 11, 2014 the United States' Memorandum in Opposition to Defendant's Motion to Vacate, Set Aside or Correct Sentence ("Government's Memorandum") was filed (Document 94).

On March 17, 2014 defendant filed a response to the government's response ("Defendant's Response") (Document 98) to his Section 2255 motion.

Defendant also requests the court to direct that his attorney's notes and the transcripts of his case be turned over to him pursuant to 28 U.S.C. §§ 753(f), 2250 and Rule 6 of the Rules Governing Section 2255 Proceedings for the United States District Courts ("Request for Transcript and Defense Counsel Notes"), which request was filed on March 17, 2014 (Document 97).

On May 22, 2015, defendant filed a motion for leave to clarify and expand his Section 2255 Motion ("Second Motion to

² The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat 1214, amended Section 2255 of Title 28 of the United States Code to include a one-year limitations period from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f). Defendant filed both his Section 2255 Motion and his Motion to Amend within one year of March 4, 2013, on which date the United States Supreme Court denied defendant's petition for certiorari. Thus, both motions are timely. See 28 U.S.C. § 2255(f).

Amend")(Document 99).³ Within the motion, defendant also requests a stay of his Section 2255 Motion while he appeals for

³ In the "Certificate of Service" of defendant's Second Motion to Amend, defendant certifies that a copy of the motion was sent to the office of respondent, the United States Attorney's Office, through the appropriate prison officials. Second Motion to Amend at page 13. However, the certificate also states, "clerk of the court, please notify the parties through electronic court filing." Id. (internal quotations omitted). This request suggests that defendant may not have properly served his motion upon the government pursuant to Federal Rule of Civil Procedure 4, despite the fact that each of defendant's prior motions were properly served. However, because defendant is pro se and because the government would have electronically received notice of the filing when it was docketed, I consider the Second Motion to Amend on the merits.

Defendant's Second Motion to Amend identifies three new claims not raised in either defendant's original Section 2255 Motion or his first Motion to Amend: (1) trial counsel provided ineffective assistance by failing to object to the inclusion of Detective Jeffrey Taylor's testimony about defendant's intent to sell crack cocaine and personally consume marijuana found in his hotel room, which testimony allegedly violated Federal Rule of Evidence 704(b); (2) trial counsel was ineffective in failing to object to testimony by Sergeant Kurt J. Tempinski that the firearm defendant possessed upon his arrest was manufactured in Brazil, which testimony defendant alleges constituted hearsay and violated the Confrontation Clause; and (3) trial counsel was ineffective by failing to raise the defense that defendant intended to personally consume the crack found in his possession, not sell it.

A petition for writ of habeas corpus may be amended in accordance with Federal Rule of Civil Procedure 15. See 28 U.S.C. §§ 2242; Mayle v. Felix, 545 U.S. 644, 649, 125 S.Ct. 2562, 2566, 162 L.Ed.2d 582, 589 (2005). An amended petition that is "tied to [the same] common core of operative facts" as the original section 2255 motion will relate back. Mayle, 545 U.S. at 664, 125 S.Ct. at 2574, 162 L.Ed.2d at 598. A new claim does not relate back when it is "supported by facts that differ in both time and type" from those in the original section 2255 motion. Mayle, 545 U.S. at 650, 125 S.Ct. at 2566, 162 L.Ed.2d at 590. See also Hodge v. United States, 554 F.3d 372, 378 (3d Cir. 2009).

The Second Motion to Amend was filed on May 22, 2015, well after the one-year statute of limitations for habeas corpus claims. See 28 U.S.C. § 2255(f). Moreover, none of defendant's new claims refer to any set of facts previously delineated in his original Section 2255 motion. Rather, defendant alleges three entirely different errors by trial counsel occurring at different times during trial. Thus, the three new claims raised in defendant's Second Motion to Amend do not relate back to his original habeas corpus petition. See Mayle, 545 U.S. at 650, 125 S.Ct. at 2566, 162 L.Ed.2d at 590. Accordingly, I conclude these claims are untimely and I do not consider them.

vacatur of his prior state court convictions.⁴

Finally, on October 9, 2015 (Document 100) and September 16, 2016 (Document 104) defendant filed what he styled a Notice of Supplemental Authority for the purpose of bringing to the court's attention additional cases in support of his arguments. Specifically, defendant cites the decisions of the United States Court of Appeals for the Third Circuit in Fisher v. Folz, 496 F.2d 333 (3d Cir 1973) and the more recent decisions in United States v. Vasquez-Algarin, 821 F.3d 467 (3d Cir. 2016) and United States v. Lowe, 791 F.3d 424 (3d Cir. 2015).

For the following reasons, I grant defendant's initial motion to amend his Section 2255 habeas corpus motion. I deny defendant's motion to vacate, set aside or correct sentence without an evidentiary hearing. In addition, defendant's request for stay of his Section 2255 Motion, trial transcripts, defense counsel's trial notes, and a Certificate of Appealability are also each denied.

⁴ Defendant pled guilty to possession of cocaine with intent to sell or deliver on April 4, 2000 in the Superior Court for Forsyth County, North Carolina and to selling cocaine on July 23, 2003 in Schenectady County, New York. PSR ¶ 26, n.2. Because both of these felony convictions involved controlled substances, defendant was classified as a career offender under section 4B1.1 of the United States Sentencing Guidelines, with a total offense level of 37. PSR ¶ 26.

PROCEDURAL HISTORY

Defendant Timothy Snard was indicted on March 31, 2009 on three counts: possession with intent to distribute five or more grams of cocaine base ("crack"), in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count One); possession of a firearm during and in furtherance of a drug trafficking crime (intent to distribute cocaine base), in violation of 18 U.S.C. § 924(c)(1) (Count Two); and convicted felon in possession of a firearm or ammunition in violation of 18 U.S.C. § 922(g)(1) (Count Three).⁵ Defendant's Motion to Suppress Evidence was filed on May 27, 2009.

After hearing held on August 20, 2009, I denied defendant's motion to suppress evidence by Order and Opinion dated September 27, 2009 and filed on September 28, 2009 (Documents 31 and 32).

The Government's Motion in Limine was filed on October 19, 2009, which sought to introduce evidence of defendant's prior felony drug conviction and the fact that defendant was arrested on the basis of an arrest warrant. A hearing on the motion in limine was held the same day. By Order

⁵ Indictment at page 1.

dated October 22, 2009 and filed October 30, 2009 (Document 51), I granted the government's motion in limine, ruling that the jury could be informed during trial of both defendant's prior felony conviction and outstanding arrest warrant. Therefore, I concluded that I did not need to bifurcate the charge of possession of a firearm by a convicted felon from the other two charges in the Indictment.

At the conclusion of the government's case-in-chief at trial, defendant moved for judgment of acquittal. I denied this motion by Order dated October 26, 2009 and filed October 27, 2009 (Document 47). On October 27, 2009 the jury found defendant guilty of all three charges contained in the Indictment.

On November 5, 2009 Defendant's Motion for New Trial was filed. On November 10, 2009 I dismissed Defendant's Motion for New Trial for failure to file a brief.

