

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 00-291-02
v.	:	
	:	CIVIL ACTION
ADAM BENTLEY CLAUSEN	:	No. 04-4625

MEMORANDUM

ROBERT F. KELLY, Sr. J.

APRIL 12, 2005

Presently before the Court is the *pro se* Habeas Corpus Motion pursuant to 28 U.S.C. § 2255 by Adam Bentley Clausen (“Clausen”). Clausen raises multiple grounds for relief which he lists in four categories: (1) 18 U.S.C. § 924 (c) - a defective indictment and Court error by imposing “super-enhanced” penalties for “second or subsequent” offenses; (2) Brady and Jenks Act violations; (3) prosecutorial and governmental misconduct; and (4) ineffective assistance of counsel.

On May 24, 2000, a Grand Jury returned a twenty-seven count indictment charging Clausen, Kenneth Sternberg (“Sternberg”), Joel Casa (“Casa”), Kirke Franz Szawronski, Jr. (“Szawronski”) and Isaac Tillman (“Tillman”)(collectively, “Defendants”) with violations arising out of the armed robberies or attempted armed robbery of various businesses. Prior to trial, pursuant to plea agreements, Tillman and Szawronski pleaded guilty and testified at trial. Clausen, Sternberg and Casa went to trial. Clausen was charged with multiple counts of Hobbs Act Robbery/Attempted Robbery (18 U.S.C. § 1951); Hobbs Act Conspiracy (18 U.S.C. § 1951); and Use of Firearm in Relation to a Crime of Violence (18 U.S.C. § 924 (c)(1)). On December 12, 2000, following a jury trial, Clausen was convicted on all counts. Clausen was sentenced to

ninety-seven months imprisonment on the Hobbs Act counts and a mandatory minimum sentence of 205 years to run consecutively to the Hobbs Act sentence as required by 18 U.S.C. § 924 (c)(1).

Clausen appealed his conviction and sentence. On March 26, 2003, the Court of Appeals for the Third Circuit (“Third Circuit”) affirmed the judgment and sentence. Clausen’s conviction became final on October 6, 2003 upon the denial of *certiorari* by the Supreme Court of the United States (“Supreme Court”). See Kapral v. United States, 166 F.3d 565, 570-71 (3d Cir. 1999)(“a judgment of conviction does not become ‘final’ within the meaning of § 2255 until the Supreme Court affirms the conviction and sentence on the merits or denies a timely filed petition for *certiorari*.”). Clausen filed his *pro se* Habeas Corpus Motion Under 22 U.S.C. § 2255 on October 1, 2004. The government filed its Response on December 8, 2004. Clausen filed his Reply and Objections to the Government’s Response on January 20, 2005, and filed a Supplement and Request for an Evidentiary Hearing on March 30, 2005.

I. BACKGROUND

The facts at trial established that between February 7, 2000 and February 26, 2000, two or more Defendants robbed eight businesses in Philadelphia and one business in New Jersey, all at gun point. The guilty verdict against Clausen on all counts was substantiated by the overwhelming testimony by cooperating co-Defendants, Tillman and Szawronski, as well as the substantial testimony by robbery victims and witnesses.

A. Testimony of Cooperating Co-Defendants

1. Tillman’s Testimony

Through the testimony of Tillman, it was established that Clausen was involved in the following activities and robberies:

118 S. 16 th Street (Shogun Massage Parlor)

On February 7, 2000, Clausen and Tillman planned and executed the robbery of the Shogun Massage Parlor. (N.T. 12/5/00, p. 23-25). During this robbery, Clausen pulled out his gun and demanded money. (Id., p. 26-27). Clausen held one woman and pointed his gun directly at her. (Id., p. 27). After the robbery, Clausen and Tillman split the approximately \$3,000-\$4,000 in proceeds. (Id., p. 29, 32).

118 S. 16 th Street (Shogun Massage Parlor)

Within a week of the first Shogun Massage Parlor robbery, Clausen, Tillman and Szawronski planned the second robbery of the Shogun Massage Parlor. (N.T. 12/5/00, p. 33-34). On February 11, 2000, Clausen, Tillman and Szawronski participated in the second robbery of the Shogun Massage Parlor. (Id., p. 38-42). During the robbery, Clausen gave Szawronski the gun that he had used in the first robbery of the Shogun Massage Parlor. (Id., p. 39). Szawronski shot the massage parlor's door with the gun. (Id., p. 41). After the gun was fired, Clausen, Tillman and Szawronski ran away and did not get any money from the robbery that night. (Id., p. 42).

42 South 3rd Street Massage Parlor (Shanghai Gardens Spa)

On February 17, 2000, Clausen, Tillman and Szawronski planned and executed the robbery of the massage parlor located at 42 South 3rd Street. (N.T. 12/5/00, p. 42-52). While planning the robbery, the three men looked through massage parlor advertisements contained in Philadelphia daily/weekly newspapers. (Id., p. 43). Prior to the robbery, Clausen, Tillman and Szawronski discussed the fact that Szawronski had a gun intended for the robbery. (Id., p. 46-47). During the robbery, the three men took money and some electronics (i.e., a laptop computer, a Sony diskman, speakers). (Id., p. 49, 51). The three men split the cash from the robbery and Clausen got the computer.¹ (Id., p. 52).

Smuggler's Restaurant and Bar

On February 19, 2000, Clausen, Tillman and Szawronski planned to rob Smuggler's Restaurant and Bar. (N.T. 12/5/00, p. 53-54). Approximately one week prior, the three men had

¹ George A. Sandford ("Sanford") is a computer consultant who knows Clausen. (N.T. 12/8/00, p. 5-77). During trial, Sandford identified Government Exhibit 47 as a Compac Presario laptop computer that he received from Clausen in approximately January 2000 or February 2000. (Id., p. 5-78). Sandford states that when Clausen gave him the computer he stated that it was not operational and he wanted Sandford to make the computer operational. (Id., p. 5-79). Sandford worked on the computer and got it to function as a laptop. (Id.). When Sandford got the computer operating he noticed that it had an Asian user name. (Id., p. 5-80). Additionally, Linda Stephens, owner of the Shanghai Gardens Spa, testified about a laptop computer that was stolen during a robbery that occurred on February 17, 2000. (N.T. 12/8/00, p. 5-55-5-570).

unsuccessfully attempted to rob it. (Id., p. 54). On February 19, 2000, the plan was that Clausen and Tillman would act as lookouts while Szawronski and Casa robbed the night manager when he was leaving for the night. (Id., p. 61). As they were arriving at Smuggler's Restaurant and Bar they saw the owner leaving in his truck. (Id., p. 62). They thought that he may have the money from closing and they followed him, but they lost him once he entered his gated community. (Id., p. 62-63). The men decided to return to Smuggler's Restaurant and Bar to see if anyone else would leave at the end of the night with a bag containing money. (Id., p. 64-65). Once back at Smuggler's Restaurant and Bar, Clausen drove around the highway checking for police and trying to find a good spot so that he could watch everything that was happening from the front of the establishment. (Id., p. 66). While the men were waiting, the night manager and his girlfriend exited the restaurant with a bag and Szawronski and Casa robbed them while Clausen and Tillman acted as lookouts. (Id., p. 70-71). Szawronski and Casa also took the night manager's car. (Id., p. 72). While the robbery was occurring, Clausen radioed Tillman wanting to know what was happening. (Id.). Tillman informed Clausen of what was occurring and informed him that the two men had stolen the car. (Id.). Szawronski and Casa abandoned the car nearby and Tillman picked them up. (Id., p. 73). Clausen again radioed wanting to know what was occurring. (Id.). Tillman informed Clausen that he had picked up Szawronski and Casa and that they had abandoned the car. (Id.). Clausen asked whether they got the money and Tillman responded, "yes." (Id.). The four men met at Tillman's house and counted the money which Tillman estimated to be approximately a little over \$8,000. (Id., p. 74). The men evenly divided up the money between themselves. (Id., p. 74-75).

1112 Sansom Street Massage Parlor (Sansom Studio)

On February 23, 2000, Clausen, Tillman, Casa and Sternberg planned and executed the robbery of a massage parlor located on Sansom Street. (N.T. 12/5/00, p. 77-85). Prior to February 23, 2000, Clausen and Tillman discussed permitting Sternberg to participate in the robberies. (Id., p. 76). On February 23, 2000, Clausen, Tillman, Casa and Sternberg looked through the newspapers in order to find the next place they were going to rob. (Id., p. 77). Clausen, Tillman and Sternberg had guns. (Id., p. 78-79). Driving in a truck owned by Clausen's girlfriend, Clausen, Tillman, Casa and Sternberg arrived at the massage parlor. (Id., p. 80). The four men entered the massage parlor and robbed it. (Id., p. 82). During the robbery, Sternberg fired his gun several times at various electronic equipment. (Id.). After Sternberg fired his gun, the four men met up in the common area and Clausen wanted to know what was happening. (Id., p. 83). Tillman demanded money from a woman and when she didn't give him any money, he hit her in the back of her head with the butt of his gun which resulted in the gun discharging. (Id., p. 83-84). The four men shared the money that they took during the robbery.

