

filed February 16, 2010, by defendant Angel Ferrer, pro se, which motion requests that the court vacate his sentence and conviction.

Defendant also filed a Motion to Amend and/or Supplement Movant's 28 U.S.C. § 2255 Motion Pursuant to Fed.R.Civ.P. Rule 15(a) and (c) ("Defendant's Second Motion to Amend")(Document 306) on February 10, 2009, which motion asks this court to hold his Section 2255 Motion in abeyance, grant him 180 days to submit an amended section 2255 motion, and grant his Second Motion to Amend.

On April 23, 2012 the government filed the Government's Opposition to Angel Ferrer's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Government's Opposition One")(Document 329).

On September 23, 2013 defendant filed Petitioner's Motion Requesting Leave of the Court to File a Motion to Amend/Supplemnt [sic] Mr. Ferrer's § 2255 Motion Presently

(Continuation of footnote 1):

Defendant's Third Section 2255 Motion encompasses all of the grounds raised in his Section 2255 Motion and his Second Section 2255 Motion. Therefore, I will consider defendant's Third Section 2255 Motion as the operative motion in this matter.

Similarly, defendant filed three memoranda of law. The three memoranda are identical. Therefore, because I will consider defendant's Third Section 2255 Motion as the operative motion in this matter, I will also consider the accompanying memorandum, Defendant's Third Memorandum, as the operative memorandum in this matter.

Pending Pursuant to Rule 15(a)(c) & (d), F.R.Civ.P., in Light of a New U.S. Supreme Court Precedent i.e., *Alleyne v. United States*, 2013 U.S. LEXIS 4543 (June 17, 2013) to Cure a Serious Fundamental Miscarriage of Justice ("Third Motion to Amend") (Document 375).

On October 8, 2013 the government filed Government's Opposition to Angel Ferrer's Motion for Leave to Amend his Section 2255 Petition ("Government's Opposition Two") (Document 378).

On June 8, 2015 defendant sent a letter to this court ("Fourth Motion to Amend") requesting that the court add the arguments raised in the section 2255 motion filed by his co-defendant David Nduka Bosah to defendant's pending section 2255 motion.

For the following reasons, I grant in part and deny in part defendant's Third Section 2255 Motion without an evidentiary hearing. Specifically, I grant the motion regarding his Double Jeopardy claims. In all other respects I deny his Third Section 2255 Motion. I dismiss defendant's Section 2255 Motion and Second Section 2255 Motion. I deny defendant's Motion to Amend, Second Motion to Amend, Third Motion to Amend and Fourth Motion to Amend.

PROCEDURAL HISTORY

On March 15, 2005 a federal grand jury in the Eastern District of Pennsylvania returned a thirteen-count Indictment against defendant and his five co-defendants, Argenis Pacheco Moscoso, Jason Lopez, Christian Delgado, David Nduka Bosah, and Joshua Baez, for their actions relating to the sale of crack cocaine in Reading, Berks County, Pennsylvania, between March 2003 and August 2004.

Specifically, defendant was charged with the following crimes:

- (1) Conspiracy to Distribute Cocaine Base ("Crack") in violation of 21 U.S.C. §§ 841(a)(1), 841(b)((1)(A), and 846 (Count One);
- (2) Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1) (Count Two);
- (3) Possession with Intent to Distribute Cocaine Base ("Crack") in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. § 2 (Counts Three and Ten);
- (4) Distribution of Cocaine Base ("Crack") in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2 (Counts Four, Six and Eight);
- (5) Distribution of Cocaine Base ("Crack") within 1,000 feet of a School in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a) and 18 U.S.C. § 2 (Counts Five, Seven and Nine);
- (6) Possession with Intent to Distribute Cocaine Base ("Crack") within 1,000 feet of a School in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 860(a) and 18 U.S.C. § 2 (Count Eleven);

- (7) Possession with Intent to Distribute Cocaine Base ("Crack") in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. § 2 (Count Twelve);
- (8) Possession with Intent to Distribute Cocaine Base ("Crack") within 1,000 feet of a School in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a) and 18 U.S.C. § 2 (Count Thirteen).

On November 28, 2005 defendant and his co-defendants began a three-week jury trial. Throughout the proceedings defendant was represented by court-appointed attorney Maureen C. Coggins, Esquire.

On December 21, 2005, at the conclusion of the trial, the jury found defendant guilty of nine counts in the Indictment. Defendant was convicted of one count of conspiracy to distribute cocaine base ("crack") in violation of 21 U.S.C. § 846 (Count One), three counts of distribution of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Counts Four, Six and Eight), three counts of distribution of cocaine base ("crack") within 1,000 feet of a school in violation of 21 U.S.C. § 860(a) (Counts Five, Seven and Nine), one count of possession with intent to distribute cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Count Ten), and one count of possession with intent to distribute cocaine base ("crack") within 1,000 feet of a school in violation of 21 U.S.C. § 860(a)

(Count Eleven). Defendant was acquitted of the remaining four counts.²

Following sentencing hearings conducted on July 31, 2006 and September 20, 2006, I imposed a sentence of 396 months imprisonment, a \$500 special assessment, and eight years of supervised release.

Defendant appealed his conviction to the United States Court of Appeals for the Third Circuit challenging his conviction on the grounds that: (1) the district court abused its discretion when it failed to remove Juror 3 or grant his motion for a mistrial; (2) the district court abused its discretion when it dismissed Juror 9 for inappropriate conduct over his objections; and (3) the admission of a co-defendant's state conviction "necessarily implicated [him]" and because he did not have an opportunity to cross-examine his co-defendant, his right under the Confrontation Clause was violated. United States v. Delgado, 289 Fed.App'x 497, 502-503 (3d Cir. 2008). On August 22, 2008 the United States Court of Appeals for the Third Circuit affirmed the judgment. Id. at 503.