On February 24, 2010, I sentenced defendant to 264 months imprisonment, consisting of a term of 204 months on Count One and 120 months on Count Three, such terms to run concurrently; and 60 months on Count Two, such term to run consecutively to the sentence imposed on Count One. I further sentenced defendant to eight years of supervised release. Moreover, I imposed a special assessment of \$300.00 and imposed a fine of \$2,000.00.

On March 10, 2010 defendant filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit challenging his conviction and sentence on the following grounds: (1) the police violated his Fourth Amendment rights by searching his hotel room without a warrant, where they discovered illegal narcotics and a firearm; (2) defendant was entitled to a bifurcated trial because the evidence of his prior felony drug conviction was inadmissible under Federal Rule of Evidence 404(b); and (3) defendant's voir dire rights were violated because he was only able to question potential jurors before knowing the trial would not be bifurcated.⁶

United States v. Snard, 497 Fed.Appx. 228, 231-233 (3d Cir. 2012). On September 21, 2012, the Third Circuit affirmed defendant's conviction. Id. at 234.

Defendant then filed a petition for certiorari with the United States Supreme Court. The petition was denied on March 4, 2013. Snard v. United States, ___ U.S. ___, 133 S.Ct. 1508, 185 L.Ed.2d 560 (2013).

On August 5, 2013 defendant pro se filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Document 83). Defendant then

⁶ Defendant raised three other grounds on direct appeal to the United States Court of Appeals for the Third Circuit. However, the Third Circuit declined to consider those claims. United States v. Snard, 497 Fed.Appx. 228, 234 (3d Cir. 2012).

filed a Motion to Amend and/or Clarify Petitioner's § 2255 Pursuant to Fed.R.Civil.P. Rule 15(a) and (c) (Document 84) on August 9, 2013.

On August 23, 2013 defendant filed the Petition to Withdraw the 28 U.S.C. § 2255 and Supplemental Fed.R.Civil.P. Rule 15 (a) and (c) Petitions Without Prejudice. By Order dated August 29, 2013 and filed on August 30, 2013, I granted defendant's petition to withdraw his Section 2255 motion and dismissed the motion without prejudice to refile within the applicable statute of limitations.

On September 25, 2013, defendant filed the within Section 2255 Motion for habeas corpus relief.

CONTENTIONS OF THE PARTIES

Defendant's Contentions

Defendant collaterally challenges his sentence on six grounds of ineffective assistance of counsel, as well as attacking the constitutionality of his sentence pursuant to the decision of the United States Supreme Court in Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

Initially, defendant contends that his privately retained trial lawyer, Gregory L. Nester, Esquire, provided him ineffective assistance of counsel by failing to file the

following three post-trial motions: (1) for a new trial pursuant to Federal Rule of Criminal Procedure 33; (2) to arrest judgment pursuant to Federal Rule of Criminal Procedure 34; and (3) judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). In addition, defendant argues that his appellate counsel, Seth A. Neyhart, Esquire, was ineffective for failing to challenge trial counsel's inaction on direct appeal.

Second, defendant alleges that both his trial and appellate counsel were ineffective for failing to object to the inclusion at trial of certain testimony by Allentown Police Officer John Brixius. Specifically, defendant argues that Officer Brixius's testimony about a police radio call he received, which referred to information provided by defendant's girlfriend, Sade Johnson, to a police dispatcher, constituted hearsay and violated the Confrontation Clause of the United States Constitution.

Third, defendant contends that both his trial and appellate counsel provided ineffective assistance by failing to challenge the police entrance into his hotel room when defendant was arrested, which defendant claims violated his Fourth Amendment rights under the United States Constitution.

Fourth, defendant argues that both his trial and appellate counsel were ineffective by failing to object to the admission in evidence of statements defendant made before the

police read him his Miranda⁷ rights, which defendant claims violated his right to due process under the Fifth Amendment of the United States Constitution.

Fifth, defendant argues that both his trial and appellate counsel were ineffective for failing to object to the inclusion of "tainted evidence" at trial.⁸ He refers to 36 bags of crack cocaine that were admitted into evidence, only 12 of which had been tested by a laboratory, and evidence that a gun was found by Officer Brixius in defendant's hotel room. Defendant argues that his counsel should have objected to the inclusion of the untested bags and challenged the ownership of the gun.

Sixth, defendant contends that both his trial and appellate counsel were ineffective for failing to object to prosecutorial misconduct during his trial. Specifically, defendant alleges that the government asserted during closing argument that defendant and his girlfriend were operating a drug operation together out of their hotel room. Defendant contends that these comments were not based on trial evidence, and therefore prejudiced the jury's verdict, violating his due process rights.

⁷ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

⁸ Section 2255 Motion at page 9.

Finally, defendant contends that, pursuant to Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), defendant's sentence was unconstitutional because the Indictment did not allege, nor did the jury find beyond a reasonable doubt, every element of one of his offenses: possession of firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c). Defendant further avers that the court's jury instructions for this offense included the phrase "uses or carries," which language was not supported by the trial evidence. According to defendant, the inclusion of this language in the jury instructions prejudiced the jury and constituted violations of his Fifth Amendment due process rights and Sixth Amendment right to a jury trial.

Contentions of the Government

The government challenges each of defendant's ineffective-assistance-of-counsel claims as speculative and conclusory. Moreover, the government argues that defendant does not establish a constitutional claim under Alleyne, supra.

Specifically, the government contends that trial counsel's failure to file post-trial motions did not constitute ineffective assistance of trial defense counsel. The government argues that it was reasonable for trial counsel not to file

post-trial motions because those issues could be raised on direct appeal. Moreover, the government avers that defendant was not prejudiced by this inaction because defendant did, in fact, file a direct appeal.

The government argues that trial and appellate counsel were not ineffective in failing to object to the inclusion of Officer Brixius' testimony because his testimony did not constitute hearsay, nor did it violate the Confrontation Clause. Furthermore, the government argues that defendant has not demonstrated how he was prejudiced by defense counsel's failure to object to the testimony.

The government contends that defendant's trial and appellate counsel were not ineffective for failing to object to the police entrance into defendant's hotel room because the entrance was lawful. According to the government, the police had a valid arrest warrant for defendant, as well as a reasonable belief that defendant was inside the hotel room. Therefore, there was no reason for defense counsel to challenge the entry. The government argues that defendant has not established how he was prejudiced by counsel's failure to object to the entry.

The government asserts that defendant does not specify which of the statements of the defendant taken by the police were in violation of his Miranda rights and how the police may

have violated his rights, as well as how defendant was prejudiced by the statements. The government contends that the statements obtained before defendant was taken into custody were voluntary and thus did not violate his Miranda rights.

Accordingly, the government argues, it was not ineffective for defense counsel to fail to object to the inclusion in evidence, nor has defendant demonstrated how he was prejudiced by inclusion of the statements.

The government further contends that there was no error in defense counsel's failure to object to the admission of untested bags of crack and a gun found at defendant's hotel room. The government argues that defendant has not alleged how he was prejudiced by the untested bags of drugs, and that the jury still would have convicted defendant based on the tested bags even if the untested bags had been omitted. Moreover, the government argues that it is appropriate for the untested bags to be included in the calculation of the weight of the drugs for assessing defendant's sentence.

