

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

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 02-495
 :
 MICKEY ALLEN WEICKSEL : CIVIL NO. 11-2323
 :

SURRICK, J.

JUNE 18, 2014

MEMORANDUM

Presently before the Court is Petitioner Mickey A. Weicksel’s pro se Amended Motion to Vacate/Set Aside/Correct Sentence under 28 U.S.C. § 2255 (ECF No. 143).¹ For the following reasons, Petitioner’s Motion will be denied.

I. BACKGROUND

On August 15, 2002, a federal grand jury returned an Indictment against Petitioner Mickey A. Weicksel. (ECF No. 1.) On August 29, 2002, Petitioner was arrested. (Presentence Investigation Report (on file with Court).) At his arraignment on September 19, 2002, Petitioner entered a plea of not guilty, and a trial date was set for October 28, 2002. (ECF No. 9.) On October 18, 2002, Petitioner’s attorney, Steven A. Morley (“Morley”), filed a motion for a continuance of the trial date. (ECF No. 11.) We granted the motion on November 7, 2002, noting that “due to the volume of witnesses and documents,” the case was “so unusual and/or complex . . . that it [was] unreasonable to expect adequate preparation for trial within the time limits established by law.” (ECF No. 13.)

¹ We subject pro se pleadings to a liberal review. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A pro se complaint, “however inartfully pleaded,” is to be held to “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *see also Higgs v. Att’y Gen. of the U.S.*, 655 F.3d 333, 339 (3d Cir. 2011).

Petitioner's trial began on February 21, 2006. (Min. Entry, ECF No. 34.) On March 3, 2006, a jury found Petitioner guilty on 14 counts of wire fraud, in violation of 18 U.S.C. § 1343, three counts of bank fraud, in violation of 18 U.S.C. § 1344, and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). (Pet'r's Am. Mot. 22, ECF No. 143.) On October 23, 2007, Petitioner was sentenced to a prison term of 168 months, to be followed by five years of supervised release. (ECF No. 128.) Petitioner was also directed to pay special assessments in the amount of \$1,800 and restitution in the amount of \$750,324.37. (*Id.*) On April 2, 2010, the United States Court of Appeals for the Third Circuit affirmed Petitioner's conviction and sentence. *United States v. Weicksel*, 375 F. App'x 261 (3d Cir. 2010).

On April 4, 2011, Petitioner filed a pro se motion to vacate/set aside/correct sentence under 28 U.S.C. § 2255. (ECF No. 140.) On September 30, 2011, Petitioner filed this Amended Motion. (Pet'r's Am. Mot.)¹ On May 3, 2012, the Government filed a Response. (Gov't's Resp., ECF No. 144.)² On August 13, 2012, Petitioner filed a Reply. (ECF No. 150.)

¹ "The Federal Rules of Civil Procedure apply to motions to amend habeas corpus motions." *United States v. Duffus*, 174 F.3d 333, 336 (3d Cir. 1999). Pursuant to Rule 15(c):

[A]n amendment which, by way of additional facts, clarifies or amplifies a claim or theory in the [habeas] petition may, in the [d]istrict [c]ourt's discretion, relate back to the date of that petition if and only if the petition was timely filed and the proposed amendment does not seek to add a new claim or to insert a new theory into the case.

United States v. Thomas, 221 F.3d 430, 431 (3d Cir. 2000). Here, Petitioner's Motion was filed within the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2255(f). Rather than adding a new theory of relief, Petitioner's Amended Motion seeks only to clarify the legal and factual basis of his existing claims.

² Attached to the Government's Response are a number of exhibits, including letters from attorney Morley to the Court with regard to scheduling trial and an Affidavit from attorney Morley which addresses a number of Petitioner's complaints.

II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 2255, a federal prisoner may move the sentencing court to vacate, set aside, or correct a sentence “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” 28 U.S.C. § 2255(a). Relief under this provision is generally available “to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.” *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1989).

While the court may in its discretion hold an evidentiary hearing on a § 2255 petition, *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989), such a hearing need not be held if the “motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b); *see also United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir. 1994).

III. DISCUSSION

Petitioner raises numerous arguments in an attempt to establish two grounds for relief. Petitioner claims that he was denied effective assistance of counsel at all stages of the proceedings, pre-trial, trial, sentencing, and on appeal. (Pet’r’s Am. Mot. 23.) He also claims that judicial bias infringed upon his Sixth Amendment rights. (*Id.* at 29.)