² The jury found defendant not guilty of the following four counts: one count of possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 2); two counts of possession with intent to distribute cocaine base ("crack"), in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Counts Three and Twelve); and one count of possession with intent to distribute cocaine base ("crack"} within 1,000 feet of a school, in violation of 21 U.S.C. § 860(a) and 18 U.S.C. § 2.

Defendant then filed a petition for certiorari with the United States Supreme Court, which petition was denied on March 2, 2009. Ferrer v. United States, 555 U.S. 1217, 129 S.Ct. 1536, 173 L.Ed.2d 665 (2009).

On November 23, 2009 defendant filed his Motion to Amend, his Section 2255 Motion, and Defendant's Memorandum.

On January 19, 2010 defendant filed his Second Section 2255 Motion.

On February 16, 2010 defendant filed his Second Motion to Amend and Defendant's Second Memorandum. On February 16, 2010 defendant also filed his Third Section 2255 Motion and Defendant's Third Memorandum.

On April 23, 2012 the government filed Government's Opposition One.

On September 27, 2012 I was advised that defendant was eligible for a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) based upon amendments to the United States Sentencing Guidelines in 2011. I was further advised that the parties had agreed that defendant was eligible for sentence reduction.

On October 22, 2012 pursuant to section 3582(c)(2) and by agreement of the parties, I ordered that defendant's term of imprisonment be reduced from 396 months to 360 months.

On September 27, 2013 defendant filed his Third Motion to Amend, which requests this court grant him forty-five days to amend his Third Section 2255 Motion in light of the United States Supreme Court decision in Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). The government responded in opposition on October 8, 2013.

On June 8, 2015 defendant sent his Fourth Motion to Amend to this court in the form of a letter addressed to me requesting that the court add the arguments raised in his co-defendant's section 2255 motion to defendant's pending motion.

CONTENTIONS OF THE PARTIES

Defendant's Contentions

Defendant raises ten claims in his Third Section 2255 Motion (the operative motion in this matter).

The first two grounds raised by defendant in his Third Section 2255 Motion are closely related. In ground one, defendant contends that his attorney, Maureen C. Coggins, Esquire, provided him ineffective assistance of counsel because she "failed to raise the double jeopardy issue on direct appeal."³ Similarly, in ground two, defendant avers that his convictions under both 21 U.S.C. § 841(a) and 21 U.S.C. § 860 violated his rights under the double jeopardy clause and that

³ Third Section 2255 Motion at page 4.

this issue was not raised on direct appeal because appellate counsel was ineffective.

Defendant contends that his convictions under 21 U.S.C. § 841(a) and 21 U.S.C. § 860 are based on the same underlying conduct. Defendant argues that he has been punished twice for the same offense in violation of the rule established by the United States Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). In Blockburger, the Supreme Court established that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not". Blockburger, 284 U.S. at 304, 52 S.Ct. at 182, 76 L.Ed. at 309.

In ground three, defendant claims that the sentencing court did not comply with the requirements of Federal Rule of Criminal Procedure 32(c)(3)(D).

In ground four, defendant contends that the district court erred when it applied a three-level upward adjustment to his offense level. Defendant further states that this issue was not raised on direct appeal because counsel was ineffective.

In ground five, defendant avers that "[t]he District court committed error when it substituted alternate jurors for those excused without the movants consent".⁴

In ground six, defendant claims that "[i]t was error to Voir Dire [the] jury in the absence of movant".⁵

In ground seven, defendant contends that the trial judge invaded the province of the jury.

In ground eight, defendant avers that there was "[i]mproper vouching for [w]itness".⁶

In ground nine, defendant claims that his sentence violated "Apprendi/Booker, [sic] where indictment did not specify the amount of drugs and where the maximum sentence absent enhancements, was 10 years, according to the juries [sic] verdict."⁷

In ground ten, defendant avers that his conviction was obtained by use of unconstitutionally seized cell phone evidence.

⁴ See Third Section 2255 Motion at page 9.

⁵ Id.

⁶ Id.

⁷ Id.

In addition to filing three section 2255 motions, defendant has also asked this court for leave to amend said motions four times.

Defendant's First Motion to Amend is identical to his Second Motion to Amend. I will therefore consider them together. In these two motions, defendant asks this court to hold his Section 2255 Motion in abeyance, grant his motion to amend, and grant him 180 days to amend or supplement his Section 2255 Motion because "his entire memorandum of law is not currently a part of movant's pleadings".⁸

In his Third Motion to Amend, defendant seeks forty-five days to amend or supplement his Third Section 2255 Motion in light of the Supreme Court decision in Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). Defendant also requests that this court "issue a 'SHOW CAUSE ORDER' instructing the prosecuting attorney to fully respond to [defendant's] issues, Nos. 3, 4, and 9".⁹

Defendant contends that he should be granted leave to amend or supplement his Third Section 2255 Motion because he could "prevail, by stating a sixth amendment right to a jury

⁸ Motion to Amend at page 2.