247 North Juniper Street (247 Studio)

Later on during the night of February 23, 2000, Clausen, Tillman, Casa, Sternberg and also Szawronski, decided to rob a massage parlor located at 247 North Juniper Street. (N.T. 12/5/00, p. 86-87). The five men decided on that particular massage parlor by looking through newspaper

ads. (Id., p. 87). Prior to arriving, Tillman testified that he believed that Clausen called the massage parlor in order to obtain directions and to learn what time it was closing. (Id., p. 87-88). Again, Clausen, Tillman and Sternberg had guns. (Id., p. 89). During the robbery, Tillman's gun fired hitting the ground. (Id., p. 90). At that time, Clausen yelled at Tillman that he was being very careless with his gun that night. (Id.). The men took approximately \$1500 from the robbery. (Id., p. 91).

1812 Ludlow Street (Happiness Oriental Spa)

On February 26, 2000, Clausen, Tillman, Sternberg and Szawronski planned the robbery of a massage parlor located at 1812 Ludlow Street. (N.T. 12/5/00, p. 95-96). All four men had guns. (Id., p. 96-97). Upon arriving outside of the massage parlor, they decided not to rob it at that time because of a suspicious vehicle. (Id., p. 99). Tillman explained that one time prior, he, Clausen and Szawronski had attempted to rob the massage parlor, but Clausen had decided it was not a good time because there were too many people there and someone had run out the back door. (Id., p. 100).

42 South 3rd Street Massage Parlor (Shanghai Gardens Spa)

After deciding not to rob the massage parlor located on Ludlow Street, the four men decided to rob the massage parlor located at 42 South 3rd Street. (N.T. 12/5/00, p. 100-01). Once all four men were inside the massage parlor, they began to rob it. (Id., p. 102-06). Clausen and Tillman broke into a room that contained videotaping equipment. (Id., p. 104). One videotape recorder was running, so Clausen took the tape (the men later destroyed the tape). (Id., p. 104). An alarm sounded, so the men left. (Id., p. 104-05). They did obtain some money from the robbery. (Id., p. 105).

1812 Ludlow Street (Happiness Oriental Spa)

After the Shanghai Gardens Spa robbery, the men decided to return to the massage parlor located on Ludlow Street. (N.T. 12/5/00, p. 107). The four men entered the massage parlor and attempted to rob it. (Id., p. 108-14). During the robbery, Tillman and Clausen came across a man who was locked in a room. (Id., p. 109-10). Clausen kicked the door handle and threatened the man to open the door or he was going to shoot. (Id.). During the robbery, the police arrived and Clausen tried hiding from the police and attempted to get rid of his gun holster. (Id., p. 111-12). Tillman and Clausen pretended to act as customers and screamed for help. (Id., p. 114). The police arrested Clausen, Tillman, Sternberg and Szawronski. (Id.).

2. Szawronski's Testimony

Through the testimony of Szawronski, it was established that Clausen was involved in the following activities and robberies:

In early February 2000, Clausen, Szawronski and Tillman had a discussion about committing robberies. (N.T. 12/6/00, p. 3-16). Szawronski brought up the idea of robbing a massage parlor because he had previously robbed one. (Id.). The three men discussed the idea that robbing a massage parlor would be an easy thing to do because most massage parlors are places of prostitution and the police wouldn't be called because the workers and owners of massage parlors do not speak English. (Id.).

118 S. 16 th Street (Shogun Massage Parlor)

Clausen, Szawronski and Tillman agreed to participate in a robbery of a massage parlor. (N.T. 12/6/00, p. 3-17). While at Cheerleaders Bar, the three men agreed to rob the Shogun Massage Parlor. (Id.). Clausen and Tillman told Szawronski that they had just robbed it a few days earlier. (Id.). Clausen had a gun which Szawronski had previously sold to him. (Id., p. 3-18). Clausen gave the gun to Szawronski to use during the robbery. (Id., p. 3-19). During the robbery on February 11, 2000, Szawronski put the gun to a woman's head trying to get her to open a door, when the woman did not open the door, Szawronski shot the door. (Id., p. 3-23-3-24). Clausen, Szawronski and Tillman ran away and did not get any money from the robbery. (Id., p. 3-25). The three men went back to hang out at Cheerleaders Bar and, later, Szawronski dropped Clausen and Tillman at their homes in New Jersey. (Id., p. 3-33). During their car ride, Clausen, Szawronski and Tillman discussed the unsuccessful robbery attempt and Clausen and Szawronski agreed to rob a scrap-metal yard in the morning. (Id., p. 3-34-3-35). The scrap-metal yard that the men agreed to rob was named East Coast Recycling. (Id., p. 3-34). They agree to rob a scrap-metal yard because they thought that it would be easy since cash is usually taken to scrap-metal yards in the morning on the way to work. (Id.).

East Coast Recycling

On February 12, 2000, Szawronski picked up Clausen and they drove to East Coast Recycling arriving there at approximately 7:00 a.m. (N.T. 12/6/00, p. 3-35-3-36). Clausen had his gun. (Id., p. 3-35). When they arrived there were a lot of people and cars parked outside, so they decided not to rob it (this was the second time that this had occurred because Szawronski and Clausen had previously checked out East Coast Recycling and decided not to rob it because of too many people being nearby). (Id., p. 3-36-3-37). Szawronski and Clausen left and decided to rob the nearby scrap-metal yard named Philadelphia Scrap Metal. (Id., p. 3-37).

Philadelphia Scrap Metal

Philadelphia Scrap Metal is owned by Kirke Franz Marion Szawronski, Sr. ("Szawronski, Sr."), Szawronski's father. (N.T. 12/6/00, p. 3-38). Szawronski knew his father's routine and knew that his father would be arriving at Philadelphia Scrap Metal with money. (Id.). The plan was that Clausen would rob Szawronski, Sr. (Id.). It was planned that Szawronski would wait in the car while Clausen robbed Szawronski, Sr. as he opened the front gate of the scrap yard. (Id., p. 3-40-3-42). The plan did not occur as designed and Clausen told Szawronski that he had demanded

money at gunpoint from Szawronski, Sr., but he would not give Clausen the money and Clausen left. (Id., p. 3-42-3-43). Clausen also stated that there was a homeless man present during the attempted robbery. (Id., p. 3-43).

42 South 3rd Street Massage Parlor (Shanghai Gardens Spa)

On February 17, 2000, Clausen, Szawronski and Tillman met at a bar to discuss another robbery. (N.T. 12/6/00, p. 3-44). They looked in a weekly/daily newspaper and selected a massage parlor to rob. (Id., p. 3-45). Clausen had a gun. (Id.). First, the three men went to a massage parlor located at 1812 Ludlow Street. (Id., p. 3-46). Clausen entered the massage parlor while the others waited in the car, but he came back out because it was too crowded. (Id., p. 3-47). While in the car, the men decided to call a massage parlor located on 3rd Street to see if it was open and get directions. (Id., p. 3-47). When they arrived at the massage parlor, the men agreed that Tillman would take the gun and would enter first. (Id., p. 3-49). Once all the men were inside, they robbed the massage parlor. (Id., p. 3-49-3-50). Szawronski hit a lady with his gun. (Id., p. 3-50). The men got money from the robbery and a computer. (Id., p. 3-52).

Smuggler's Restaurant and Bar

On February 19, 2000, prior to the robbery, Clausen, Szawronski and Tillman received a call from Casa and they agreed to meet him at Cheerleader's Bar. (N.T. 12/6/00, p. 3-52-3-55). Prior to meeting Casa, Clausen, Szawronski and Tillman had planned on robbing Smuggler's Restaurant and Bar. (Id., p. 3-56). They informed Casa about their plan. (Id., p. 3-57). Clausen had a gun which was passed around between the men. (Id., p. 3-57-3-59). In two cars, the men drove into an area near to Smuggler's Restaurant and Bar and saw the owner leaving the premises in his automobile, so they followed him. (Id., p. 3-59-3-60). The owner drove into a gated community and the men lost him. (Id., p. 3-60-3-61). The men decided to go back to Smuggler's Restaurant and Bar in the hopes of catching the owner's son leaving with money. (Id., p. 3-61). Clausen was driving around and was supposed to alert the others if any police were around the area. (Id., p. 3-62). At this point, Casa had the gun. (Id., p. 3-63). The owner's son and his girlfriend exited the building and got into their car. (Id., p. 3-68). Szawronski and Casa robbed them and took their car. (Id.). They abandoned the car and Tillman picked them up. (Id., p. 3-69-3-70). All of the men went to Tillman's house and evenly split the robbery proceeds totaling approximately \$8,000. (Id., p. 3-71).