Regarding defendant's allegation that his trial counsel should have challenged the ownership of the gun, the government argues that the United States Court of Appeals for the Third Circuit has already ruled in this case that the evidence of gun possession was "sufficient" for a reasonable jury to convict defendant on both gun possession charges. Thus,

defense counsel acted reasonably in not challenging the gun ownership. Moreover, defendant does not demonstrate how he was prejudiced by his trial counsel's failure to challenge the ownership of the gun.

The government further contends that defense counsel was not ineffective for failing to object to the alleged prosecutorial misconduct of the government because no prosecutorial misconduct occurred. The government argues that the prosecutor's closing argument, which suggested that defendant and his girlfriend were selling drugs together out of the hotel room in which defendant was arrested, was supported by the evidence adduced at trial and was a reasonable and proper inference for the prosecutor to argue. Furthermore, the government argues that defendant has not demonstrated any prejudicial effect of the closing argument on his sentence.

Finally, the government contends that Alleyne is irrelevant because the defendant in that case was sentenced to a higher mandatory minimum sentence as a result of facts used by the court in sentencing but not found by a jury during trial. In this case, the government argues, there was no fact considered by the sentencing court that was not found by the jury, nor one which increased any mandatory minimum sentence applicable to defendant. Rather, the government argues that the jury was properly instructed, and defendant was properly

convicted, under the "possession" prong of 18 U.S.C. § 924(c), not the "use" or "carry" prongs.

STANDARD OF REVIEW

Section 2255 of Title 28 of the United States Code allows federal prisoners to file a motion to "vacate, set aside or correct" an unlawful sentence. 28 U.S.C. § 2255. Section 2255(a) provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

To bring a successful habeas corpus claim under section 2255, defendant must demonstrate the existence of a "fundamental defect which inherently results in a complete miscarriage of justice" or an "omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417, 421 (1962). Defendant may seek collateral relief under section 2255 on constitutional, jurisdictional, or statutory grounds. Id.

See also United States v. Williams, 615 F.2d 585, 589
(3d Cir. 1980).

DISCUSSION

Request for Stay of Section 2255 Motion

In his Second Motion to Amend, defendant requests that the court stay his Section 2255 Motion while he secures vacatur of the state court convictions which resulted in his classification as a federal career offender for purposes of his sentencing. For the following reasons, I deny defendant's request to hold his Section 2255 habeas corpus Motion in abeyance.

Vacating a state conviction that resulted in an enhancement to a defendant's sentence constitutes a "matter of fact" that may toll the one-year limitations period pursuant to 28 U.S.C. § 2255(f)(4), if the defendant exercised "due diligence" in attempting to get his state conviction vacated. Johnson v. United States, 544 U.S. 295, 302, 125 S.Ct. 1571, 1577, 161 L.Ed.2d 542, 552 (2005).

A district court has the discretion to stay a defendant's habeas petition while he exhausts such a state remedy if there is "good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no

indication that the petitioner engaged in intentionally dilatory litigation tactics.” Rhines v. Weber, 544 U.S. 269, 278, 125 S.Ct. 1528, 1535, 161 L.Ed.2d 440, 452 (2005). See also Pace v. DiGuglielmo, 544 U.S. 408, 416-17, 125 S.Ct. 1807, 1813-1814, 161 L.Ed.2d 669, 678 (2005); Heleva v. Brooks, 581 F.3d 187, 190 (3d Cir. 2009).

Granting defendant’s request for a stay would be an abuse of discretion in this case because defendant offers no evidence that would suggest his vacatur claims have merit. Rhines, 544 U.S. at 277, 125 S.Ct. at 1535, 161 L.Ed.2d at 451. Defendant does not provide any details of his alleged appeals in state court. He does not indicate the grounds for vacating his state convictions, nor does he list the case numbers or otherwise provide proof that such appeals are ongoing. Because defendant provides no details of his claims, it is impossible for the court to determine whether his claims are “potentially meritorious.” Rhines, 544 U.S. at 278, 125 S.Ct. at 1535, 161 L.Ed.2d at 452.

Defendant cites Purvis v. United States, 662 F.3d 939, 945 (7th Cir. 2011), for the proposition that an abeyance can be granted while a defendant pursues vacatur of a state court claim. However, in Purvis, the merit of the defendant’s claim was evident because the prosecutor had actually agreed to vacate the defendant’s conviction. 662 F.3d at 945. In contrast,

defendant in this case fails to establish that either of his state court convictions have a chance of being vacated.

Furthermore, defendant did not file his request for a stay and abeyance until May 22, 2015, approximately 20 months after defendant filed his original Section 2255 Motion. He offers no explanation as to why he waited to file this request for almost two years after filing his initial habeas petition. This unexplained delay suggests that defendant is merely engaging in "dilatory" methods. Rhines, 544 U.S. at 278, 125 S.Ct. at 1535, 161 L.Ed.2d at 452.

Accordingly, because defendant does not satisfy the second and third prongs of the Rhines test, I deny his request for a stay and abeyance of his Section 2255 habeas corpus Motion.

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel's act or omission was "professionally unreasonable." Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674, 696 (1984). In addition, the act or omission must have prejudiced the defense. 466 U.S. at 692, 104 S.Ct. at 2067, 80 L.Ed.2d at 696.

There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-695 (internal quotation omitted). Failing to raise a "meritless argument" cannot be construed as ineffective assistance of counsel. United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999) (citations omitted).

Failure to File Post-Trial Motions

Defendant contends that his trial counsel was ineffective for failing to file a motion for new trial, a motion for arrest of judgment, and a motion for judgment of acquittal. Furthermore, defendant contends that his appellate counsel was ineffective for not challenging trial counsel's failure to file the motions.

Defendant filed a motion for judgment of acquittal pursuant to Rule 29(a) after the government presented evidence and before defendant's case was submitted to the jury. I denied the motion on October 26, 2009 and memorialized this by Order filed on October 27, 2009 (Document 47). Defendant did not file a post-trial motion for judgment of acquittal.

On November 5, 2009, defendant also filed a motion for new trial. The motion was dismissed for failure to file a brief on November 10, 2009.

Defendant did not file a motion to arrest judgment.

Failure to file a post-trial motion does not constitute per se ineffective assistance of counsel. Cf. Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S.Ct. 2574, 2587, 91 L.Ed.2d 305, 325 (1986); Logmans v. Moore, 2005 WL 1106336, at *15 (D.N.J. Apr. 29, 2005); Khalif v. Hendricks, 2005 WL 2397227, at *17 (D.N.J. Sept. 28, 2005); Bagley v. Sherrer, 2007 WL 2908766, at *11 (D.N.J. Oct. 3, 2007). Rather, defendant must demonstrate both that the failure to file post-trial motions was unreasonable and that defendant suffered prejudice as a result of trial counsel's failure to file post-trial motions. See Kimmelman, 477 U.S. at 381, 384, 106 S.Ct. at 2586-2588, 91 L.Ed.2d at 323, 325.

Failure to file a baseless motion does not constitute ineffective assistance of counsel. See Sanders, 165 F.3d at 253, which held that failure to file a meritless suppression motion was not ineffective assistance of counsel. In United States v. Hart, 2008 WL 1900145, at *3 (E.D.Pa. Apr. 28, 2008) (Padova, S.J.), my colleague Senior United States District Judge John R. Padova held that failure to file a meritless motion for acquittal was not ineffective assistance of counsel.