⁹ Third Motion to Amend at page 3.

trial guarantee".¹⁰ Defendant also argues that he is only trying to provide "factual clarification or amplification" of the issues that the government did not previously respond to.¹¹

In his Fourth Motion to Amend, defendant, in the form of a letter addressed to me, requests that the court add the arguments raised in co-defendant David Nduka Bosah's section 2255 motion to defendant's currently pending section 2255 motion.

Government's Contentions

The government contends that the claims raised in defendant's Third Section 2255 Motion (the operative motion in this matter) are meritless.

Initially, the government avers that defendant's ineffective assistance of appellate counsel claim must fail because the underlying double jeopardy argument is meritless. The government contends that defendant cannot demonstrate ineffective assistance of appellate counsel because the record evinces that defendant was not punished for the same offense under both section 841(a)(1) and section 860.

¹⁰ Third Motion to Amend at page 5.

¹¹ Id.

The government contends that the district court properly treated defendant's violations of section 841(a)(1) as lesser included offenses of his section 860 convictions.

Next, the government makes no response to the remainder of defendant's claims because the additional grounds for relief are "identified only by a heading and are devoid of any factual or legal support" and "raise alleged trial errors that are not of a jurisdictional or constitutional dimension".¹²

Moreover, the government contends that defendant's Third Section 2255 Motion should be dismissed without an evidentiary hearing because defendant presents meritless legal issues and no disputed facts.

Finally, the government avers that defendant should not be granted a certificate of appealability because defendant has not made a substantial showing that he has been denied a constitutional right.

Regarding defendant's Third Motion to Amend, the government contends that the defendant should not be granted leave to amend his Third Section 2255 Motion in light of the United States Supreme Court's decision in Alleyne, supra, because Alleyne does not apply retroactively.

¹² See Government's Opposition One at page 3, footnote 2.

STANDARD OF REVIEW

Section 2255 of Title 28 of the United States Code provides federal prisoners with a vehicle for challenging an unlawfully imposed sentence. Section 2255 provides, in relevant part:

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).

A motion to vacate sentence under section 2255 "is addressed to the sound discretion of the district court". United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). A petitioner may prevail on a section 2255 habeas claim only by demonstrating that an error of law was constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or an "omission inconsistent with 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).

DISCUSSION

A section 2255 motion cannot be used as a substitute for a direct appeal. United States v. Smith, 235 F.Supp.2d 418, 426 (E.D.Pa. 2002)(Dubois, S.J.). In general, the failure to raise an issue on direct appeal constitutes waiver, and the procedural default prevents the claim from being raised in a section 2255 motion unless the defendant can show both cause for the failure to raise the issue and actual prejudice, or the defendant can show actual innocence. Bousley v. United States, 523 U.S. 614, 622, 118 S.Ct. 1604, 1611, 140 L.Ed.2d 828, 839-840 (1998); United States v. Mannino, 212 F.3d 835, 839-840 (3d Cir. 2000).

“‘Cause’ must be objective - something external to the petitioner, something that cannot be fairly attributed to him.” Smith, 235 F.Supp.2d at 426 (citing Coleman v. Thompson, 501 U.S. 722, 751, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640, 670 (1991); Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397, 408 (1986)). To show prejudice, defendant must establish that the alleged error “worked to his *actual* and substantial disadvantage”, and that it infected the proceedings with “error of constitutional dimensions.” United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982)(emphasis in original).

However, the United States Supreme Court has held that the procedural default rule does not apply to ineffectiveness claims in section 2255 motions, and instead "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the [defendant] could have raised the claim on direct appeal." Massaro v. United States, 538 U.S. 500, 504, 123 S.Ct. 1690, 1694, 155 L.Ed.2d 714, 720 (2003); see also United States v. Davies, 394 F.3d 182, 188 & n.5 (3d Cir. 2005).

Accordingly, although defendant raises his ineffective assistance of counsel claims (ground one, ground two, and ground four) for the first time in his petition, I proceed to address these three claims.

Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel involves two elements which must be shown by defendant: (1) counsel's performance must have been deficient, meaning that counsel made errors so serious that he was not functioning as "the counsel" guaranteed by the Sixth Amendment; and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984).

To establish a deficiency in counsel's performance, a convicted defendant must demonstrate that the representation fell below an "objective standard of reasonableness" based on the particular facts of the case and viewed at the time of counsel's conduct. Strickland, 466 U.S. at 688, 104 S.Ct. at 2064-2065, 80 L.Ed.2d at 693-694; Senk v. Zimmerman, 886 F.2d 611, 615 (3d Cir. 1989).

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." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-695 (internal quotations omitted).

To establish the second Strickland prong, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Counsel's errors must have been so serious that they deprived defendant of a "fair trial" with a "reliable" result. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

Double Jeopardy Claims

As stated above, in both ground one and ground two of his Third Section 2255 Motion, defendant alleges that his counsel, Maureen C. Coggins, Esquire, was ineffective for failing to raise the argument that his convictions under both 21 U.S.C. § 841(a) and 21 U.S.C. § 860 for the same underlying conduct violated his rights under the Double Jeopardy Clause. Therefore, I will address these claims together.

The Double Jeopardy Clause provides that a defendant shall not receive two punishments for the same offense. U.S. CONST. amend V. A defendant may not be punished under two different statutes for the same conduct unless "each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932).