A. Ineffective Assistance of Counsel

Petitioner’s ineffective assistance of counsel claim is based upon the following three alleged deficiencies on the part of attorney Morley: (1) failing to push the trial forward; (2)

failing to properly investigate and call witnesses; and (3) operating under a serious conflict-of-interest between his duty to the court and his duty to Petitioner.

To establish a claim for ineffective assistance of counsel in violation of the Sixth Amendment, a defendant must show that: (1) his or her attorney's performance was deficient; and (2) that the deficient performance prejudiced his or her defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient representation, a defendant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." *Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir. 1999) (citing *Strickland*, 466 U.S. at 688). To establish prejudice, a defendant must show that "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, "[t]he 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." *Id.* at 694. Under *Strickland*, counsel is presumed to have acted within the range of "reasonable professional assistance," and the defendant bears the burden of "overcom[ing] the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). While a defendant has the right to effective assistance of counsel, courts have explained that the Constitution does not guarantee the right to a perfect trial. *See Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002) ("[T]he court is not engaging in a prophylactic exercise to guarantee each defendant a perfect trial with optimally proficient counsel, but rather to guarantee each defendant a fair trial, with constitutionally competent counsel."). "Judicial scrutiny of counsel's

performance must be highly deferential” as “there are countless ways to provide effective assistance in any given case.” *Strickland*, 466 U.S. at 689.

1. Failure to Push the Trial Forward

Petitioner argues that Morley allowed the Court and the Government to violate the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.* (Pet’r’s Am. Mot. 4.) As evidence, Petitioner notes that he was not indicted until four years after his crimes took place and that during the subsequent four years between his indictment and trial, “there w[ere] numerous opportunities to push the prosecution forward.” (*Id.* at 24.) During that time, Petitioner alleges that he wrote letters and made phone calls requesting a speedy trial. (*Id.*) Petitioner also contends that Morley asked for a continuance without his permission and that he lied to Petitioner about the strength of the Government’s case. (*Id.*) Finally, Petitioner maintains that the trial was delayed because the prosecution “needed time to fabricate a case.” (*Id.*)

The Speedy Trial Act requires that an “indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.” 18 U.S.C. § 3161(b). The Act further requires that a defendant be brought to trial “within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.” 18 U.S.C. § 3161(c)(1). However, § 3161(h)(7)(A) excludes from that time:

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(7)(A). Moreover, one of the factors that a judge must consider when deciding whether to grant a continuance is:

Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

18 U.S.C. § 3161(h)(7)(B)(ii).

Initially, we note that the Third Circuit Court of Appeals found that Petitioner had waived any substantive claim for violation of the Speedy Trial Act because he raised this argument for the first time on appeal. *Weicksel*, 375 F. App'x at 266; see 18 U.S.C. § 3162(a)(2) (“Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.”). Accordingly, we need address only whether Morley’s failure to make a timely objection constituted ineffective assistance of counsel. See *United States v. Brown*, Nos. 99-790, 04-4121, 2005 WL 1532538, at *6 (E.D. Pa. Jun. 28, 2005) (“[T]o determine whether [Petitioner] has alleged sufficient ‘cause’ to excuse the procedural default of his speedy trial claims, [the court] must evaluate whether trial counsel’s failure to object on these grounds constitutes ineffective assistance of counsel.”).

Morley did not render deficient performance under *Strickland* because Petitioner did not have a colorable claim under the Speedy Trial Act. The Government did not violate § 3161(b) of the Act because Petitioner was indicted prior to his arrest. Moreover, the Order of November 7, 2002, continuing the trial was perfectly proper. The Order clearly stated that the trial was being continued so that the parties would have more time to prepare for a complex case. That explanation was sufficient to satisfy the “ends of justice” balancing test set forth in § 3161(h)(7)(A). See *United States v. Lattany*, 982 F.2d 866, 879 (3d Cir. 1992) (“[I]t is not necessary . . . to articulate facts which are obvious and are set forth in the motion for the

continuance itself.”); *see also United States v. Garraud*, No. 07-427, 2008 WL 5264915, at *4 (E.D. Pa. Dec. 17, 2008) (“It is clear from the record that we continued the trial . . . to provide [d]efendant time for effective trial preparation.”). Moreover, Petitioner has not provided any documentation in support of his contention that he requested Morley to proceed to trial as quickly as possible. In fact, Morley has stated that no such requests were ever made. (Morley Aff. ¶ 2, Gov’t’s Resp. Ex. 7.) Finally, even if Petitioner did object to the continuance, that fact alone would not be dispositive. The Speedy Trial Act “allows for a continuance ‘at the request of the defendant *or* his counsel.”” *United States v. Young*, Nos. 05-56, 10-3465, 2011 WL 4056729, at *6 (E.D. Pa. Sept. 12, 2011) (emphasis in original) (quoting 18 U.S.C. § 3161(h)(7)(A)). Obviously, Morley felt that he needed more time to prepare for trial. Petitioner has failed to meet his burden under *Strickland*’s first prong.