Szawronski also testified that, in the past, he and Clausen had discussed that if they ever were captured by the police they would act as if the robbery of Smuggler's Restaurant and Bar was an insurance job. (N.T. 12/6/00, p. 3-103). Thus, Szawronski lied and stated this explanation to the police. (Id.). Szawronski thought the lie would push the robbery off of himself. (Id.).

247 North Juniper Street (247 Studio)

On February 23, 2000, prior to the robbery, Szawronski met with Clausen, Casa, Sternberg and

Tillman at Cheerleader's Bar. (N.T. 12/6/00, p. 3-73). Tillman told Szawronski that he had shot a woman in the head and Sternberg talked about how he shot up a place during a previously committed robbery. (Id., p. 3-74). On the way to 247 Studio, Clausen, Casa, Sternberg and Tillman told Szawronski that they had attempted to rob it earlier, but could not get in because they needed a pass. (Id., p. 3-75). Clausen, Tillman and Sternberg had guns. (Id.). The five men entered the massage parlor. (Id., p. 3-76-3-77). Clausen had his gun and was making sure that a customer did not move. (Id., p. 3-77). Clausen also burned a man with a curling iron because he thought that the man was a manager and knew where money was located.² (Id.). During the robbery, Tillman's gun fired. (Id., p. 3-78). Szawronski and Clausen both questioned Tillman about the firing of the weapon. (Id.). The men received money and electronics from the robbery. (Id., p. 3-79). The money was evenly divided and everyone went home to their houses. (Id., p. 3-79-3-80).

1812 Ludlow Street (Happiness Oriental Spa)

On February 26, 2000, prior to the robbery, Clausen, Sternberg, Szawronski and Tillman agreed to rob the massage parlor located on 3rd Street. (N.T. 12/6/00, p. 3-80-3-81). At first, the four men went to a massage parlor located at 1812 Ludlow Street, but it was too crowded so they decided to go back to the massage parlor located on 3rd Street. (Id., p. 3-81). All four men were armed. (Id.). Clausen and Tillman had gun holsters. (Id., p. 3-84).

42 South 3rd Street Massage Parlor (Shanghai Gardens Spa)

When they arrived at the massage parlor located on 3rd Street, the four men entered and robbed it. (Id., p. 3-86-3-89). Clausen and Szawronski gathered the customers and placed them in a room. (Id., p. 3-87). Clausen and Tillman went upstairs with a woman who said that there was money upstairs. (Id., p. 3-87-3-88). Clausen tried to open a door upstairs with a hammer and an alarm was sounded. (Id.). After the alarm sounded, the men fled from the massage parlor. (Id., p. 3-88, 3-89). The men got approximately \$2,000 and some wallets. (Id., p. 3-89). They also took a surveillance videotape from the upstairs of the massage parlor. (Id.).

1812 Ludlow Street (Happiness Oriental Spa)

Before arriving at the massage parlor located at 1812 Ludlow Street, the men destroyed and threw away a surveillance tape from the robbery of the massage parlor located on 3rd Street. (Id., p. 3-86). The four men then went to a massage parlor located at 1812 Ludlow Street. (Id., p. 3-90). All four men entered the massage parlor with their guns out. (Id.). During the robbery Clausen had his gun out. (Id., p. 3-91). Throughout the robbery, Szawronski was in contact with Clausen and

² Sun P. Woods, owner of 247 Studio, stated that during an armed robbery on February 23, 2000, one of the robbers burned a customer with a curling iron and the robbers took approximately \$2,000-\$3,000, two VCRs, cigarettes and beer. (N.T. 12/7/00, p. 4-214 -4-226).

Tillman through their cell phones. (Id., p. 3-92). Sternberg alerted the men to the fact that a woman had escaped. (Id.). Clausen then went upstairs. (Id.). The police arrived. (Id.). The four men were then taken to the Central Detectives and arrested. (Id., p. 3-94).

3. Testimony by Tillman and Szawronski Regarding Cell Phone Use

Both Tillman and Szawronski also testified regarding the use of cell phones as a means for the men to keep in contact with each other during their robberies. Tillman testified that Szawronski purchased Nextel mobile phones (which contained two-way radio features) for himself, Clausen and Tillman. (N.T. 12/5/00, p. 34-38). The men used the phones while they were committing their robberies. (Id., p. 35). Szawronski testified that he purchased three cell phones (with two-way radio features) from Nextel for himself, Clausen and Tillman.³ (N.T. 12/6/00, p. 3-26). He purchased them so that the three men could keep in contact if they were to perform a robbery. (Id.). When purchasing the cell phones, Szawronski provided his name, and the names of Clausen and Tillman to the salesperson as the people who would be using the three phones. (Id., p. 3-27). Szawronski kept one of the phones and then gave a phone to Clausen and gave a phone to Tillman. (Id., p. 3-28). The phone numbers of the three cell phones differed from one another by the last digit of the phone numbers being one number apart. (Id., p. 3-29). Szawronski identified Clausen's cell phone as Government Exhibit 46. (Id., p. 3-30). Szawronski stated that he, Clausen

³ Szawronski recognized Government Exhibit 52 as his Nextel phone bill. (N.T. 12/6/00, p. 3-31). Szawronski was sent the Nextel phone bill because he purchased the three cell phones in his name. (Id., p. 3-32). Szawronski was billed for all three phones. (Id.). Also, a stipulation was entered between the government and defense counsel that Agent Parmigiani would testify that on Page 20 of the phone bill, Line 239, on February 23, 2000 at 10:44 p.m., there was a phone call from a cell phone identified as Adam Clausen's phone to 215-972-5133, which is the phone number listed to 247 Juniper Street Health Spa. (N.T. 12/8/00, p. 5-106-5-107). Clausen's attorney, Rocco C. Cipparone, Jr. ("Cipparone"), clarified that he was stipulating to Agent Parmigiani's identification of the cell phone as belonging to Clausen, but was not stipulating that it was, in fact, Clausen's phone. (Id., p. 5-107).

and Tillman used the Nextel cell phones during the course of robberies that they committed in order to keep in touch. (Id., p. 3-31-3-32).

B. Testimony of Witnesses/Victims

In addition to the testimony of cooperating co-Defendants, Tillman and Szwaronski, there was a myriad of testimony from witnesses and victims of the robberies.⁴ Wion Denis (“Denis”), manager of the Shogun Massage Parlor, was present during a robbery on the night of February 7, 2000. (N.T 12/7/00, p. 4-22, 4-29). During the robbery, one robber grabbed Denis by the neck and ordered her to open the door. (Id., p. 4-29). The robber also pointed a gun at her and threatened her. (Id., p. 4-30). The unmasked robbers were in the lighted massage parlor for approximately fifteen minutes. (Id., p. 4-30-4-31). She saw the robbers again when they robbed the massage parlor a second time approximately four days after the first robbery. (Id., p. 4-31-4-32). During the second robbery, Denis escaped to a room and locked the door. (Id., p. 4-32-4-33). One of the robbers shot the door. (Id., p. 4-33). During this robbery, Denis looked at the robbers in the massage parlor’s lighted hallway through a door peephole for approximately twenty minutes. (Id., p. 4-35). During the trial, Denis identified Clausen as being someone that she recognized from the two robberies. (Id., p. 4-37).

⁴ During the robberies, Tillman testified that the robbers were unmasked and the places being robbed were generally well lit. (N.T. 12/5/00, p. 92-94, 107). He also testified that the robberies ranged in time from approximately ten to forty-five minutes. (Id.). Szawronski testified that none of the three robbers wore face masks during the February 11, 2000 robbery of the Shogun Massage Parlor and the hallway was lit. (N.T. 12/6/00, p. 3-25). During the robbery of the massage parlor located at 42 South 3rd Street, Szawronski testified that Clausen was wearing a hat. (Id., p. 3-49). He also testified that none of the robbers wore masks and that the place was lit. (Id.). Regarding the robbery of the massage parlor located at 247 Juniper Street, Szawronski testified that none of the robbers had any covering over their faces and the place was lit. (Id., p. 3-76).