Specifically, a court should not sentence a defendant for both a lesser-included offense and the greater offense. Rutledge v. United States, 517 U.S. 292, 297, 116 S.Ct. 1241, 1245, 134 L.Ed.2d 419, 425 (1996). In the context of greater offenses and lesser-included offenses, the United States Supreme Court has explained that both the second conviction and the second sentence are impermissible punishments that violate the Double Jeopardy Clause. See Rutledge, 517 U.S. at 302,

116 S.Ct. at 1248, 134 L.Ed.2d at 429 (citing Ball v. United States, 470 U.S. 856, 864-865, 105 S.Ct. 1668, 1673, 84 L.Ed.2d 740, 748 (1985)). The Supreme Court reasoned that:

[t]he separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.

Ball at 470 U.S. at 865, 105 S.Ct. at 1668, 84 L.Ed.2d at 748.

In United States v. Jackson, 443 F.3d 293, 301 (3d Cir. 2006), the United States Court of Appeals for the Third Circuit held that 21 U.S.C. § 841(a)(1) is a lesser-included offense of 21 U.S.C. § 860(a). In Jackson, the Third Circuit held that the district court erred when it sentenced Jackson for violating both section 841(a) and section 860(a). Id. at 301. The Third Circuit reasoned that district court failed to consider section 841(a) as a lesser-included offense because the court imposed a \$200 special assessment rather than a \$100 special assessment. Id. To remedy the error, the Third Circuit vacated both the defendant's conviction and sentence for violating section 841(a)(1). Id. at 302.

Here, defendant was found guilty of nine separate counts: one count of conspiracy to distribute cocaine base ("crack") in violation of 21 U.S.C. § 846 (Count One), three counts of distribution of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Counts Four, Six and Eight), three counts of distribution of cocaine base ("crack") within 1,000 feet of a school in violation of 21 U.S.C. § 860(a) (Counts Five, Seven and Nine), possession with intent to distribute cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Count Ten), and possession with intent to distribute cocaine base ("crack") within 1,000 feet of a school in violation of 21 U.S.C. § 860(a) (Count Eleven).

In light of the Third Circuit's precedent in Jackson, supra, I must vacate defendant's four convictions under section 841(a)(1) (Counts Four, Six, Eight and Ten) because they are lesser-included offenses of his convictions under section 860(a) (Counts Five, Seven, Nine and Eleven) for the same underlying conduct.

However, I need not resentence defendant because it is clear that, for purposes of sentencing, I properly treated defendant's four convictions under section 841(a)(1) as lesser-included offenses of section 860(a) and did not impose a duplicative sentence on the section 841(a) counts.

Initially, in contrast to Jackson, where the defendant faced a \$200 special assessment (with \$100 attributable to his conviction under section 841(a) and \$100 attributable to his conviction under section 860(a)), I only imposed a \$500 special assessment on defendant, even though defendant was convicted of nine separate counts.¹³ It is clear that \$100 of defendant's special assessment is attributable to his conspiracy conviction (Count One) and the remaining \$400 is attributable to his four convictions under section 860(a). No portion of the special assessment I imposed on defendant is attributable to his erroneous convictions under section 841(a)(1).

Next, the Presentence Investigation Report specifically reflected the concept that defendant should not receive a special assessment or fine based on his convictions under section 841(a)(1) because they are lesser-included offenses of his convictions under section 860(a).¹⁴

Finally, I sentenced defendant to 396 months imprisonment, without attributing that term to any specific count. However, the transcript of the sentencing hearing clearly indicates that defendant's term of imprisonment is based

¹³ See Judgment in a Criminal Case at page 6.

¹⁴ See Presentence Investigation Report at page 32, footnote 7.

on his conviction for conspiracy.¹⁵ Specifically, in my explanation of my reasons for imposing defendant's sentence, I emphasized defendant's role as an organizer of the drug conspiracy, the extended duration of the conspiracy, and the quantity of drugs sold throughout the conspiracy.¹⁶

Moreover, I emphasized that because of the seriousness of the conspiracy "[t]he [Sentencing] Guideline range begins and ends at life imprisonment".¹⁷

Therefore, although I must vacate defendant's four convictions under section 841(a)(1) (Counts Four, Six, Eight and Ten) because they are lesser-included offenses of his convictions under section 860(a) (Counts Five, Seven, Nine and Eleven) and constitute impermissible punishment in violation of the Double Jeopardy Clause, I need not resentence defendant because no part of his original sentence is attributable to his convictions under section 841(a)(1).

Even without the four erroneous convictions under section 841(a)(1), I would still sentence defendant to the same term of imprisonment.

¹⁵ See Notes of Testimony of the sentencing hearing conducted on September 20, 2006 before me in Allentown, Pennsylvania, styled "Sentencing Hearing before the Honorable James Knoll Gardner[,] United States District Court Judge" ("N.T."), at pages 97 and 100-113.

¹⁶ Id. at pages 100-102 and 104.

¹⁷ Id. at page 104.

Because I conclude that defendant's double jeopardy claim is meritorious, I must also conclude that defendant's appellate counsel, Attorney Maureen C. Coggins, was ineffective for failing to raise this issue on appeal.

Defendant has satisfied both prongs of the Strickland test. First, defendant has established that Attorney Coggins performance was deficient and fell below an "objective standard of reasonableness". Strickland, 466 U.S. at 688, 104 S.Ct. at 2064-2065, 80 L.Ed.2d at 693-694.

It was clear from defendant's Judgment in a Criminal Case that he was convicted under both section 841(a)(1) and section 860(a).¹⁸ While there is no general duty to predict changes in the law, an attorney must stay informed of changes in the law. See United States v. Davies, 394 F.3d 182, 189 (3d Cir. 2005) (citing Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989)). Here, Jackson was decided on April 5, 2006, prior to imposition of defendant's sentence on September 20, 2006.