In addition, Petitioner cannot establish prejudice as required under *Strickland*’s second prong. Petitioner makes no claims of witnesses’ unavailability, change of heart, or loss of memory during the delay. Moreover, there is little reason to believe that Petitioner’s trial would have resulted in a more favorable outcome had his attorney been less prepared. *See United States v. Coleman*, Nos. 05-295, 10-2013, 2012 WL 1231800, at *4 (E.D. Pa. Apr. 12, 2012) (“Because defense counsel’s readiness for trial was of paramount importance, counsel’s requests for, and the Court’s decisions to grant, ‘ends of justice’ continuances were reasonable.”). Finally, even if Morley had raised an objection on Speedy Trial Act grounds, his argument would have been rejected on appeal. As the Third Circuit noted, “the record shows that only [Petitioner] sought a continuance of the trial. Thus, even if he hadn’t waived this argument, it would fail.” *Weicksel*, 375 F. App’x at 266 (citing *Vermont v. Brillon*, 556 U.S. 81, 90 (2009)); *see also United States v. Bedford*, 628 F.3d 1232, 1235 (10th Cir. 2010) (finding that the

attorney's failure to move for dismissal on the basis of the Speedy Trial Act was not ineffective assistance where the delays resulted from continuance motions filed by the defendant or his co-defendants). Petitioner cannot establish that the result of his trial would have been different but for Morley's failure to push the case forward. Petitioner cannot establish prejudice. We reject his first claim of ineffective assistance of counsel.³

2. *Failure to Investigate and Call Witnesses*

Petitioner next argues that Morley failed to investigate and subpoena "over three dozen" witness and numerous exhibits that would have "exonerate[d] [Petitioner] before the jury." (Pet'r's Am. Mot. 25.) Petitioner's Motion specifically names twelve individuals, including: family members, acquaintances, and representatives from the financial institutions that sustained losses as a result of Petitioner's criminal activity. (*Id.*) Petitioner also generally references professionals such as a handwriting expert, a forensic accountant, and a psychologist. (*Id.*)

The Third Circuit has held that "an attorney must investigate a case, when he has cause to do so, in order to provide minimally competent professional representation." *United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997). Thus, defendants can establish deficient representation under *Strickland* if counsel fails to conduct any pretrial investigation. *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989). However, "[w]hen a petitioner claims that counsel's failure to call a witness resulted in prejudice, 'such a showing may not be based on mere speculation about what the witnesses counsel failed to locate might have said.'" *Raspino v. United States*, Nos. 08-321, 04-182, 2008 WL 4899349, at *3 (E.D. Pa. Nov. 13, 2008) (quoting

³ The case cited by Petitioner in support of his speedy trial claims, *United States v. Zedner*, 547 U.S. 489 (2006), is easily distinguished. In *Zedner*, which was decided after Petitioner's conviction, the Supreme Court held that defendants "may not prospectively waive the application of the [Speedy Trial Act]." *Id.* at 503. In the instant case, Petitioner does not allege, nor does the record suggest, that Petitioner signed a prospective waiver form or prospectively waived the application of the Speedy Trial Act.

Gray, 878 F.2d at 714). “[A]t the very least, ‘petitioner must make a specific affirmative showing as to what the evidence would have been.’” *Id.* (quoting *Blout v. United States*, 330 F. Supp. 2d 493, 497 (E.D. Pa. 2004)); *see also Hernandez v. United States*, Nos. 10-4943, 06-126, 2013 WL 5331055, at *8 (D.N.J. Sept. 23, 2013) (noting that “bald assertions and conclusory allegations do not provide sufficient ground to require an evidentiary hearing” especially where counsel investigated possible witnesses and “rejected [them] for perfectly sound reasons”).

Petitioner offers little support for his contention that Morley failed to investigate and subpoena potential witnesses. He provides affidavits for only four of the twelve individuals identified in his Motion. According to their affidavits, these witnesses would have done little more than vouch for Petitioner’s character and make general assertions about his innocence. (Pet’r’s Am. Mot. 14-19.) Although Morley considered calling such character witnesses to testify as to Petitioner’s law-abiding nature, he was concerned that if he did so, Petitioner’s criminal record would be revealed to the jury on cross-examination. (Morley Aff. ¶ 8.) We cannot say that Morley’s strategic determination not to call character witnesses was unreasonable.