On February 26, 2000, Stephanos Haviaras (“Haviaras”) was at the massage parlor located at 18th Street and Ludlow Street as a customer when people entered with guns and robbed it and its customers. (N.T. 12/7/00, p. 4-55-4-57). One of the men had a gun. (Id., p. 4-57-4-58). Haviaras had approximately \$2,000 which was taken by the robbers. (Id., p. 4-60). The robbers communicated with each other through two-way cell phones. (Id., p. 4-62). Haviaras approximated that the robbers were in the massage parlor for about thirty minutes. (Id.). Haviaras identified Clausen as one of the men at the massage parlor. (Id., p. 4-65).

On February 12, 2000, Thomas Kuhlman (“Kuhlman”) was at Philadelphia Scrap Metal early in the morning waiting for it to open. (N.T. 12/7/00, p. 4-78-4-79). He saw a man stick a gun in Szawronski, Sr.’s face while Szawronski, Sr. was in his car. (Id., p. 4-80). The man demanded that Szawronski, Sr. hand him a briefcase and Szawronski, Sr. refused to give it to him. (Id., p. 4-81). The robber ran away. (Id., p. 4-82). Kuhlman was in the presence of the robber for approximately ten to fifteen minutes and saw the robber’s face. (Id.). Kuhlman did not identify anyone in court, but he did previously make a positive identification of Clausen through a photograph. (Id., p. 4-84-4-86).

As explained earlier, Kirke Franz Marion Szawronski, Sr. owns Philadelphia Scrap Metal and is the father of Kirke Franz Szawronski, Jr. (N.T. 12/7/00, p. 4-93-4-96). Szawronski, Sr. testified that his son knew his daily routine regarding opening the business and that he carried money in a briefcase in the morning. (Id., p. 4-98-4-99). On February 12, 2000, Szawronski, Sr. testified he arrived at Philadelphia Scrap Metal at 7:10 a.m. and, upon his arrival, he was robbed at gunpoint for his briefcase. (Id., p. 4-100-4-102). Szawronski, Sr. refused to give the robber his briefcase. (Id., p. 4-102-4-103). The robber did not get the briefcase and ran away. (Id., p. 4-104).

Szawronski, Sr. got a look at the robber's face. (Id.). Szawronski, Sr. positively identified Clausen as the robber. (Id., p. 4-105).

II. DISCUSSION

As previously mentioned, the four categories upon which Clausen bases his *pro se* petition for habeas relief are as follows: (1) 18 U.S.C. § 924 (c) - a defective indictment and Court error by imposing “super-enhanced” penalties for “second or subsequent” offenses; (2) Brady and Jenks Act violations; (3) prosecutorial and governmental misconduct; and (4) ineffective assistance of counsel. Clausen raises multiple grounds for relief within each category. Since Clausen is *pro se*, I “hold his documents to a less stringent standard than those drafted by attorneys.” United States v. Jasin, 280 F.3d 355, 361 (3d Cir. 2002). Liberally construing all of the claims within Clausen’s Habeas Motion, and applying a less stringent standard, I find that he is not entitled to any habeas relief.

A. 18 U.S.C. § 924 (c)

1. Defective Indictment

Clausen challenges the constitutional sufficiency of the Government’s twenty-seven count indictment used to convict him. Specifically, Clausen asserts that each Section 924 (c) count in the indictment used the required terminology of “did knowingly use, carry, brandish, and discharge a firearm during and in retaliation to a crime of violence” to give him notice of an enhanced sentence of five, seven or ten years imposed as a consecutive mandatory minimum if convicted. However, Clausen argues that none of the Section 924 (c) counts used the required terminology of “did knowingly use, carry, brandish, and discharge a firearm during and in retaliation to a second or subsequent crime of violence” to give him notice of a super-enhanced

sentence of twenty-five years imposed as a consecutive mandatory minimum if convicted on more than one Section 924 (c) count. As a result, Clausen asserts that this Court lacked subject matter jurisdiction to impose the super-enhanced twenty-five year mandatory minimum consecutive sentences because he was never indicted on any “second or subsequent” offense under Section 924 (c). Clausen claims the Court did not have jurisdiction to try, convict and sentence him on more than one count under Section 924 (c)(1) and, accordingly, the Court violated Clausen’s Fifth and Sixth Amendment rights by imposing such sentences.

Regarding the sufficiency of an indictment, the Third Circuit in United States v. Schramm, 75 F.3d 156 (3d Cir. 1996), stated as follows:

[t]he principle that an indictment must contain the essential elements of the offense charged is premised upon three distinct constitutional commands which we cannot ignore. First, the indictment must be sufficiently precise to inform the defendant of the charges against which he or she must defend, as required by the Sixth Amendment. Second, the indictment must enable an individual to determine whether he or she may plead a prior acquittal or conviction to bar future prosecutions for the same offense, in accordance with the Fifth Amendment. To accomplish these goals, an indictment must specifically set forth the essential elements of the offense charged. Third, the purpose of an indictment is to shield a defendant in a federal felony case from unfounded prosecutorial charges and to require him to defend in court only those allegations returned by an independent grand jury, as provided by the Fifth Amendment. . . . By sufficiently articulating the critical elements of the underlying offense, an indictment insures that the accused has been duly charged by the grand jury upon a proper finding of probable cause, and will be convicted only on the basis of facts found by that body.

Id. at 162-63 (internal quotation marks and citations omitted). An indictment is “sufficient if, when considered in its entirety, it adequately informs the defendant of the charges against [him] such that [he] may prepare a defense and invoke the double jeopardy clause when appropriate.” United States

v. Whited, 311 F.3d 259, 262 (3d Cir. 2002)(citations omitted). A two part test is used “to measure the sufficiency of an indictment: ‘(1) whether the indictment contains the elements of the offense intended to be charged and sufficiently appries the defendant of what he must be prepared to meet, and (2) enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense.’” United States v. Hodge, 211 F.3d 74, 76 (3d Cir. 2000)(quoting Gov’t of the Virgin Islands v. Moolenaar, 133 F.3d 246, 248 (3d Cir. 1998)).

Examination of the government’s indictment against Clausen in its entirety reveals that it is constitutionally sufficient. The indictment contained the elements of each offense and fairly informed Clausen of the charges against which he was required to defend. Also, the indictment enabled Clausen to plead an acquittal or conviction in bar of future prosecutions for the same offense. Each count in Clausen’s indictment specified the relevant criminal statutes and described the substantive offense Clausen was attempting to accomplish, indicating the date and overt acts comprising the criminal activities, and identifying Clausen, co-Defendants and victims. The indictment did not specifically include the “second or subsequent” language; nevertheless, it informed Clausen of the nature and cause of the accusations against him and provided sufficient notice for him to prepare his defense and, if necessary, to plead former jeopardy in a subsequent prosecution. Minor and technical deficiencies in an indictment must be ignored by courts. *See Schramm*, 75 F.3d at 163 (citations omitted). When considered in its entirety, the indictment’s charges against Clausen suffered from no material omissions, sufficiently apprised Clausen of the charges against him and would have enabled him to invoke the bar of double jeopardy if necessary. Thus, Clausen’s indictment sufficiently alleged the material elements of the offenses and the indictment was legally sufficient. Consequently, Clausen is not entitled to habeas relief on the basis

that the indictment was constitutionally insufficient.

2. 42 U.S.C. § 924(c)(1)(D)

Clausen argues that he is entitled to habeas relief because he was unconstitutionally sentenced to nearly 200 years in excess of his statutory maximum solely by the sentencing Judge's determination of the "facts" due to the judicially determined super-enhanced sentences under Section 924 (c)(1)(D). Regarding the calculation of his 213 year sentence, Clausen contends that this Court's use of several sentencing enhancements under the Federal Sentencing Guidelines was unconstitutional in light of the holdings by the Supreme Court in Apprendi v. New Jersey, 530 U.S. 466, 477 (2000), Blakely v. Washington, --- U.S. ---, 124 S. Ct. 2531 (2004), United States v. Booker, --- U.S. ---, 125 S. Ct. 738 (2005) and related decisions.⁵

In Apprendi, the defendant entered a guilty plea to state firearm offenses. Apprendi, 530 U.S. at 466. The trial judge found by a preponderance of the evidence that the defendant had committed a hate crime and sentenced him to an enhanced sentence under the New Jersey hate crime law. Id. Based upon the Due Process Clause, the Supreme Court held that the findings upon which defendant's hate crime sentence was based must be proved to a jury beyond a reasonable doubt. Id. at 490. Specifically, the Supreme Court stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id.