Despite the fact that more than five months elapsed from the decision in Jackson to defendant's sentencing, Attorney Coggins, did not raise the double jeopardy issue in defendant's

¹⁸ See Judgment in a Criminal Case at pages 1-2.

direct appeal to the Third Circuit. See United States v. Delgado, 289 Fed.App'x 497 (3d Cir. 2008).

Second, defendant has established that he was prejudiced by Attorney Coggins deficient performance because for the past ten years, defendant's criminal history improperly reflected four convictions under section 841(a) in addition to his four lawful convictions under section 860(a). As the Supreme Court has noted, each separate conviction carries independent collateral consequences, such as societal stigma and a delay in the defendant's eligibility for parole. See Ball, 470 U.S. at 865, 105 S.Ct. at 1668, 84 L.Ed.2d at 748.

Therefore, I must conclude that Attorney Coggins provided ineffective assistance of counsel when she failed to raise defendant's duplicative convictions under section 841(a) and section 860(a).

Upward Adjustment of Offense Level

In ground four of his Third Section 2255 Motion, defendant alleges that appellate counsel was ineffective for failing to argue on direct appeal that this court erred in applying a three-level upward adjustment to defendant's offense level. However, defendant does not provide any details to support this claim.

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.App'x 70 (3d Cir. 2013).

Here, defendant fails to provide the court with any factual information to assess his claim. Defendant does not indicate why the three-level upward adjustment was applied to his offense level, how the upward adjustment affected his sentence, or how the adjustment prejudiced him. Rather, defendant merely asserts that "[t]he sentencing court erred by applying a three level enhancement to movants offense level."¹⁹

Even if I were to look past the fact that defendant has not provided this court with any details about the three-level upward adjustment and attempt to evaluate the claim on its merits, I would still deny defendant's claim.

At sentencing, I determined that defendant's base offense level was 38 based on the quantity of cocaine

¹⁹ See Third Section 2255 Motion at page 8.

attributable to defendant.²⁰ I then applied a two-level upward adjustment, raising defendant's offense level from 38 to 40, because the cocaine was distributed within 1,000 feet of a school.²¹ Because I sustained defendant's objection to the two-level upward adjustment based upon his alleged possession of a firearm in connection with a drug offense, I did not apply it to defendant's base offense level.²²

The only other upward adjustment that I applied to defendant's base offense level was a four-level upward adjustment for his role as an organizer of the conspiracy, which raised defendant's offense level from 40 to 44.²³

In contrast to the defendant's allegations, I never applied a three-level upward adjustment to defendant's base offense level. Because defendant merely concludes -- without providing any facts to support his contention -- that the sentencing court erred when it applied a three-level enhancement to his offense level and because the record in this case does not support defendant's contention, I dismiss defendant's claim that Attorney Coggins was ineffective for failing to argue on

²⁰ See N.T. at page 70.

²¹ Id. at page 70.

²² Id. at page 71, 47-53.

²³ See Presentence Investigation Report at paragraph 59; N.T. at page 71.

direct appeal that the sentencing court erred in applying a three-level upward adjustment to defendant's sentence.

Ancillary Claims

(Grounds Three, Five, Six, Seven, Eight, Nine and Ten)

Because I employ a common analysis to assess the claims that defendant raises in grounds three, five, six, seven, eight, nine, and ten of his Third Section 2255 Motion, I will address them together.

In ground three, defendant claims that the sentencing court did not comply with the requirements of Federal Rule of Criminal Procedure 32(c)(3)(D).

In ground five, defendant avers that "[t]he District court committed error when it substituted alternate jurors for those excused without the movants consent".²⁴

In ground six, defendant claims that "[i]t was error to Voir Dire [the] jury in the absence of movant".²⁵

In ground seven, defendant contends that the trial judge invaded the province of the jury.

In ground eight, defendant avers that there was "[i]mproper vouching for [w]itness".²⁶

²⁴ See Third Section 2255 Motion at page 9.

²⁵ Id.

²⁶ Id.

In ground nine, defendant claims that his sentence violated "Apprendi/Booker, where indictment did not specify the amount of drugs and where the maximum sentence absent enhancements, was 10 years, according to the juries [sic] verdict."²⁷

In ground ten, defendant avers that his conviction was obtained by use of unconstitutionally seized cell phone evidence.

As stated above, a section 2255 motion cannot be used as a substitute for a direct appeal. United States v. Smith, 235 F.Supp.2d 418, 426 (E.D.Pa. 2002)(Dubois, S.J.). Generally, the failure to raise an issue on direct appeal constitutes waiver, and the defendant is procedurally barred from raising the claim in a section 2255 motion unless the defendant can show both cause for the failure to raise the issue and actual prejudice, or the defendant can show actual innocence. Bousley, 523 U.S. at 622, 118 S.Ct. at 1611, 140 L.Ed.2d at 839-840; Mannino, 212 F.3d at 839-840.

Defendant did not raise any of the claims raised in grounds three, five, six, seven, eight, nine and ten on direct appeal. See United States v. Delgado, 289 Fed.App'x 497 (3d Cir. 2008). Defendant does not explain why these issues

²⁷ See Third Section 2255 Motion at page 9.

were not raised on direct appeal.²⁸ Defendant also does not allege that these claims were not raised because he received ineffective assistance of counsel.²⁹ Moreover, defendant does not allege that he is actually innocent and he has shown neither cause for the failure to present these claims nor actual prejudice.