Defendant does not articulate which issues would have formed the basis of the Rule 33, Rule 34, and Rule 29(c) motions. Defendant states only that trial counsel informed him that, "he would address the issues on appeal."⁹ Without knowing the issues which would have comprised the motions, it is impossible to definitively determine whether the motions had any merit and whether trial counsel's failure to file the motions was reasonable.

Nonetheless, because defendant is proceeding pro se, I attempt here to infer the issues to which he refers by examining defendant's first motion for judgment of acquittal and his motion for new trial, as well as the procedural guidelines for each of these three motions.

Motion for New Trial (Rule 33)

Defendant's motion for new trial, filed but dismissed for failure to file a brief, enumerated the following reasons for relief:

- (a) This Honorable Court should have granted defendant's pre-trial motion to suppress evidence;
- (b) This Honorable Court should have granted defendant's motion for judgment of acquittal made at the close of the Government's case

⁹ Defendant's Memorandum at page 3 (internal quotations omitted).

in chief because of insufficient evidence of guilt;

- (c) This Honorable Court should have permitted the selection of the jury from a single panel, namely the second day's panel, rather than combining the day one and day two jury panels because the voir dire questioning was inconsistent between the two panels;
- (d) This Honorable Court should have granted defendant's *Batson* challenge made promptly after the Government struck the only two African-Americans in the jury panel;
- (e) This Honorable Court should have granted a mistrial because certain members of the jury were in a position to hear a reference by the court that the defendant was in custody;
- (f) This Honorable Court should not have allowed the jury to hear evidence of defendant's prior criminal record, in particular defendant's prior drug conviction from New York, during trial;
- (g) This Honorable Court should not have ruled following the selection and swearing of the jury that the trial would not be bifurcated thereby denying defendant the opportunity to voir dire the jury panel concerning his prior drug conviction; and
- (h) This Honorable Court should not have summarized the witness' testimony to the jury during the court's charge to the jury.

Defendant's Motion for New Trial at pages 1-2.

Defendant states in his memorandum supporting his Section 2255 Motion that trial counsel informed defendant of his intent to raise the above issues on direct appeal. Appellate counsel did in fact raise several of these issues with the

United States Court of Appeals for the Third Circuit: (a), which referred to the warrantless search of defendant's hotel room; (b), that the trial evidence was insufficient to support a guilty verdict; (c) and (g), that defendant's voir dire rights were violated; and (f), that evidence of defendant's criminal record was inadmissible. Of the claims it considered, the Third Circuit found that none had merit.

Moreover, it is clear that no prejudice resulted to defendant because of trial counsel's failure to pursue a motion for new trial. Defendant does not suggest that any of these issues were procedurally defaulted as a result of trial counsel's inaction. Indeed, as just explained, several were pursued on direct appeal. Thus, because defendant was not prejudiced, trial counsel's failure to pursue a post-trial motion for new trial does not constitute ineffective assistance of counsel.

Furthermore, defendant does not argue in either his Section 2255 Motion or supporting memoranda that appellate counsel was ineffective for failing to raise on direct appeal any of the issues delineated in the motion for new trial. Rather, defendant contends only that appellate counsel was ineffective for failing to challenge trial counsel's decision not to pursue a motion for new trial. Accordingly, because I determine that trial counsel's omission was not ineffective

assistance of counsel, it was not ineffective assistance of appellate counsel to fail to challenge trial counsel's inaction.

Motion for Judgment of Acquittal

Defendant filed a motion for judgment of acquittal after the government presented its case, which was denied. While defendant did not file a post-trial motion for judgment of acquittal, he did raise on direct appeal to the Third Circuit the alleged insufficiency of the trial evidence to convict defendant of the two firearm possession offenses with which he was charged in the Indictment.¹⁰ The Third Circuit found this claim meritless, explaining that there was "ample evidence" from which a jury could find that defendant committed both firearm offenses. Snard, 497 Fed.Appx. at 231, n.1.

Furthermore, defendant suffered no prejudice from trial counsel's failure to raise the insufficiency of the evidence claim in a motion for acquittal because, as explained above, the claim was later brought on direct appeal by appellate counsel and denied by the Third Circuit. Accordingly, it was not ineffective assistance of trial counsel to reserve the insufficiency of the evidence issue for direct appeal instead of

¹⁰ Brief of Appellant, United States v. Snard, No. 64186-066 (3d Cir. Apr. 2, 2012), 2012 WL 1196942, at *2.

filing a post-trial motion for acquittal, nor was it ineffective assistance for appellate counsel not to challenge trial counsel's inaction.

Motion to Arrest Judgment

Under Federal Rule of Criminal Procedure 34, the court "must arrest judgment if the court does not have jurisdiction of the charged offense." This court clearly has subject matter jurisdiction over defendant's case.

Defendant was indicted and convicted under 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), 18 U.S.C. § 924(c), and 18 U.S.C. § 922(g)(1). All three offenses are federal offenses which occurred in the City of Allentown, Lehigh County, Pennsylvania, within this judicial district.

Thus, failure to file a motion to arrest judgment did not constitute ineffective assistance of counsel because there was no basis on which to file the motion. See Sanders, 165 F.3d at 253.

Accordingly, appellate counsel's failure to object to trial counsel's decision not to pursue the meritless motion does not constitute ineffective assistance of counsel.

**Failure to Object to Alleged Hearsay Testimony and to an Alleged
Violation of the Confrontation Clause**

Hearsay

Defendant argues that Officer Brixius' testimony regarding the police radio call he received which directed him to defendant's hotel room constituted hearsay, and that both trial counsel and appellate counsel were ineffective for failing to object to the testimony. I disagree.

Under Federal Rule of Evidence 801(c), hearsay is defined as "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed.R.Evid. 801.

Hearsay is inadmissible unless an exception applies. Fed.R.Evid. 802-803. The purpose for which a statement is introduced into evidence is often indicative of whether the statement constitutes hearsay. See United States v. Sallins, 993 F.2d 344, 346-347 (3d Cir. 1993), which found that testimony about the contents of a police radio call was hearsay because the purpose was to establish the fact that the defendant was present at the scene with a gun.

"The non-hearsay evidentiary function of testimony about a police radio call is to provide a 'background'

explanation for the testifying officer's actions—that is, to explain what the officer was doing at the scene.” United States v. Price, 458 F.3d 202, 208 (3d Cir. 2006). The officer should be permitted to justify his presence at the scene without revealing more than necessary to express that he was acting on “information received.” Id. (citing Sallins, 993 F.2d at 346).

Officer Brixius’ testimony regarding the police radio call he received on September 12, 2008 was clearly used to illustrate why he and other officers were at defendant’s hotel room, and nothing more. When asked about the contents of the dispatch from the Allentown Communications Center, Officer Brixius stated that it was regarding a “wanted party, someone with an arrest warrant” at room 434 of the Hotel Traylor.¹¹ He further stated, “the name that was given was Timothy Snard with a birthdate.”¹²

Officer Brixius then stated that he ran the name and birth date in the mobile version of the National Crimes Incident Center (“NCIC”), which confirmed that there was an active arrest warrant for Timothy Snard and which listed a description of the wanted person.¹³

¹¹ See Notes of Testimony of the jury trial conducted on October 23, 2009 in Allentown, Pennsylvania, styled “Transcript of Jury Trial (Day 4) Before the Honorable James Knoll Gardner[,] United States District Judge” (“N.T. 10/23/09”), at pages 5-6.