In Blakely, the Supreme Court held that a sentence that was enhanced by the State of Washington's sentencing regime on the basis of factors found by the judge, rather than the jury,

⁵ Clausen also refers to Harris v. United States, 536 U.S. 545 (2002), Ring v. Arizona, 536 U.S. 584 (2002), and Shepard v. United States, --- U.S. ---, 125 S. Ct. 1254 (2005). However, his analysis is principally based upon Apprendi and Blakely.

violated defendant's constitutional right to trial by jury. Blakely, --- U.S. at ---, 24 S. Ct. at 2533.

Expanding the ruling in Apprendi, which was limited to sentences that exceeded the statutory maximum, the Supreme Court concluded that "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Id., -- U.S. at ---, 24 S. Ct. at 2537.

In Booker, the Supreme Court reaffirmed its holding in Apprendi and extended Blakely's holding to the Federal Sentencing Guidelines. Booker, --- U.S. at ---, 125 S. Ct. at 742. In Booker, the Supreme Court held that Booker's Sixth Amendment right to trial by jury by was violated by the judge who increased his sentence based on a fact found by the judge by a preponderance of the evidence (rather than by the jury beyond a reasonable doubt). Id., --- U.S. at ---, 125 S. Ct. at 749. Specifically, the Court held that "we reaffirm our holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Id., --- U.S. at ---, 125 S. Ct. at 756-57. The Supreme Court held that the mandatory facet of the Federal Sentencing Guidelines was unconstitutional and modified Sentencing Reform Act provisions to make the Guidelines advisory. Id., --- U.S. at ---, 125 S. Ct. at 756-57.

There is no dispute in this case that Clausen's conviction became final on October 6, 2003, well before Blakely and Booker were decided. Thus, the issue here is only whether Clausen is entitled to the benefit of Booker, which is directly applicable to the instant matter, on collateral review. In a comprehensive and well-reasoned decision issued on February 25, 2005, the Honorable Jan E. DuBois of this Court addressed this issue and concluded that the new rules of law in Blakely

and Booker do not retroactively apply to collateral challenges to judgments that were final at the time that those rules were announced. See United States v. Aikens, --- F. Supp. 2d ---, No. 04-3930, 2005 WL 433440, at *8-*9 (E.D. Pa. Feb. 25, 2005); see also United States v. Williams, No. 04-4816, 2005 WL 240939, at *2 (E.D. Pa. Jan. 31, 2005)(concluding that Booker is not retroactive on collateral attack).

In Aikens, Judge DuBois summarized the three Supreme Court decisions of Apprendi, Blakely and Booker, and performed an in-depth analysis of the retroactivity of a new rule of law as governed by Teague v. Lane, 489 U.S. 288 (1988). Aikens, --- F. Supp. 2d at ---, 2005 WL 433440, at *4-8. Judge DuBois found that Booker's extension of Apprendi and Blakely to the Federal Sentencing Guidelines established a new rule. Id., --- F. Supp. 2d at ---, 2005 WL 433440, at *6. As explained by Judge DuBois, the final step of the analysis regarding retroactivity of a new rule of law requires that the new rule satisfy one of the two Teague exceptions; namely, “that the rule places certain primary, private individual conduct beyond the power of the criminal law-making authority to proscribe” or “a new rule applies retroactively if it is ‘implicit in the concept of ordered liberty,’ implicating ‘fundamental fairness,’ and is ‘central to an accurate determination of innocence or guilt,’ such that its absence ‘creates an impermissibly large risk that the innocent will be convicted.’” Id., --- F. Supp. 2d at ---, 2005 WL 433440, at *7 (quoting Teague, 489 U.S. at 311-13; United States v. Swinton, 333 F.3d 481, 487 (3d Cir. 2003)(“Teague's second exception is reserved for watershed rules of criminal procedure that not only improve the accuracy of trial, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.”)). If neither exception is applicable, then the petitioner is not entitled to the benefit of the decision. Id., --- F. Supp. 2d at ---, 2005 WL 433440, at *7.

Judge DuBois concluded that the first Teague exception was inapplicable. Id.

Regarding the second exception, Judge DuBois determined that it did not apply because, while Booker established a new rule, it was not a watershed rule of criminal procedure. Id., --- F. Supp. 2d at ---, 2005 WL 433440, at *7. Judge DuBois stated, in part, as follows:

Booker was a two-part decision. First, the Court held that judicial factfinding can no longer support a sentence exceeding the maximum authorized by a plea of guilty or a jury verdict. Second, the Court ruled that the sentencing guidelines are advisory rather than mandatory. Neither of these holdings are central to an accurate determination of innocence or guilt such that there is an impermissibly large risk that the innocent will be convicted. When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial factfinding seriously diminishes accuracy. Similarly, Booker's holding that the sentencing guidelines are advisory, cannot be said to seriously diminish accuracy to the extent that there was an impermissibly large risk of punishing conduct the law did not reach.

Id., --- F. Supp. 2d at ---, 2005 WL 433440, at *7 (internal quotation marks and citations omitted).

In light of the aforementioned, Judge DuBois concluded that “Booker is not a watershed rule of criminal procedure that should be applied retroactively to cases on collateral review.”⁶ Id., --- F. Supp. 2d at ---, 2005 WL 433440, at *8. I agree with Judge DuBois’ analysis, reasoning and conclusion. Accordingly, Clausen’s Habeas Motion on this ground is denied because it is a collateral challenge to a judgment that was final at the time that the rules of Blakely and Booker

⁶ Concentrating his analysis on Booker, Judge DuBois explained that, “[b]y the same reasoning, the Court concludes that Blakely announced a new rule. However, the Court’s analysis focuses on Booker because it is directly applicable to the instant case since Booker specifically addressed the constitutionality of the Sentencing Guidelines.” Aikens, --- F. Supp. 2d at ---, 2005 WL 433440 at *9 n.1.

were announced.⁷

B. Brady/Jenks Act Violations

Clausen asserts that the prosecution failed to divulge evidence as required by Brady v. Maryland, 373 U.S. 83 (1963).⁸ Clausen alleges that the prosecution's failure deprived him of a fair trial in violation of the Due Process Clause, the Fifth and Sixth Amendments and, as a result, he suffered unfair prejudice. Specifically, Clausen argues that the government failed to provide the following: impeachment evidence and quite possibly exculpatory evidence regarding illegal activities (i.e., prostitution, immigration violations, criminal records and tax violations) occurring within the massage parlors; Agent Parmigiani's notes from his interview with Denis (manager of the Shogun Massage Parlor); robbery police reports that Denis testified about during trial; Swaronski, Sr.'s criminal record due to federal tax evasion; "off the record" meetings between cooperating co-Defendants and the government; and reports or documentation by Berlin Township Police Department and Chance Investigations ruling that the Smuggler's Restaurant and Bar robbery was an inside job. Clausen argues that the prosecution's alleged failure to reveal this information deprived him of exculpatory evidence and impeachment material resulting in the denial of a fair trial. Consequently, Clausen seeks a new trial. The government denies Clausen's claims and argues that there is no merit to any of his contentions.

"Due process requires the prosecution to inform the defense of evidence material to

⁷ Because both of Clausen's arguments for habeas relief based upon Section 924 (c) are meritless, he cannot establish that his counsel was ineffective for not pursuing them.

⁸ Clausen also claims that the prosecution's alleged failure to provide exculpatory information that gives rise to his Brady claim also violated the Jenks Act. 18 U.S.C. § 3500. I will not treat Clausen's Jenks Act claim separately.

guilt or punishment.” Buehl v. Vaughn, 166 F.3d 163, 181 (3d Cir. 1999)(citing Brady, 373 U.S. at 87). Likewise, “[t]he prosecution must also disclose evidence that goes to the credibility of crucial prosecution witnesses.” Id. (citations omitted). “In Brady v. Maryland, the Supreme Court held ‘that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.’” Lambert v. Blackwell, 387 F.3d 210, 252 (3d Cir. 2004), *petition for cert. filed*, --- U.S.L.W. --- (U.S. Feb. 3, 2005)(No. 04-8536)(quoting Brady, 373 U.S. at 87). Subsequently, the Supreme Court held “that ‘a defendant’s failure to request favorable evidence did not leave the Government free of all obligation,’ and a Brady violation might arise ‘where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way.’” Id. (quoting Kyles v. Whitley, 514 U.S. 419, 433 (1995)). “In addition, impeachment evidence, as well as exculpatory evidence, falls within the Brady rule because [s]uch evidence is evidence favorable to an accused.” Id. (internal quotation marks and citations omitted). “Thus, to establish a Brady violation requiring relief, a defendant must show that: (1) the government withheld evidence, either willfully or inadvertently; (2) the evidence was favorable, either because it was exculpatory or of impeachment value; and (3) the withheld evidence was material.” Id. (citations omitted).