In addition, defendant provides no facts or explanations to support these claims in his Third Section 2255 Motion or the accompanying memorandum of law. The little information that defendant does provide is conclusory and vague.

Defendant acknowledges this deficiency. In both his Motion to Amend and his Second Motion to Amend, defendant seeks 180 days to amend or supplement his Third Section 2255 Motion because "his entire memorandum of law in support is not currently a part of movant's pleadings".³⁰

However, even if defendant were granted time to amend his Third Section 2255 Motion and provide additional information about grounds three, five, six, seven, eight, nine and ten in his accompanying memorandum of law, my decision would be unchanged. Because defendant is procedurally barred from

²⁸ See Third Section 2255 Motion at page 7.

²⁹ Id.

³⁰ See Motion to Amend at page 2; Second Motion to Amend at page 2.

raising the claims presented in grounds three, five, six, seven, eight, nine and ten of his Third Section 2255 Motion, it is unnecessary for defendant to amend or supplement his Third Section 2255 Motion.

Therefore, because defendant did not raise the issues presented in grounds three, five, six, seven, eight, nine and ten of his Third Section 2255 Motion on direct appeal, I dismiss these claims.

Motion to Amend and Second Motion to Amend

As noted above, defendant's Motion to Amend and Second Motion to Amend are identical. In these two motions, defendant asks this court to hold his Section 2255 Motion in abeyance, grant his motion to amend, and grant him 180 days to amend or supplement his Section 2255 Motion because "his entire memorandum of law is not currently a part of movant's pleadings".³¹

Ordinarily, 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). However, a district court has discretion to deny a defendant's motion to amend if amendment would be futile under the circumstances of

³¹ Motion to Amend at page 2.

the case. See Hill v. City of Scranton, 411 F.3d 118, 134 (3d Cir. 2005).

Defendant's request for leave to amend is broad. He has not articulated what changes he would make to his memorandum of law in order to complete it. Moreover, defendant has not raised the claims presented in grounds three, five, six, seven, eight, nine and ten on direct appeal, so any amendment made to his memorandum of law addressing those grounds would be futile because he is procedurally barred from raising those claims.

Therefore, I deny defendant's Motion to Amend and defendant's Second Motion to Amend.

Motion to Amend Pursuant to *Alleyne v. United States*

In his Third Motion to Amend, defendant contends that he should be granted leave to amend or supplement his Third Section 2255 Motion so that he can "test [his] claims Nos. 3, 4, and 9, on their merits i.e., in light of Alleyne".³² Defendant further avers that he is "only attempting to provide factual clarification or amplification to petitioner's issues the government declined to respond to".³³ Defendant argues that

³² See Third Motion to Amend at page 4.

³³ Id. at page 6.

granting his Third Motion to Amend would "cure a serious fundamental miscarriage [sic] of justice".³⁴

In response, the government argues that "a claim of error under Alleyne may not be raised in a case, like this one, which became final prior to the Alleyne decision."³⁵

In Alleyne v. United States, ___ U.S. ___, ___, 133 S.Ct. 2151, 2163, 186 L.Ed.2d 314, 330 (2013), the United States Supreme Court held that "facts that increase mandatory minimum sentences must be submitted to the jury". However, the Supreme Court also stated that the ruling in Alleyne "does not mean that any fact that influences judicial discretion must be found by a jury". Id.

Alleyne does not limit the ability of a sentencing judge to find facts relevant to calculating the appropriate Sentencing Guidelines range, provided that the sentence ultimately imposed does not exceed the statutorily prescribed range. United States v. Freeman, 763 F.3d 322, 335 (3d Cir. 2014); see also United States v. Ramirez-Negrón, 751 F.3d 42, 48 (1st Cir. 2014) (collecting cases).

Thus, Alleyne is not relevant to this case. Here, based upon the jury's verdict, defendant faced statutory

³⁴ See Third Motion to Amend at page 10.

³⁵ Government's Opposition Two at page 1.

sentencing ranges of ten years to life based on his conspiracy conviction in violation of 21 U.S.C. § 846, one year to forty years for each of his convictions for distribution of cocaine base ("crack") within 1,000 feet of a school in violation of 21 U.S.C. § 860(a), and five years to eighty years for his conviction of possession with intent to distribute cocaine base ("crack") within 1,000 feet of a school.

Following the jury's verdict, I found that defendant was responsible for at least four kilograms of cocaine during the conspiracy.³⁶ This finding, which was made for the purpose of determining defendant's applicable Sentencing Guidelines range, does not violate Alleyne because the defendant was ultimately sentenced to 396 months imprisonment,³⁷ which is less than the statutory maximum term allowed for each of defendant's convictions.

Furthermore, even if Alleyne were relevant to defendant's case, as the government points out, Alleyne may not be retroactively applied to cases on collateral review. United States v. Reyes, 755 F.3d 210, 212 (3d Cir. 2014) cert. denied, ___ U.S. ___, 135 S.Ct. 695, 190 L.Ed.2d 403 (2014).

³⁶ See N.T. at pages 65-70.

³⁷ As noted above, pursuant to my Order dated October 22, 2012, I subsequently ordered that defendant's term of imprisonment be reduced from 396 months to 360 months.

Therefore, defendant's contention that he should be granted leave to amend or supplement his Third Section 2255 Motion in light of Alleyne is without merit. Accordingly, I deny defendant's Third Motion to Amend.

