

dissatisfaction with the Court's ruling, however, he has failed to present a proper basis to seek reconsideration. See Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993). Petitioner's motion fails to state sufficient grounds to prevail; accordingly Petitioner's motion to Alter or Amend is denied.

A. Motion to Strike

Petitioner challenges the Court's Order granting the Government's Motion to Strike his rebuttal memorandum. His challenge essentially restates the argument he earlier asserted against the Motion to Strike—that his rebuttal memorandum was timely filed and that he did not falsify the Certificate of Service. Petitioner provides no new evidence to support these claims other than his unsubstantiated assertions. Additionally, Petitioner cites no intervening change in the law in support of his claim, particularly in light of the Court's prior findings on this issue. He relies instead on the mailbox rule and Federal Rule of Civil Procedure 12(f) asserting they prevent the Court from striking the rebuttal memorandum because it was timely filed with a legitimate Certificate of Service. Petitioner, therefore, has failed to allege sufficient grounds, legal or factual, in support of this argument to reconsider and the motion is denied.

B. Denial of Habeas Corpus

1. Brady Violations

Petitioner raises as a ground for reconsideration that the prosecution withheld Brady material. This Court has previously found, however, that Petitioner failed to raise this issue on appeal. Under § 2255, an issue that could have been raised on direct appeal but was not is subject to procedural default. United States v. Frady, 456 U.S. 152, 162-67 (1982). Petitioner provides no evidence that the Court's determination of procedural default constituted manifest

error. His present argument merely complains of alleged inadequacies by his counsel with regard to locating the purportedly exculpatory documents. As these unsupported allegations fail to detail any manifest error of law or fact on the Court's part, Petitioner's motion for reconsideration on this issue is denied.

2. Subornation of Perjury

Petitioner next asserts as a basis for reconsidering the denial of his habeas corpus petition alleged subornation of perjury by the Government. Like his Brady argument, however, Petitioner failed to raise the issue on appeal thereby waiving his right to collaterally attack it. Petitioner provides no newly available evidence to support his motion. Similarly, Petitioner fails to point to any intervening change in the law tending to support his argument for reconsideration.

Petitioner's reliance on United States v. Biberfeld, 957 F.2d 98 (3d Cir. 1992), in this instance is inapposite inasmuch as the argument could have been raised in his Motion to Vacate, Set Aside or Correct Sentence but was not. Accordingly, Petitioner's motion on this issue is denied.

3. Ineffective Assistance of Counsel

Petitioner's final argument in support of his motion to reconsider is that he received ineffective assistance of counsel. Petitioner failed, however, to raise this argument on appeal and accordingly, this Court found it to be waived by procedural default. In the instant motion, Petitioner relies on United States v. DeRawal, 10 F.3d 100 (3d Cir. 1993), as support for his position that despite his failure to raise the issue on appeal, he has not waived it for purposes of his § 2255 motion. Petitioner's argument notwithstanding, DeRawal is inapplicable to this motion as it does not constitute an intervening change in the law; Lampkin could have, but failed to argue the decision in his § 2255 motion.

Additionally, even considering Petitioner's DeRawal argument, the Court finds it was not manifest injustice to deny Petitioner's motion on this issue. Lampkin retained separate counsel for trial, sentencing and for appeal. At the sentencing stage of the case, Lampkin clearly thought that he had an ineffective assistance of counsel claim against his trial counsel. Having been represented by a different attorney, Lampkin was free to raise the ineffective assistance of counsel claim on appeal, but failed to do so. Under these circumstances, Petitioner's claim was procedurally defaulted.

Therefore, this ground of Petitioner's present motion is denied.

C. Evidentiary Hearing

Petitioner lastly argues that this Court erroneously held he was not entitled to an evidentiary hearing with regard to his § 2255 motion. A court must hold an evidentiary hearing prior to denying a prisoner's § 2255 motion when the petitioner's allegations raise an issue of material fact. See Walker v. Johnson, 312 U.S. 275, 285 (1941). There is an issue of material fact when: (1) the petitioner's failure to object was not a procedural waiver and (2) the error alleged is sufficiently serious to permit collateral review under § 2255. See United States v. Essig, 10 F.3d 968, 976-77 (3d Cir. 1993).

In support of his argument, Petitioner denies he procedurally defaulted on the Brady, subornation of perjury and ineffective assistance of counsel issues, arguing accordingly that his § 2255 allegations raise an issue of material fact. Lampkin has failed, however, to proffer any newly available evidence or cite to recently changed law to support his position as discussed above. In light of the standard of review on a motion for reconsideration, Petitioner has not met his burden.

III. CONCLUSION

Petitioner's Motion to Alter or Amend the Court's Order Denying Habeas Relief shall be denied.

An order follows.

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

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	(Crim. A. No. 92-086-04)
v.	:	
	:	
KENNETH CORNELIUS LAMPKIN	:	NO. 98-CV-5270

ORDER

AND NOW, this day of September, 1999, in consideration of Petitioner's Motion to Alter or Amend the Court's Order Denying Habeas Relief and the Government's response thereto, it is ORDERED the Motion to Alter or Amend the Court's Order Denying Habeas Relief is DENIED.

BY THE COURT:

JAMES MCGIRR KELLY, J.