Moreover, Petitioner’s assertion that other potential witnesses would have provided exculpatory testimony is contradicted by the record. One of the individuals identified by Petitioner informed Morley that he did not possess information favorable to Petitioner’s case and that he did not wish to be contacted by Petitioner. (*Id.* at 2-3.) Morley interviewed another potential witness who was a former business associate of Petitioner. (*Id.* at 3.) Although he could have provided testimony that was relevant to Petitioner’s defense, Morley was concerned that the jury would view the testimony as unreliable because the individual’s business license had previously been suspended. (*Id.*) Therefore, Morley chose to elicit the same testimony from

a different witness. (*Id.*) A third potential witness identified by Petitioner provided the government with information that was detrimental to Petitioner's defense. (Gov't's Resp. Ex. 3.) Given these facts, we cannot say that Morley's decision to not call these witnesses was unreasonable under *Strickland*. See *Gray*, 878 F.2d at 710 (“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable”) (quoting *Strickland*, 466 U.S. at 690-91).

Petitioner also faults Morley for failing to re-call several government witnesses and for not calling any expert witnesses. (Pet'r's Am. Mot. 25, 28.) However, Petitioner does not explain how recalling these witnesses would have produced testimony that was any more favorable than that which was elicited by Morley on cross-examination. Nor does Petitioner provide any clarification as to how testimony from expert witnesses, such as a forensic accountant, would have altered the verdict.⁴ Petitioner has failed to meet his burden under *Strickland* and his second claim of ineffective assistance must be rejected.

⁴ To the extent Petitioner challenges the loss figures provided by Crusader's Bank and Lehman Brothers Bank (see Pet'r's Am. Mot. 28), a § 2255 motion is not the proper method for doing so. See *United States v. Savage*, 466 F. App'x 68, 70 (3d Cir. 2012) (observing that the idea that a defendant “could challenge a restitution order via 28 U.S.C. § 2255 [is] a highly doubtful proposition”); *United States v. Knight*, No. 94-32, 2008 WL 763305, at *1 n.2 (E.D. Pa. Mar. 20, 2008) (“Petitions under § 2255 are not available to attack a restitution order because a petition under § 2255 must be claiming a right to be released.”). However, even if Petitioner's challenge is presentable in a § 2255 motion, it should be reviewed for clear error or abuse of discretion. See *United States v. Sosebee*, 419 F.3d 451, 455 (6th Cir. 2005) (noting that the amount of loss is reviewed using an abuse of discretion standard for restitution purposes and a clear error standard for sentencing guideline purposes). In the instant case, Petitioner cannot succeed under either standard since the Third Circuit affirmed the entirety of Petitioner's sentence, including the restitution amounts, on direct appeal. *Weicksel*, 375 F. App'x at 261.

3. *Conflict of Interest between Duty to the Court and Duty to the Client*

Petitioner argues that licensed attorneys harbor a major conflict of interest that both Morley and the Court ignored and left undisclosed. (Pet'r's Am. Mot. 26.) Petitioner argues that Morley's duty to the administration of justice precluded his ability to provide Petitioner with effective representation. (*Id.* at 26-27.) Petitioner also cites the notion that third party payment of defendants' legal fees can cause a potential conflict-of-interest for attorneys. (*Id.* at 27.) Finally, Petitioner cites *United States v. Morrison*, 449 U.S. 361, 366 (1981), to argue that reversal is "mandated if prejudice is proven on attorney-client relationship." (Pet'r's Am. Mot. at ¶ 27.)

We agree with the Government that Petitioner's conflict-of-interest arguments are frivolous. We recognize that as officers of the court, attorneys have "an overarching duty of candor to the [c]ourt." *Eagan v. Jackson*, 855 F. Supp. 765, 790 (E.D. Pa. 1994). We further acknowledge that "an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct" *Nix v. Whiteside*, 475 U.S. 157, 168 (1986); *see Eagan*, 855 F. Supp. at 790 ("[T]he lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit.") (quoting *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457-58 (4th Cir. 1993)). The fact that attorneys owe a duty to both their client and the court does not create a conflict of interest. Ethical trial attorneys honor both of these duties every day in effectively representing their clients in court. *See Nix*, 475 U.S. 157, 171 (holding that an attorney's refusal to cooperate with the defendant in presenting perjured testimony at trial does not constitute ineffective assistance of counsel); *see also United States v. Gonzalez*, 222 F. App'x 238, 243 (4th Cir. 2007) (finding that the

defendants' claim that their court-appointed counsel had a conflict of interest because he had sworn to uphold the United States Constitution was frivolous).