Fourth Motion to Amend

On June 8, 2015, defendant sent his Fourth Motion to Amend to this court, in the form of a letter addressed to me requesting that the Court add "the Arguments and Laws governing the 2255 of David Nduka Bosah[]" to defendant's Third Section 2255 Motion.³⁸ Defendant states that he and David Nduka Bosah "are co-defendants who have suffered the same legal neglects".³⁹ Defendant contends that he was forced to proceed to trial without having had the opportunity to "plea out".⁴⁰ Defendant also advises that he would be willing to formally submit this request in motion form.⁴¹

A section 2255 motion may be amended in accordance with the Federal Rules of Civil Procedure. See United States v. Duffus, 174 F.3d 333, 336 (3d Cir. 1999). Rule 15(a)(2) provides that a court should freely grant leave to amend when

³⁸ Fourth Motion to Amend at page 1.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

justice so requires. FED.R.CIV.P. 15(a)(2). However, the court is not required to grant leave to amend if there is evidence of "undue delay, bad faith or dilatory motive on the part of the movant". Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962).

Defendant's Fourth Motion to Amend, which requests that I add "the Arguments and Laws governing the 2255 of David Nduka Bosah[]" to defendant's Third Section 2255 Motion is denied.

Initially, defendant's Fourth Motion to Amend is untimely. Defendant filed his Third Section 2255 Motion on February 16, 2010 and he did not mail his Fourth Motion to Amend to this court until June 8, 2015, more than five years later. Defendant is not entitled to the benefit of the relation back doctrine⁴² because, in his Fourth Motion to Amend, defendant seeks to add an entirely new claim based on a new set of factual averments, which are not currently part of his Third Section 2255 Motion.

Next, defendant has not articulated the precise nature of the arguments made in David Nduka Bosah's section 2255

⁴² "An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading". FED.R.CIV.P. 15(c)(1).

motion. Defendant fails to articulate the factual and legal bases which would support adding the unspecified claims raised by David Nduka Bosah to defendant's pending motion.

As a matter of law, defendant's pleadings are held to a less stringent standard than pleadings drafted by attorneys. See Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed.2d 652, 654 (1972). However, as evidenced by the extensive motion record in the pending matter, defendant is well aware of what is required in a proper motion to amend.

Defendant fails to articulate any factual or legal bases to support his Fourth Motion to Amend. It is not the role of this court to seek out the arguments raised by defendant's co-defendant, determine the relevancy of those claims to defendant's case, and attach them to defendant's currently pending Third Section 2255 Motion. Even if I were to look at the substantive claims raised by defendant's co-defendant, David Nduka Bosah, my denial of defendant's Fourth Motion to Amend would be unchanged.

In his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, David Nduka Bosah alleged that his trial counsel (who was different from defendant's trial counsel) provided ineffective assistance of counsel by failing to inform Bosah of all plea options,

failing to argue for downward adjustment at sentencing, and "failing to raise the Kimbrough[v. United States, 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007)] issue on direct appeal".⁴³

Although defendant's Fourth Motion to Amend generally requests that this court add "the Arguments and Laws governing the 2255 of David Nduka Bosah" to defendant's Third Section 2255 Motion, defendant only makes specific reference to one of David Nduka Bosah's claims.⁴⁴

In ground one of his motion, David Nduka Bosah alleges that his trial counsel failed to inform him of all possible plea options. Defendant seeks to adopt this argument, but he has not shown how David Nduka Bosah's claim is applicable to defendant's case. Defendant had different trial counsel than David Nduka Bosah, so defendant cannot simply adopt the ineffective assistance of counsel argument made by his co-defendant without applying that argument to the conduct of his own trial attorney.

Defendant does not assert the content of any discussions he had with his trial counsel concerning possible plea options. Though defendant contends that he was "forced to go to trail [sic] without any chance of the option to plea out",

⁴³ See David Nduka Bosah's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, which motion was filed July 23, 2009 (Document 286) at page 4-7.

⁴⁴ See Fourth Motion to Amend at page 1.

defendant does not specify how he was forced or who forced him to go to trial.⁴⁵

Defendant provides this court with no factual or legal bases to support addition of the claim that defendant's trial counsel provided ineffective assistance to defendant by failing to discuss all plea options with defendant to defendant's Third Section 2255 Motion. Therefore, defendant's Fourth Motion to Amend is denied.

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

⁴⁵ See Fourth Motion to Amend at page 1.

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

Regarding defendant's double jeopardy claims (grounds one and two) I find that an evidentiary hearing is not required because defendant's claim is meritorious and he is entitled to the above-mentioned relief as a matter of law.

However, because I find that all eight of defendant's remaining grounds for habeas relief are meritless, a hearing on those matters is unnecessary. Thus, I deny defendant's request for an evidentiary hearing.

Additionally, because I deny defendant's request for an evidentiary hearing, I also deny defendant's request that I appoint counsel to further investigate his claims.

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 grounds three through ten of defendant's Third Section 2255 Motion fail to make 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 as to grounds three through ten of defendant's Third Section 2255 Motion.

CONCLUSION

For the reasons expressed above, I grant in part and deny in part defendant's Third Section 2255 Motion. I grant defendant's motion with respect to his Double Jeopardy claims. Specifically, I vacate defendant's convictions for distribution of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Counts Four, Six and Eight) and possession with intent to distribute cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Count Ten). In all other respects defendant's motion is denied.