¹² Id. at page 5.

¹³ N.T. 10/23/09 at pages 5-7.

The government did not probe further into the details of the police radio call. Nor did the government refer to the contents of the police radio call during its closing argument to suggest that Officer Brixius' testimony spoke to the truth of defendant's possession of drugs or a gun.¹⁴ Rather, the testimony was used solely to establish how Officer Brixius and other police officers came to be present outside the door of defendant's hotel room. Price, 458 F.3d at 208.

Because the testimony was used for a non-hearsay purpose, Officer Brixius' statements were not hearsay. Thus, I conclude that defendant's claim that trial and appellate counsel failed to object to hearsay statements is meritless and does not constitute ineffective assistance of counsel. Sanders, 165 F.3d at 253.

Confrontation Clause

Next, defendant argues that Officer Brixius' testimony violated the Confrontation Clause of the United States Constitution, and thus trial and appellate counsel were ineffective for failing to object to his testimony. I disagree.

¹⁴ See Notes of Testimony of the jury trial conducted on October 27, 2009 in Allentown, Pennsylvania, styled "Partial Transcript of Jury Trial-Day 6 Before the Honorable James Knoll Gardner[,] United States District Judge", ("N.T. 10/27/09") at pages 4-21.

The Confrontation Clause prohibits the court from allowing "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177, 194 (2004). Testimonial statements are those used "to establish or prove past events potentially relevant to later criminal prosecution." Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 2274, 165 L.Ed.2d 224, 237 (2006).

Permissible nontestimonial statements, in contrast, "describe events that are presently unfolding," including "descriptions of present circumstances requiring police assistance." United States v. Cannon, 220 Fed.Appx. 104, 109 (3d Cir. 2007).

In Cannon, the United States Court of Appeals for the Third Circuit found that that a warning to police at the scene by an anonymous woman that the defendant had a gun was nontestimonial and did not violate the Confrontation Clause. Moreover, in United States v. Davis, 577 F.3d 660, 670 (6th Cir. 2009), the United States Court of Appeals for the Sixth Circuit found that a woman's 911 telephone call to police in which she stated that she saw the defendant with a gun did not violate the Confrontation Clause because it was not introduced to prove the "truth of the matter asserted."

As noted above, testimony of Officer Brixius' was not introduced to prove that defendant possessed a gun and drugs, but rather to explain why Brixius and other officers were present at his hotel room. See Washington, 547 U.S. at 822, 126 S.Ct. at 2274, 165 L.Ed.2d at 237; Davis, 577 F.3d at 670. Just as the statements in Cannon and Davis described contemporaneous circumstances where police assistance was necessary, so did the testimony of Officer Brixius establish the background in which his presence was needed at the scene. See Cannon, 220 Fed.Appx. at 109; Davis, 577 F.3d at 670. Thus, the statements of Officer Brixius were nontestimonial and did not violate the Confrontation Clause.

Because defendant's claim that the testimony of Officer Brixius violated the Confrontation Clause is without merit, trial and appellate counsel's failure to object to his testimony on that ground did not constitute ineffective assistance. Sanders, 165 F.3d at 253.

Failure to Object to Police Entrance Into Defendant's Hotel Room

Defendant claims that trial and appellate counsel's failure to object to the police's entrance into defendant's

hotel room constituted ineffective assistance of counsel in violation of his Fourth Amendment rights.

The warrantless search and seizure of a home is "presumptively unreasonable" and in violation of the Fourth Amendment. Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639, 651 (1980). However, "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." Payton, 445 U.S. at 603, 100 S.Ct. at 1388, 63 L.Ed.2d at 661 (1980). See also United States v. Veal, 453 F.3d 164, 167 (3d Cir. 2006).

For such an entry to be proper, the police must reasonably believe that the wanted person "(1) lived in the residence and (2) is within the residence at the time of entry." Veal, 453 F.3d at 167 (3d Cir. 2006) (citations omitted).

Here, police received a dispatch indicating that there was a warrant for Timothy Snard's arrest and that he was located in the hotel room. Officer Brixius confirmed that there was a valid arrest warrant for defendant through the National Crime Information Center ("NCIC") system. In Capone v. Marinelli, 868 F.2d 102, 105 (3d Cir. 1989), the Third Circuit determined that the arresting officer was reasonable in depending on a NCIC

bulletin which indicated there was an active arrest warrant for the defendant.

Here, the NCIC arrest warrant provided the wanted person's identifying characteristics. Furthermore, when defendant verbally answered the policeman's knock on the door, the police confirmed that a man was inside the hotel room.¹⁵ When the resident opened the door, the police saw a six-foot-five-inch black male, with a tattoo on his left arm that read, "Vic". These physical features matched the description provided by the NCIC warrant.¹⁶

Thus, it was reasonable for the police to believe that defendant lived in the hotel room and was in the hotel room when the police arrived. Accordingly, the police entrance into defendant's hotel room with a valid arrest warrant did not violate the Fourth Amendment.

Moreover, according to the trial record, the police did not forcefully enter defendant's hotel room.¹⁷ Rather, defendant opened the door of the hotel room voluntarily.

¹⁵ N.T. 10/23/09 at page 8.

¹⁶ Id. at pages 8-9.

¹⁷ Defendant suggests that the police improperly commanded him to open the door in a show of authority. Defendant's Response at page 7. However, the trial record does not support this contention.

An unreasonable seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." United States v. Smith, 575 F.3d 308, 312 (3d Cir. 2009)(citations omitted). Characteristics of such a seizure include "the

The police may knock forcefully on the door of a private citizen and inform the occupant of their presence, and the occupant maintains the right to decline to answer. See Kentucky v. King, ___ U.S. ___, ___, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865, 881 (2011).

Officer Brixius knocked on the hotel room door and, after a failed ruse, informed defendant that the Allentown police were outside and asked if he could open the door.¹⁸ Rather than electing not to answer, the defendant said, "I'll be

threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of

(Footnote 17 continued):

(Continuation of footnote 17):

language or tone of voice indicating that compliance with the officer's request might be compelled." Smith, 575 F.3d at 313 (citations omitted).

In his testimony, Officer Brixius stated that he first attempted a ruse by knocking on the door and saying he was "J." N.T. 10/23/09 at page 8. Defendant asked, "Who are you looking for?" Id. Officer Brixius replied, "T," to which defendant said, "you got the wrong room." Id. Officer Brixius then said, "It's the Allentown Police. Can you open the door?" Id. Defendant said, "I'll be right there." Id. After about 45 seconds, defendant opened the door. Id. Officer Brixius asked defendant to turn around. Id. at page 9. Defendant complied, and the police placed handcuffs on him in the doorway. Id.