Assuming *arguendo* that the government either willfully or inadvertently withheld favorable evidence, Clausen’s claim fails because he cannot show that the alleged withheld evidence was material.⁹ The materiality of suppressed evidence should be “‘considered collectively,

⁹ I note that the government denies withholding any evidence, either willfully or inadvertently. (*See* Gov.’s Resp. Clausen’s Habeas Pet. at 15-17). The government argues that Clausen’s assertions amount to nothing more than nitpicking and points out “the fact that

not item-by-item.” Lambert, 387 F.3d at 253, n.35 (quoting Kyles, 514 U.S. at 436). “[A] showing of materiality does not require a demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” Id. (quoting Kyles, 514 U.S. at 435)(internal quotation marks omitted). “Rather, [t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Id. (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). “In other words, the relevant question is: ‘when viewed as a whole and in light of the substance of the prosecution’s case, did the government’s failure to provide . . . [the] Brady impeachment evidence to the defense prior to the [] trial lead to an untrustworthy guilty verdict . . . ?” Id. (quoting United States v. Pelullo, 105 F.3d 117, 123 (3d Cir. 1997)).

After considering the materiality of suppressed evidence collectively, I conclude that Clausen has not shown that the withheld evidence was material. Regarding the evidence that the massage parlor owner’s were involved in various illegal activities, the trial transcripts reveal that the government was open about their illegal activities. For example, AUSA Cole’s opening statement stated, in part, “members of the jury, you will learn that what goes on behind closed doors in these massage parlors is sex for money. In other words, the age old profession of prostitution. I want you to know that up front. . . .” (N.T. 12/4/00, p. 1-78). Agent Parmigiani also extensively covered the illegal activities occurring in Asian massage parlors during his testimony. Additionally, defense counsel cross-examined most, if not all, of the victims about their illegal activities and Clausen’s

Clausen cites to the record where the use of this information was clearly disclosed either on direct examination or on cross-examination or both.” (Id. at 17). Thus, relying upon Clausen’s own citations to the record, the government argues that the information was made available to counsel.

attorney's closing included argument that the illegal activities were used as leverage by the government against the massage parlor owners by either threatening arrest or by declining to arrest in exchange for favorable testimony. (N.T. 12/11/00, p. 6-50-6-51). Although some of the massage parlor owners denied knowledge of illegal activities within their massage parlors, the trial transcripts reveal that the illegal activities were well-known. Thus, the massage parlor owner's testimony otherwise only served to make their credibility questionable. "Suppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." Id. (quotation and internal quotation marks omitted).

Clausen's claim regarding Swaronski, Sr.'s criminal record due to federal tax evasion also receives the same analysis. Szawronski, Sr. openly testified about his conviction and supervised release resulting from federal tax evasion. (N.T. 12/7/00, p. 4-94). Clausen's attorney, Cipparone, cross-examined Szaronski, Sr. pertaining to his crime, conviction, sentence and supervised release. (Id., p. 4-106-4-107). In his closing argument, Cipparone used Szawronski, Sr.'s criminal conviction and supervised release against him by pointing out that the criminal convictions were based upon fraud offenses and the government's supervised release could be a possible reason for Szawroinski, Sr. to conform his testimony consistent with the government's theory. (N.T. 12/11/00, p. 6-65). Thus, Szawronski, Sr.'s criminal record was not only well known, but was utilized to Clausen's advantage during trial.

As for Agent Parmigiani's alleged notes from his interview with Denis and the alleged robbery police reports, neither are material. There was substantial evidence at trial, including the in-court identification by Denis and testimony by cooperating co-Defendants, showing

that Clausen was involved in the robberies of Denis's massage parlor. Likewise, Clausen's allegations of "off the record" meetings between cooperating co-Defendants and the government are immaterial. There is no reasonable probability that, had any evidence been disclosed to the defense regarding these meetings, the result of the proceeding would have been different. Similarly immaterial are Clausen's assertions pertaining to alleged Berlin Township Police Department and Chance Investigation reports or documentation ruling that the Smuggler's Restaurant and Bar robbery was an inside job. Other than Clausen's allegations, there is no proof regarding the existence of the alleged reports or documentation. Moreover, Clausen's assertion that the Smuggler's Restaurant and Bar robbery was an inside job is completely belied by the extensive and uncontroverted testimony and evidence deduced at trial which resulted in the jury verdict finding Clausen guilty of the robbery.

When viewed as a whole and in light of the substance of the prosecution's case, the government's alleged failure to provide the Brady impeachment evidence to the defense prior to the trial did not lead to an untrustworthy guilty verdict. The evidence at trial overwhelmingly showed that Clausen committed the crimes for which he was convicted, and none of the aforementioned evidence would have sufficed to alter the result of trial. Thus, there is no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Accordingly, Clausen's claim for habeas relief based upon Brady/Jenks Act violations is denied.¹⁰

¹⁰ Clausen's claims regarding alleged Brady/Jenks Act violations are not meritorious. Thus, Clausen cannot establish that his counsel was ineffective for failing to present these claims to the Court.

C. Prosecutorial and Governmental Misconduct

Clausen seeks habeas relief by asserting that the government engaged in various instances of prosecutorial misconduct. “It is well settled that a criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone.” Kindler v. Horn, 291 F. Supp. 2d 323, 359 (E.D. Pa. 2003)(citation omitted). “Indeed, a petitioner will not succeed merely because the prosecutor’s actions were undesirable or even universally condemned.” Id. (internal quotation marks and citations omitted). “The appropriate standard of review on habeas corpus of a claim of prosecutorial misconduct is the narrow one of due process and not the broad exercise of supervisory power.” Id. (citations omitted). “The relevant question is whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id. (internal quotation marks and citation omitted). “Thus, habeas relief is not available simply because the prosecutor’s remarks were undesirable or even universally condemned.” Id. (citations omitted). “Finally, the arguments of counsel must be judged in the context in which they were made, bearing in mind that arguments of counsel carry less weight with a jury than do instructions from the court.” Id. (citation omitted).

“Furthermore, prosecutorial misconduct does not always warrant the granting of a new trial.” Id. at 360 (citation omitted). It has been “acknowledged that given the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial.” Id. (internal quotation marks and citations omitted). “For these reasons, . . . an appellate court should not exercise its supervisory power to reverse a conviction when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error.” Id. (internal quotation

marks and citation omitted). “The harmless error doctrine requires that the court consider an error in light of the record as a whole, but the standard of review depends on whether the error was constitutional or non-constitutional.” Id. at 361 (citation omitted). “Non-constitutional error is harmless when it is highly probable that the error did not contribute to the judgment.” Id. “High probability, in turn, requires that the court possess a sure conviction that the error did not prejudice the defendant.” Id. (citations omitted). “If the error was constitutional, the court may affirm only if the error is harmless beyond a reasonable doubt.” Id. (citations omitted).

In the case at bar, Clausen is not entitled to habeas relief because he has failed to show that the prosecutor’s comments or actions so infected the trial with unfairness as to make the resulting conviction a denial of due process. Most of Clausen’s numerous allegations about the conduct of the government and AUSA Cole involve conclusory and unsubstantiated allegations of lying and intimidation, or involve behavior that Clausen labels as “improper.”¹¹ The majority of Clausen’s allegations can be summarily dismissed because, even if true, they do not show that the trial was so infected with unfairness as to make the resulting conviction a denial of due process. That is, nothing that Clausen alleges pertaining to prosecutorial or governmental misconduct affected the fundamental fairness of the trial so as to rise to the level of a federal due process violation. Examining all of the alleged statements and misconduct together in context and in light of the entire trial, including the effect of my curative instructions, there is no showing that they so infected the trial with unfairness as to make the conviction a denial of due process. Clausen received a fair trial where the quantum and quality of the evidence overwhelmingly, and without

¹¹ Clausen’s claim includes allegations that the government willfully withheld vast amounts of Brady/Jenks Act discovery materials. This assertion has been previously addressed, and denied, in Part. III.B.

question, established his guilt in relation to numerous serious and violent crimes. “[T]he stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair, whereas prosecutorial misconduct is more likely to violate due process when evidence is weaker” Marshall v. Hendricks, 307 F.3d 36, 69 (3d Cir. 2002)(citing Moore v. Morton, 255 F.3d 95, 119 (3d Cir. 2001)). Although some of AUSA Cole’s statements and actions in this case may have been in error, they did not so infect the trial as to make the conviction a denial due process rising to the level of prosecutorial misconduct that constitutes a constitutional deprivation.