I also deny defendant's First Motion to Amend, Second Motion to Amend, Third Motion to Amend and Fourth Motion to Amend. Additionally, defendant's request for an evidentiary hearing and his request for appointment of 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
)	No. 05-cr-00143-02
vs.)	
)	
ANGEL FERRER,)	
)	
Defendant)	

O R D E R

NOW, this 14th day of October, 2016 upon consideration of the following documents:

- (1) Motion to Amend and/or Supplement Movant's 28 U.S.C. § 2255 Motion Pursuant to Fed.R.Civ.P. Rule 15(a) and (c) ("Motion to Amend"), which motion to amend was filed by defendant pro se on November 18, 2009 (Document 298);¹ together with
 - (A) Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Section 2255 Motion"); and
 - (B) Memorandum of Law in Support of 28 U.S.C. § 2255 ("Defendant's Memorandum");
- (2) Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Second Section 2255 Motion"), which motion was filed by defendant pro se on January 19, 2010 (Document 303);

¹ Although the docket entries reflect that the Motion to Amend was filed November 23, 2009, the document is dated November 18, 2009. See Motion to Amend at page 2.

Under the prison mailbox rule, a pleading is deemed filed on the date the defendant gave it to prison officials for mailing. Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L.Ed.2d 245, 255 (1988). Accordingly, I will consider the date of filing as November 18, 2009.

- (3) Motion to Amend and/or Supplement Movant's 28 U.S.C. § 2255 Motion Pursuant to Fed.R.Civ.P. Rule 15(a) and (c) ("Second Motion to Amend"), which motion to amend was filed by defendant pro se on February 16, 2010 (Document 306); together with
- (A) Memorandum of Law in Support of 28 U.S.C. § 2255 ("Defendant's Second Memorandum");
- (4) Motion Under 28 U.S.C. §2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody ("Third Section 2255 Motion"), which motion was filed by defendant pro se on February 16, 2010 (Document 307); together with
- (A) Memorandum of Law in Support of 28 U.S.C. § 2255 ("Defendant's Third Memorandum");
- (5) Government's Opposition to Angel Ferrer's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Government's Opposition One"), which opposition was filed April 23, 2012) (Document 329); together with
- (A) Judgment in a Criminal Case;
- (B) Sentencing Hearing Transcript; and
- (C) Order dated December 8, 2009 and filed December 9, 2009;
- (6) Petitioner's Motion Requesting Leave of the Court to File a Motion to Amend/Supplemnt [sic] Mr. Ferrer's § 2255 Motion Presently Pending Pursuant to Rule 15(a)(c) & (d), F.R.Civ.P., in Light of a New U.S. Supreme Court Precedent I.E., Alleyne v. United States, 2013 U.S. LEXIS 4543 (June 17, 2013) to Cure a Serious Fundamental Miscarriage of Justice ("Third Motion to Amend"), which

motion to amend was filed by defendant pro se on September 23, 2013 (Document 375);² together with

- (A) Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody Instructions (Exhibit A);
- (7) Government's Opposition to Angel Ferrer's Motion for Leave to Amend His Section 2255 Petition ("Government's Opposition Two"), which opposition was filed October 8, 2013 (Document 378);
- (8) Letter from defendant Angel Ferrer to this court dated June 8, 2015 ("Fourth Motion to Amend");

and for the reasons expressed in the accompanying Opinion, it appearing that, in his Third Section 2255 Motion, defendant requests that the court vacate or set aside his sentence and conviction; it further appearing that, in his Third Memorandum of Law, defendant requests that the court hold an evidentiary hearing on his claims and appoint counsel to further address defendant's claims; it further appearing that, in his Motion to Amend and in his Second Motion to Amend, defendant requests that the court hold his Section 2255 Motion in abeyance and grant him 180 days to amend the motion; it further appearing that, in his Third Motion to Amend, defendant requests the court grant him leave to amend his Section 2255 Motion in light of the United

² Although the docket entries reflect that the Third Motion to Amend was filed September 27, 2013, the document is dated September 23, 2013. See Third Motion to Amend at page 11.

In accordance with the prison mailbox rule, I will consider the date of filing as September 23, 2013. Lack, 487 U.S. at 276, 108 S.Ct. at 2385, 101 L.Ed.2d at 255.

States Supreme Court's decision in Alleyne v. United States;³ it further appearing that, in his Fourth Motion to Amend, defendant requests that this court add the claims asserted by his co-defendant David Nduka Bosah to his pending section 2255 motion.

IT IS ORDERED that defendant's Section 2255 Motion and Second Section 2255 Motion are each dismissed.

IT IS FURTHER ORDERED that defendant's Third Section 2255 Motion is granted in part and denied in part.

IT IS FURTHER ORDERED that defendant's Third Section 2255 Motion is granted with respect to his Double Jeopardy claims.

IT IS FURTHER ORDERED that defendant's convictions for distribution of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Counts Four, Six and Eight) and possession with intent to distribute cocaine base ("crack") in violation of 21 U.S.C. §841(a)(1) (Count Ten) are each vacated.

IT IS FURTHER ORDERED that, in all other respects, defendant's Third Section 2255 Motion is denied.

IT IS FURTHER ORDERED that defendant's Motion to Amend, Second Motion to Amend, and Third Motion to Amend are each denied.

³ Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

IT IS FURTHER ORDERED that the Clerk of Court shall file the Letter from defendant Angel Ferrer to this court dated June 8, 2015 ("Fourth Motion to Amend").

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

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

IT IS FURTHER ORDERED that defendant's request for appointment of counsel is denied.

IT IS FURTHER ORDERED that a certificate of appealability is denied.

IT IS FURTHER ORDERED that the Clerk of Court shall mark this matter closed for statistical purposes.

BY THE COURT:

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