At no point did Officer Brixius or other officers command (as opposed to request) defendant to open the hotel room door. While several officers were present at the door, nothing in the record indicates that a weapon was displayed or that the police's language or tone was forceful. The only physical touching of defendant that occurred was after defendant opened the door and the police placed handcuffs on him pursuant to a valid arrest warrant.

Thus, defendant's contention that he was forced to open the door because of the police's show of authority is unsubstantiated by the record.

¹⁸ N.T. 10/23/09 at page 8.

right there," and opened the door.¹⁹ The police placed handcuffs on defendant while he was standing in the doorway.²⁰

Therefore, the police entrance into defendant's hotel room was lawful because the entrance was both pursuant to a valid arrest warrant and because defendant voluntarily opened the door. Because defendant's contention that the police unlawfully entered his hotel room is without merit, trial and appellate counsel were not ineffective for failing to object to the entrance. Sanders, 165 F.3d at 253.

Finally, in his two notices of supplemental authority, defendant cites the decision of the United States Court of Appeals for the Third Circuit in Fisher v. Folz, 496 F.2d 333 (3d Cir 1973) and the more recent decisions in United States v. Vasquez-Algarin, 821 F.3d 467 (3d Cir. 2016) and United States v. Lowe, 791 F.3d 424 (3d Cir. 2015) in support of his contention that his previous lawyers were ineffective.

Those decisions are inapplicable to the facts and circumstances of this case because none of those cases involve factual circumstances similar to this case, i.e. execution of a valid arrest warrant and execution by law enforcement officials of a limited protective sweep of an area.

¹⁹ Id. at page 8.

²⁰ N.T. 10/23/09 at page 9.

Moreover, the United States Court of Appeals for the Third Circuit has already held that the search in this case fell under the exception to the warrant requirement known as the "protective sweep" doctrine enunciated in Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). See United States v. Snard, 497 Fed.Appx. at 232. Accordingly, for the foregoing reasons, I deny this aspect of defendant's motion.

Failure to Object to Pre-Miranda Statements

Defendant contends that trial and appellate counsel were ineffective for failing to object to statements that were allegedly taken in violation of defendant's Miranda rights. However, defendant does not provide any details of these alleged improper statements.

A defendant cannot meet his burden under the Strickland test by relying solely on conclusory statements of his counsel's ineffectiveness. See, e.g., United States v. Crawford, 1994 WL 672635, at *1 (E.D.Pa. Nov. 28, 1994) (McGlynn, J.); McPherson v. Lavan, 2002 WL 32341785, at *2 (E.D.Pa. Dec. 30, 2002) (Robreno, J.); United States v. Brown, 2013 WL 6182032, at *14 (M.D.Pa. Nov. 25, 2013); White v. United States, 930 F.Supp.2d 566, 569 (D.Del. 2013) subsequent mandamus

proceeding sub nom. In re White, 517 Fed.Appx. 70 (3d Cir. 2013).

Here, defendant fails to provide the court with any factual information to assess his claim. Defendant does not indicate which of his statements to the police were taken in violation of his Miranda rights, how those statements violated his rights, or how the statements prejudiced him. Rather, defendant offers only the conclusory allegation that "statement's [sic] were made in violation of the Fifth Amendment."²¹

Because defendant merely concludes that statements were taken in violation of his Miranda rights, I dismiss defendant's claim that trial and appellate counsel were ineffective for failing to object to object to the alleged statements.

Failure to Object to "Tainted" Evidence

Untested Bags of Cocaine Base

Defendant contends that trial and appellate counsel provided ineffective assistance of counsel by failing to object to the admission in evidence of 24 untested bags of cocaine base.

²¹ Section 2255 Motion at page 8.

Where the government estimates the weight of drugs in a defendant's possession based on a test sample, there must be "an adequate basis in fact for the extrapolation" and "the quantity [must be] determined in a manner consistent with accepted standards of reliability." United States v. McCutchen, 992 F.2d 22, 25-26 (3d Cir. 1993).

If a defendant is found in possession of many similar-looking containers of a substance, and if a sampling of those containers is tested and their contents are identified as cocaine base, it is reasonable to infer that cocaine base is in all of the containers. McCutchen, 992 F.2d at 26.

Here, laboratory tests were performed on a random sampling of 15 of the 39 plastic bags of white rock material found in defendant's hotel room.²² Expert witness Adam Shober of the Pennsylvania State Police Bethlehem Crime Laboratory testified that he performed color testing, infrared testing, and gas chromatography-mass spectrometer ("GCMS") testing on the contents of the 15 bags and determined to a reasonable scientific certainty that the substance in each tested bag was cocaine base.²³ Mr. Shober testified that while the bags were

²² Adam Shober of the Pennsylvania State Police Bethlehem Crime Laboratory testified that he performed analysis on a random 12 of the 36 bags of material he first received and that the contents of each of the 12 bags tested positive for cocaine base. N.T., 10/23/09 at pages 149 and 154-156. He testified that he was later sent three additional bags, all of which he tested and identified as cocaine base. Id. at pages 156-157.

²³ Id. at pages 149 and 154-157.

not "exactly uniform in size," all were "small plastic bag corners with an off-white substance."

Each plastic bag containing white rock material admitted into evidence was found in the same place in defendant's hotel room on the same day. Each of the bags looked similar, albeit slightly varied in size. Because the government determined to a reasonable standard of reliability that the tested samples contained cocaine base, it can be inferred that all 39 bags contained cocaine base. See McCutchen, 992 F.2d at 26.

Thus, it was proper to admit the untested bags into evidence because they were relevant to the determination of whether defendant possessed more than five grams of cocaine base. See Fed.R.Evid. 402 ("All relevant evidence is admissible").

Because objecting to the admission of the untested bags of cocaine base into evidence would have been meritless, trial and appellate counsel's failure to do so did not constitute ineffective assistance of counsel. Sanders, 165 F.3d at 253.

Ownership of the Gun

Next, defendant contends that his trial and appellate attorneys provided ineffective assistance of counsel by failing to argue that the gun found in defendant's hotel room should be excluded from evidence because it did not belong to defendant.

Constructive possession of a firearm requires that the defendant have "dominion and control" over the firearm, as well as knowledge that firearm exists. United States v. Zwibel, 181 Fed.Appx. 238, 241 (3d Cir. 2006)(citations omitted); see also United States v. Brown, 3 F.3d 673, 680 (3d Cir. 1993).

It was not necessary for the government to prove that defendant owned the gun in order to demonstrate that defendant possessed it. Moreover, the Third Circuit found that there was "ample evidence from which a jury could find both that Snard constructively possessed...the gun and that the gun was possessed in furtherance of the drug-trafficking offense." Snard, 497 Fed.Appx. at 234, n.1.

Thus, it was reasonable for trial and appellate counsel not to challenge the ownership of the gun because the question of ownership would not have been determinative of defendant's firearm possession. Accordingly, it was not ineffective assistance of counsel for trial and appellate counsel to fail to make a meritless objection about the lack of ownership of the gun. Sanders, 165 F.3d at 253.

Failure to Object to Prosecutorial Misconduct

Defendant alleges that trial and appellate counsel were ineffective for failing to object to the government's closing statement, in which the prosecutor suggested that defendant was selling drugs out of his hotel room with his girlfriend.