Although the majority of Clausen’s claim can be summarily dismissed, his assertions that AUSA Cole’s opening statement included two improper references to Clausen being in prison requires an explanation.¹² Clausen asserts that AUSA Cole improperly informed the jury that the Defendants bragged about the crimes to their buddies in prison. Clausen alleges that AUSA Cole’s statements were not directed at an individual Defendant and, therefore, were prejudicial against him.

¹² Clausen also seeks habeas relief based upon AUSA Cole’s argument in his opening statement that, “[y]ou will hear testimony that one of these defendants even bragged that, you’ll never make these charges stick, because I’ll get out of here in no time, these women aren’t going to come in and testify, they’re just whores. And the customers, they’re not going to testify, what are they going to tell their wives.” (N.T. 12/4/00, p. 1-79). During trial, AUSA Cole attempted to elicit this statement from Officer Gill in relation to what Sternberg said to him when he placed him under arrest, but defense counsel’s objections were sustained and the testimony was excluded. (N.T. 12/18/00, p. 5-128-5-131). As a result, AUSA Cole never clarified his statement; however, there is no showing of prejudice against Clausen. Both Tillman and Szawronski testified that they purposefully robbed massage parlors because of their illegal activity which made them easy targets since there was no fear that the police would be called because of the unlawful activity. (N.T. 12/5/00, p. 22; 12/6/00, p. 3-16). Also, one of the premises of the government’s case against the Defendants was that they intentionally targeted Asian massage parlors in anticipation that the police would not be called because the workers and customers were fearful of the police because of their illegal activities and their illegal immigration status. In light of the aforementioned, AUSA Cole’s statement did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.

However, the record discloses that AUSA Cole's statements were solely in reference to Clausen's co-Defendant, Sternberg.

AUSA Cole's opening statement declared, in part, as follows:

[a]nd during one of the robberies, members of the jury, one of these Defendants at gunpoint, demanded oral sex from one of the women, that's right, oral sex. And one of his buddies thought it was such a great idea, that he did it, too. Afterwards, that same Defendant bragged about it to his buddies and he later bragged about it in prison.

(N.T. 12/4/00, p. 1-73). Continuing on with his opening statement, AUSA Cole explained the circumstances under which Sternberg demanded and received oral sex during the commission of a robbery and that Tillman, following in his footsteps, availed himself of the same thing. (*Id.*, p. 1-97). After explaining the actions of Sternberg and Tillman, AUSA Cole stated, "the evidence will show that, not only did Sternberg brag about [the oral sex] later, but he bragged about it while in prison." (*Id.*, p. 1-97)(emphasis added). Through this explanation and statement, AUSA Cole clarified that he was referring to Sternberg as the Defendant who was bragging about his actions to his prison buddies. Furthermore, both Tillman and Szwaronski testified during the trial that Sternberg bragged about receiving oral sex from one of the employees of a massage parlor during a robbery. (N.T. 12/5/00, p. 91; 12/6/00, p. 3-79). Clausen would like this Court to believe that the statements were not clearly directed at any individual Defendant, thereby prejudicing him; however, the record clearly shows that the statements were directed solely at Sternberg. As a result, Clausen cannot show any prejudice.¹³ Accordingly, Clausen's claim is without merit and does not provide a

¹³ It is also noted that trial testimony established that Clausen was arrested following the final February 26, 2000 robbery. During trial, Detective Christopher Casee testified that on February 26, 2000, he and his partner, Detective Kenneth Roch, answered a call to go to 1812 Ludlow Street. (N.T. 12/8/00, p. 5-108-5-109). When they arrived at the location, they encountered the robbers. (*Id.*, p. 5-110-5-111). Casee took into custody a man that he made an

basis for federal habeas relief.¹⁴

D. Ineffective Assistance of Counsel

Clausen’s final premise for habeas relief rests upon numerous allegations of ineffective assistance of counsel. “The Sixth Amendment right to counsel encompasses the right to effective assistance of counsel.” McAleese v. Mazurkiewicz, 1 F.3d 159, 166 (3d Cir. 1993)(citing Strickland v. Washington, 466 U.S. 668, 686 (1984)). “A claim of ineffective assistance requires a defendant to establish that counsel’s representation fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.” Id. (citing Strickland, 466 U.S. at 687-88). “In order to demonstrate prejudice, the defendant must establish ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Id. (citing Strickland, 466 U.S. at 694). “A reasonable probability is one ‘sufficient to undermine confidence in the outcome.’” Id. (citing Strickland, 466 U.S. at 694). “Stated differently, there will be no award of relief unless the defendant affirmatively establishes the likelihood of an unreliable verdict.” Id. (citing Strickland, 466 U.S. at 688-89). “Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” Strickland, 466 US. at 700.

in-court identification as Clausen. (Id., p. 5-114, 5-115). Police officer Kenneth Gill also testified that he responded to a call of a robbery in progress at 1812 Ludlow Street. (N.T. 12/8/00, p. 5-129). During the trial, Gill recognized Clausen as one of the men taken into custody. (Id., p. 5-131). Tillman and Szawronski also testified that they were arrested, along with Clausen, on February 26, 2000. (N.T. 12/5/00, p. 111-114; 12/6/00, p. 3-92-3-94). In light of this testimony, it was established at trial that Clausen was in police custody.

¹⁴ Since Clausen’s arguments for habeas relief based upon prosecutorial or governmental misconduct are meritless, he cannot establish that his counsel was ineffective for not pursuing them.

Clausen asserts many reasons for his ineffective assistance of counsel claim against his attorney, Cipparone. Although Clausen asserts numerous and varied reasons for his ineffective assistance of counsel claim, it must be dismissed because he has not shown the prejudice required in order to obtain habeas relief. The Third Circuit “has ‘read Strickland as requiring the courts to decide first whether the assumed deficient conduct of counsel prejudiced the defendant.’”

McAleese, 1 F.3d at 170 (quoting United States v. Fulford, 825 F.2d 3, 8 (3d Cir. 1987); citing McNeil v. Cuyler, 782 F.2d 443, 449-50 (3d Cir. 1986)).¹⁵ “Strickland itself recognized that

[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. (quoting Strickland, 466 U.S. at 697; see, e.g., Cuyler, 782 F.2d at 451 (reversing order granting writ on grounds of no prejudice; while counsel’s representation was assumed deficient, defendant received fair trial “even if his defense was flawed”)).

¹⁵ *See also* Smith v. Robbins, 528 U.S. 259, 286 n.14 (2000) (“The performance component need not be addressed first. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”); Miles v. Diguglielmo, No. 04-2301, 2005 WL 396603, at *4 (E.D. Pa. Feb. 17, 2005) (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.”); United States v. Waddy, No. 92-6827, 2003 WL 22429047, at *7 (E.D. Pa. Sept. 18, 2003) (“The Third Circuit has emphasized that we must address the question of prejudice first, acting on the assumption that counsel’s conduct was deficient and only then, if we find prejudice based on such an assumption, consider whether counsel’s conduct was, in fact, deficient.”); United States v. Swint, No. 98-5788, 2000 WL 987861, at *16 (E.D. Pa. July 17, 2000) (the Court explained that it analyzed each of petitioner’s ineffective assistance of counsel claims “notwithstanding the authority to reject ineffective assistance of counsel arguments without addressing the specifically alleged deficiencies of counsel where, as in this case, the evidence of guilt is clear”).

Upon examining Clausen's claims in light of the totality of the evidence, I conclude that he cannot establish prejudice because he has not shown 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. Clausen sets forth numerous claims and allegations of deficient performance by Cipparone, but he fails to show any prejudice as that term is defined by Strickland. Clausen makes general contentions that he was prejudiced, however, he does not affirmatively establish the likelihood of an unreliable verdict. Most of Clausen's ineffective assistance of counsel claim involves marginal errors which are immaterial and, thus, do not show that there is a reasonable probability that, but for Cipparone's unprofessional errors, the result of the proceeding would have been different. The following are a few examples of Clausen's allegations: Cipparone was late to Court during trial; Cipparone failed to challenge two Chinese massage parlor owner's English speaking and writing abilities; and, after the verdict, Cipparone attempted to get Clausen to meet with ASUA Cole to provide information in exchange for a substantial reduction in sentence. "'Harmless errors,' which do not have substantial and prejudicial effect upon the defendant, are not grounds for habeas corpus relief; the effect of the error must be 'substantial and injurious.'" United States v. LaSalle, No. 96-3896, 1996 WL 433592, at *2 (E.D. Pa. Jul. 22, 1996)(quoting Brecht v. Abrahamson, 507 U.S. 619 (1993)). As a result, the majority of Clausen's ineffective assistance of counsel claims are easily dismissed.