"The prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence." United States v. Werme, 939 F.2d 108, 117 (3d Cir. 1991) (citing United States v. Scarfo, 685 F.2d 842, 849 (3d Cir.1982)). In determining the impropriety of a prosecutor's closing argument, the court must find that the statement was "sufficiently prejudicial to violate the defendant's due process rights." Werme, 939 F.2d at 117 (citing Scarfo, 685 F.2d at 849).

The prosecutor did not refer to any facts outside of the record to support his suggestion, but rather referred only to the evidence in the record to draw a reasonable inference that defendant and his girlfriend were running a drug operation together out of the hotel room. Officer Brixius testified that the hotel room was registered to Sade Johnson and that there

were women's clothes lying next to the men's clothes in the hotel room.²⁴

Indeed, defense counsel also drew particular attention to these facts in closing argument to imply that the drugs found in the hotel room did not belong to defendant.²⁵ Moreover, Sade Johnson was the caller who informed police that defendant was in the hotel room with drugs and a gun, which suggests not only that she had knowledge of the drug operation, but also that she may have participated in it.

Because the prosecutor relied only on evidence in the record to draw a reasonable inference that defendant and his girlfriend were running a joint drug operation, the government's closing statement was not improper. Thus, trial and appellate counsel's failure to raise this meritless claim of prosecutorial misconduct does not constitute ineffective assistance of counsel. Sanders, 165 F.3d at 253.

Constitutionality of Defendant's Sentence Pursuant to *Alleyne v. United States*

Defendant contends that his sentence is unconstitutional pursuant to Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), because the jury did not

²⁴ N.T., 10/23/09 at pages 95 and 109-110.

²⁵ N.T., 10/27/09 at pages 23-25.

find beyond a reasonable doubt every element of one of the offenses charged in the Indictment: possession of a firearm in furtherance of drug trafficking, 18 U.S.C. § 924(c). Specifically, defendant alleges that the jury instructions included language from the "uses or carries" prong of 18 U.S.C. § 924(c)(1)(A), which caused a "constructive amendment" of the count alleged in the indictment and prejudiced the jury.²⁶

18 U.S.C. § 924(c)(1)(A) provides, in relevant part:

"[A]ny person who, during and in relation to any crime of violence or drug trafficking crime...uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime...(i) be sentenced to a term of imprisonment of not less than 5 years;

18 U.S.C. § 924(c)(1)(A).

Defendant's allegation that I included the "uses or carries" language of 18 U.S.C. § 924(c)(1)(A) when instructing the jury on Count II misrepresents the record.

Defendant was charged only with the "possession" prong of 18 U.S.C. § 924(c)(1)(A).²⁷ When I initially referred to Count II during the jury instructions, I stated that defendant was charged with "possession of a firearm in furtherance of a

²⁶ Motion to Amend at page 3.

²⁷ Indictment at page 2.

drug trafficking crime.”²⁸ I later reiterated Count II of the Indictment as “charging the defendant with possession of a firearm in furtherance of a drug trafficking crime.”²⁹

When providing the jury with the legal definition of Count II, I stated, “Count II of the indictment charges Timothy Snard with possessing a firearm in furtherance of a drug trafficking crime,” and informed the jury of the two elements they were required to find, “[f]irst, that Timothy Snard committed the crime of possession with intent to distribute as charged in Count I of the indictment. And second, that Timothy Snard knowingly possessed a firearm in furtherance of this crime.”³⁰ I then proceeded to instruct the jury on the definition of “possession.”³¹ I did not tell the jury that they needed to find that defendant used or carried a firearm.³²

Thus, defendant’s contention that the jury was prejudiced by the inclusion of “uses or carries” language in the jury instructions is baseless because no such language was included in the jury instructions.

²⁸ N.T., 10/27/09 at page 6 (emphasis added).

²⁹ Id. at page 48.

³⁰ N.T., 10/27/09 at page 54.

³¹ Id. at pages 55-57.

³² Id.

Moreover, Alleyne is not relevant to this case. Alleyne stands for the proposition that the jury must find beyond a reasonable doubt any fact that increases a defendant's mandatory minimum sentence. Alleyne, ___ U.S. at ___, 133 S.Ct. at 2162-63, 186 L.Ed.2d at 329-330.

A five-year mandatory minimum sentence was applicable to, and imposed upon defendant, for possession of a firearm in furtherance of drug trafficking pursuant to 18 U.S.C. § 924(c)(1)(A)(i).³³ Convicting defendant under the "use or carry" prong of 18 U.S.C. § 924(c)(1)(A) would have warranted the same five-year mandatory minimum sentence. 18 U.S.C. § 924(c)(1)(A)(i).

The relevant higher statutory mandatory minimums under 18 U.S.C. § 924(c)(1)(A) would have been 7 years imprisonment if defendant had "brandished" a firearm, 18 U.S.C. § 924(c)(1)(A)(ii), and 10 years imprisonment if defendant had "discharged" a firearm, 18 U.S.C. § 924(c)(1)(A)(iii). Neither of those enhancements were alleged in the Indictment or imposed upon defendant in sentencing.

Moreover, even if Alleyne were analogous to defendant's case, Alleyne may not be retroactively applied to

³³ PSR at page 1; See Notes of Testimony of the sentencing conducted on February 24, 2010 in Allentown, Pennsylvania, styled "Transcript of Sentencing Hearing Before the Honorable James Knoll Gardner[,] United States District Judge" at page 56.

cases on collateral review. United States v. Reyes,
755 F.3d 210, 212 (3d Cir. 2014).

Therefore, defendant's claim that his sentence for
Count II is unconstitutional pursuant to Alleyne is without
merit. Accordingly, I dismiss defendant's final ground for
habeas relief.

Evidentiary Hearing

I further dismiss defendant's motion without holding
an evidentiary hearing.

An evidentiary hearing is warranted for a habeas
corpus petition when "the petitioner has alleged facts that, if
proved, would entitle him to relief" and when "an evidentiary
hearing is necessary to establish the truth of those
allegations." Zettlemyer v. Fulcomer, 923 F.2d 284, 291 (3d
Cir. 1991) (citations omitted).

Whether an evidentiary hearing is ordered for a
section 2255 motion is committed to the district court's
discretion. Virgin Islands v. Forte, 865 F.2d 59, 62
(3d Cir. 1989). A district court "must order an evidentiary
hearing to determine the facts unless the motion and files and

records of the case show conclusively that [defendant] is not entitled to relief." Id.

Because I find that all seven of defendant's grounds for habeas corpus relief are meritless as a matter of law, a hearing on the matters is unnecessary. Thus, I deny defendant's request for an evidentiary hearing.

Request for Transcripts and Defense Counsel's Notes

Defendant requests that the transcripts of his case and defense counsel's notes pertaining to the testimony of Officer Brixius be turned over to him pursuant to 28 U.S.C. §§ 753(f), 2250 and Rule 6 of the Rules Governing Section 2255 Proceedings for the United States District Courts. For the following reasons, I deny defendant's request.

Transcripts

28 U.S.C. § 753 provides, in relevant part:

Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States...if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal.