Although most of his ineffectiveness claims are easily dismissed, further discussion is necessary to address Clausen's claim that Cipparone conceded his guilt during closing argument when he asserted a defense based upon the argument that Clausen did not engage in robberies or

attempted robberies, but engaged in extortion.¹⁶ Regarding the extortion defense, Cipparone explained to the jury that if they decided that Clausen was engaged in extortion then they would have to acquit him of the robbery charges for which he was being tried. (N.T. 12/11/00, p. 6-45–6-48). In his closing argument, Cipparone stated to the jury that, “[i]f you have a reasonable doubt that these incidents were robbery and that it could be extortion or street tax, then you must find Adam Clausen not guilty.” (*Id.*, p. 6-59).

As previously set forth *ad nauseam* in this Memorandum Opinion, the amount of

¹⁶ During trial, Sternberg’s attorney, Paul Hetznecker, Esq. (“Hetznecker”), also asserted the extortion defense on behalf of his client. Sternberg filed a Petition for Habeas Relief in which one of the grounds was an ineffective assistance of counsel claim based upon Hetznecker’s use of the extortion defense. (See Crim. A. No. 00-291-01; Civ. A. No. 04-55). In a Memorandum Opinion dated February 10, 2005, I denied Sternberg’s Habeas Petition, including his claim of ineffective assistance of counsel. In Clausen and Sternberg’s individual Habeas Petitions, both men separately recite to excerpts from the record of Hetznecker’s closing argument. Clausen and Sternberg drew from those excerpts that AUSA Cole was objecting to Hetznecker’s closing argument because he was getting dangerously close to admitting Sternberg’s presence during the robberies in question. Both Clausen and Sternberg argue that the Court appeared to recognize this and was agreeing with the objection. In my Memorandum Opinion, I clarified that such an interpretation was mistaken. As I explained,

[t]he prosecutor was objecting because Mr. Hetznecker was arguing facts not in evidence. Mr. Hetznecker was arguing to the jury what Mr. Sternberg was “thinking” while those crimes were in progress even though Mr. Sternberg never testified as to what he was thinking or anything else for that matter.

I cautioned Mr. Hetznecker at that point because I knew if it continued the government on rebuttal would claim as a matter of fairness it had the right to point out to the jury, something to the effect that it was the defense attorney saying these things not the defendant. Thus causing a possible conflict with the law as stated in Griffin v. State of California, 380 U.S. 609 (1965). At no time did I think the prosecution was objecting because the defense attorney was making a harmful admission.

United States v. Sternberg, No. 04-55, 2005 WL 331574, at *6 (E.D. Pa. Feb. 10, 2005).

evidence at trial against Clausen establishing his guilt was overwhelming. See Part I. Tillman and Szawronski's testimony not only established Clausen's involvement in all of the robberies and attempted robberies for which he was found guilty, but also showed Clausen's leadership role in each and every crime. Likewise, the convincing testimony against Clausen by victims and witnesses of the robberies and attempted robberies further solidified Clausen's involvement in all of the crimes for which he was indicted and found guilty. Not only has Clausen's guilt been proven through the testimony by cooperating co-Defendants, victims and witnesses, but police reports and testimony by a Philadelphia Detective and Police Officer show that Clausen was arrested at the scene of the last robbery (1812 Ludlow Street (Happiness Oriental Spa)) and a weapon found there was identified as Clausen's gun. (N.T. 12/6/00, p. 3-83; N.T. 12/8/00, p. 5-123, 5-136-37).

In light of the totality of the evidence at trial, Clausen received a fair trial in which his guilty verdict was corroborated with overwhelming record support.¹⁷ "The effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: 'a verdict

¹⁷ Due to the extortion defense, Clausen asserts that the government was not held to its heavy burden of establishing its case beyond a reasonable doubt. Throughout trial, the government was held to its burden of proof beyond a reasonable doubt that Clausen committed the robberies and attempted robberies for which he was indicted. Not only was the government held to its burden, but it met its burden, and then far exceeded it, by convincingly proving Clausen's guilt for each and every crime through the evidence.

In relation to the extortion defense, Clausen also argues that, although he knowingly and intelligently waived his right to testify, his waiver was in error because he was under the presumption that Cipparone was going to hold the government to meeting its heavy burden of proof which he did not do when he asserted the extortion defense during closing arguments. (Clausen's Reply at 23-24). Review of the record shows that Cipparone held the government to its heavy burden of proving Clausen's guilt beyond a reasonable doubt throughout the trial. Cipparone's closing argument was based upon the argument that the government did not meet its burden of proof beyond a reasonable doubt. (N.T. 12/11/00, p. 6-42-6-73). Throughout his argument, Cipparone stressed the government's burden and argued that the Clausen should be acquitted because the government failed to meet its burden of proof. (Id.).

or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)(quoting Strickland, 466 at 696; United States v. Agurs, 427 U.S. 97 (1976)). As explained in Strickland,

a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and the factual findings that were affected will have been affected in different ways. Some errors will have a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695-96. The guilty verdict in Clausen’s case is overwhelming supported and reliable. Clausen has not shown that the decision reached by the jury would reasonably likely have been different absent Cipparone’s use of the extortion defense during his closing argument. Clausen may allege that he was prejudiced by the extortion defense, but he has not established, by a reasonable probability, the likelihood of an unreliable verdict. Thus, Clausen has not shown the requisite prejudice as required by Strickland in order to be entitled to habeas relief. As a result, Clausen’s request for habeas relief based upon ineffective assistance of counsel is denied.¹⁸

¹⁸ All of Clausen’s ineffective assistance of counsel claims, including his claims based upon Cipparone’s representation pre-trial, as trial counsel, as sentencing counsel and appellate counsel, are denied because Clausen has failed to show either that such representation was deficient or that he was prejudiced as a result of such representation.

III. CONCLUSION

Clausen's *pro se* Habeas Corpus Motion pursuant to 28 U.S.C. § 2255 is denied. Clausen's claims based upon 18 U.S.C. § 924 (c) are denied. Examination of the government's indictment against Clausen in its entirety reveals that it is constitutionally sufficient. Clausen's Habeas Motion on the basis that the Court erred by imposing "super-enhanced" penalties for "second or subsequent" offenses is denied because it is a collateral challenge to a judgment that was final at the time that the rules of Blakely and Booker were announced. Clausen's claims based upon Brady/Jenks Act violations are also denied because he has failed to show a reasonable probability that, had the evidence or documentation been disclosed to the defense, the result of the trial would have been different. Likewise, Clausen's claims based upon prosecutorial and governmental misconduct are denied. Clausen has not made the requisite showing that the alleged comments or actions so infected trial with unfairness as to make the resulting conviction a denial of due process. Finally, Clausen's ineffective assistance of counsel claims do not provide a basis for habeas relief. Clausen has failed to make the requisite showing of prejudice and, therefore, he is not entitled to habeas relief based upon ineffective assistance of counsel.¹⁹

An appropriate Order follows.

¹⁹ Clausen's Habeas Motion fails to state a ground for relief under 28 U.S.C. § 2255, and will be denied without an evidentiary hearing. After a review of all of the habeas pleadings and the complete record in this case, I find that an evidentiary hearing is not required because the pleadings and record conclusively show that Clausen is not entitled to relief. *See United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir. 1994). Therefore, Clausen's request for an evidentiary hearing is denied. Likewise, Clausen's request for additional discovery is denied because he has failed to establish good cause for any further discovery. *See* 28 U.S.C. § 2255, Rule 6.

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

_____	:	
UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 00-291-02
v.	:	
	:	CIVIL ACTION
ADAM BENTLEY CLAUSEN	:	No. 04-4625
_____	:	

ORDER

AND NOW, this 12th day of April, 2005, upon consideration of the *pro se* Habeas Corpus Motion pursuant to 28 U.S.C. § 2255 by Adam Bentley Clausen (Doc. No. 210), and all of the Responses and Relies thereto, it is hereby **ORDERED** that:

1. the Motion is **DENIED**;
2. the Request for an Evidentiary Hearing is **DENIED**;
3. the Request for Additional Discovery is **DENIED**; and
4. there is no probable cause to issue a Certificate of Appealability.

BY THE COURT:

s/ Robert F. Kelly
ROBERT F. KELLY, Sr. J.