28 U.S.C. § 753.

In a collateral appeal, the district court may provide transcripts to the defendant at the government's cost if defendant's claim is "not frivolous" and "the transcript is needed to decide the issue presented." United States v. MacCollom, 426 U.S. 317, 326, 96 S.Ct. 2086, 2092, 48 L.Ed.2d 666, 675 (1976)(plurality); see also United States v. Serrano, 562 Fed.Appx. 95, 97 (3d Cir. 2014).

Here, there is no indication that a transcript is essential to defendant's ability to prove any of his claims. Defendant merely states that he has a "particularized need" of the transcript because it will "refresh his recollection of proceedings that occurred many months previously" and "will allow Petitioner to disregard claims not supported by the record."³⁴ Defendant's explanation falls short of demonstrating why a transcript is "needed to decide the issue presented." MacCollom, 426 U.S. at 326, 96 S.Ct. at 2092, 48 L.Ed.2d at 675.

Moreover, defendant waited until after filing his initial Section 2255 Motion on September 25, 2013 and his Motion to Amend on October 25, 2013 before requesting a copy of the trial transcripts on March 17, 2014, the same day on which he filed his reply to the government's response to his Section 2255 Motion. In other words, by the time defendant requested his

³⁴ Request for Transcript and Defense Counsel Notes at pages 1-2.

transcripts, he had fully briefed his claims, supported by his own recollections of the trial record.

Defendant had also received a response to his Section 2255 Motion from the government by that time, which would have indicated which of defendant's factual recollections were unsupported by the trial record. Thus, it is difficult to believe that a transcript is necessary to aid defendant's ability to prove his claims in light of the fact that he was able to prepare several detailed briefs supporting his Section 2255 petition without the use of a trial transcript.

Furthermore, after examining the trial record, I determine that none of defendant's grounds for habeas corpus relief have merit as a matter of law.

Thus, defendant is not entitled to a transcript at government expense because a transcript is not needed for defendant to assert or prove his claims and because defendant has not demonstrated that his claims are nonfrivolous. MacCollom, 426 U.S. at 326, 96 S.Ct. at 2092, 48 L.Ed.2d at 675. Accordingly, I deny defendant's request for a transcript.

Defense Counsel's Notes

Pursuant to Rule 6 of the Rules Governing Section 2255 Proceedings, "[a] judge may, for good cause, authorize a party

to conduct discovery." Good cause exists "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief." Bracy v. Gramley, 520 U.S. 899, 908-09, 117 S.Ct. 1793, 1799, 138 L.Ed.2d 97, 106 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 300, 89 S.Ct. 1082, 1091, 22 L.Ed.2d 281, 291 (1969)). A discovery request amounting to a speculative "fishing expedition" should not be granted. Williams v. Beard, 637 F.3d 195, 210-11 (3d Cir. 2011).

Here, defendant's request for his attorney's notes is nothing more than a speculative "fishing expedition." Id. Defendant does not indicate how the notes would help demonstrate the merits of his claims, nor does he even suggest what facts he is looking for. Rather, he states only that he needs the notes to help refresh his memory. As discussed above, defendant was able to fully brief his Section 2255 Motion and his reply to the government's response without the contents of his attorney's notes. He filed the request for his attorney's notes on the same day as filing his reply brief to the government, which further indicates that defendant is merely grasping for additional information after having fully supported his claims.

Because defendant's discovery request is a mere "fishing expedition," I deny his request for his attorney's

notes as related to the cross-examination of Officer Brixius.
Id.

Certificate of Appealability

Pursuant to the Third Circuit Local Appellate Rules, “[a]t the time a final order denying a petition under 28 U.S.C. § 2244 or § 2255 is issued, the district judge will make a determination as to whether a certificate of appealability should issue.” 3d Cir. L.A.R. 22.2 (2015). The court shall issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

I find that jurists of reason would not contest the determination that defendant’s motion falls short of making a “substantial showing of the denial of a constitutional right.” Slack v. McDaniel, 529 U.S. 473, 483-484, 120 S.Ct. 1595, 1603-1604, 146 L.Ed.2d 542, 554 (2000). Thus, a certificate of appealability is denied.

CONCLUSION

For the above reasons, I dismiss defendant's motion to vacate, set aside, or correct sentence. In addition, defendant's request for an evidentiary hearing and his request for his trial transcript and the notes of defense counsel are denied. Furthermore, I deny a certificate of appealability.

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

UNITED STATES OF AMERICA)	
)	Criminal Action
v.)	No. 09-cr-00212
)	
TIMOTHY SNARD,)	Civil Action
)	No. 13-cv-05630
Defendant)	

O R D E R

NOW, this 29th day of September, 2016, upon consideration of the following documents:

- (1) Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Section 2255 Motion"), which motion was dated September 23, 2013 and filed by defendant pro se on September 25, 2013 (Document 88); together with
 - (A) Memorandum of Law in Support of Petitioner's 28 U.S.C. § 2255 (Document 88-1);
- (2) Motion to Amend and/or Clarify Petitioner's § 2255 Pursuant to Fed.R.Civil.P. Rule 15(a) and (c) ("Motion to Amend"), which motion was dated October 22, 2013 and filed by defendant pro se on October 25, 2013 (Document 89);
- (3) United States' Memorandum in Opposition to Defendant's Motion to Vacate, Set Aside or Correct Sentence, which memorandum was undated and filed February 11, 2014 (Document 94);
- (4) Request under 28 U.S.C. § 753(f), and Rule 6, Rules Gov. § 2255 Proceedings ("Request for Transcript and Defense Counsel Notes"), which request was dated March 11, 2014 filed by defendant pro se on March 17, 2014 (Document 97);
- (5) Response to the government's response to defendant's § 2255 Motion, which defendant's response was dated March 11, 2014 and filed by defendant pro se on March 17, 2014 (Document 98);

- (6) Motion for leave to clarify and expand defendant's Section 2255 Motion ("Second Motion to Amend"), which motion was undated and filed by defendant pro se on May 22, 2015 (Document 99);
- (7) Notice of Supplemental Authority, which notice was undated and filed by defendant pro se on October 9, 2015 (Document 100); and
- (8) Notice of Supplemental Authority, which notice was undated and filed by defendant pro se on September 16, 2016 (Document 104);

it appearing that, in his Section 2255 Motion, defendant requests that the court hold an evidentiary hearing on his claims; it further appearing that, in his Second Motion to Amend, defendant requests a stay of his Section 2255 Motion while he appeals for vacatur of his prior state court convictions;

IT IS ORDERED that defendant's Section 2255 Motion is denied.

IT IS FURTHER ORDERED that defendant's Motion to Amend is granted.

IT IS FURTHER ORDERED that defendant's Second Motion to Amend is denied.

IT IS FURTHER ORDERED that defendant's request for an evidentiary hearing on his claims is denied.

IT IS FURTHER ORDERED that defendant's Request for Transcript and Defense Counsel's Notes is denied.

IT IS FURTHER ORDERED that defendant's request for a stay of his Section 2255 Motion is denied.

IT IS FURTHER ORDERED that a Certificate of Appealability is denied.

IT IS FURTHER ORDERED that the Clerk of Court shall close these two cases for statistical purposes.

BY THE COURT:

/s/ JAMES KNOLL GARDNER
James Knoll Gardner
United States District Judge