In support of his argument that trial judges “are required to determine whether third parties are paying fees of retained counsel when defendant is indigent, and if so, whether defendant understands potential conflict of interest that may exist in such arrangement and voluntarily waives conflict,” Petitioner cites *Quintero v. United States*, 33 F.3d 1133 (9th Cir. 1994). (Pet’r’s Am. Mot. 27.) *Quintero* is easily distinguished. The attorneys in *Quintero* were privately retained and were being paid by an unknown source. *Id.* at 1135. Here, Petitioner’s attorney was appointed in accordance with the Criminal Justice Act (the “CJA”), 18 U.S.C. §§ 3006 *et seq.* Pursuant to the CJA, “the [c]ourt . . . provides indigent defendants with counsel free of charge, by paying counsel’s fees.” *Sanford v. United States*, No. 08-1788, 2009 WL 2524891, at *3 (E.D.N.Y. Aug. 14, 2009); *see* 18 U.S.C. § 3006(A). This is done in compliance with the Sixth Amendment, which “sets forth that every criminal defendant is entitled to [a]ssistance of [c]ounsel for his defense.” *Sanford*, 2009 WL 2524891, at *3 (internal quotation marks omitted). Thus, the appointment of CJA counsel “is a Constitutional obligation . . . not a conflict of interest on defense counsel’s part.” *Id.* (internal quotation marks omitted); *see Davis v. Gross*, No. 09-257, 2010 WL 1872871, at *7-8 (E.D. Ky. May 10, 2010); *see also United States v. Francies*, No. 01-109, 2002 WL 31415496, at *5 (N.D. Ill. Oct. 24, 2002). Petitioner’s third claim of ineffective assistance of counsel is rejected.

B. Judicial Bias

Petitioner asserts that the Court displayed a “troubling . . . judicial bias” in failing to allow Petitioner to fire his attorney and proceed pro se at trial. (Pet’r’s Am. Mot. 29.) More specifically, Petitioner alleges Morley “was obviously laboring under a major conflict of

interest” and that our refusal to allow him to proceed pro se was a violation of his right to self-representation under the Sixth Amendment. (*Id.* at 27, 30-31.) Furthermore, Petitioner maintains that he was not present at the hearing at which we “forced” Morley to represent him and that we never inquired as to why Petitioner wanted to fire Morley. (*Id.* at 30-31.)

Petitioner’s argument is inconsistent with the facts of this case. As explained above, Morley did not labor under any conflict of interest. Moreover, there is no support for Petitioner’s assertion that Morley was forced upon him or that he was denied the right of self-representation. Petitioner relies upon the affidavit of a relative who was present at trial and who alleges that Morley refused to allow Petitioner to get a new attorney. (Cole Aff., Pet’r’s Am. Mot. 14.) In his affidavit, Morley states that Petitioner seemed satisfied with his representation during trial, made no attempts to discharge him during trial, and never stated that he wanted to proceed pro se. (Morley Aff. ¶ 10, 12.) Morley further states that it was not until after the trial that Petitioner expressed dissatisfaction with his services. (*Id.* at ¶ 11.)

The record reveals that on April 27, 2006, Morley filed a motion to withdraw as counsel. (ECF No. 65.) In the motion, Morley referenced a letter that Petitioner submitted to the Court, alleging that Morley had been ineffective at trial. (*Id.*) On June 23, 2006, we held a hearing on the Motion. (ECF No. 76.) Both Petitioner and Morley were present, and Petitioner expressed no objection to continuing with Morley’s representation through sentencing. (*Id.*) The record further reveals that it was not until after that hearing that Petitioner made several requests to replace Morley. (ECF No. 94.) In response to those requests, we held a hearing on October 31, 2006, and replaced Morley with court appointed counsel, Christopher G. Furlong (“Furlong”). (*Id.*) Petitioner was present at the hearing. (*Id.*)

At no time did Petitioner express any interest in proceeding pro se. Rather, on August 15, 2007, Petitioner filed a motion requesting permission to proceed as co-counsel with Furlong. (ECF No. 107.) On October 25, 2007, we dismissed Petitioner's motion as frivolous. (ECF No. 126); *see United States v. Turner*, 677 F.3d 570, 578 (3d Cir. 2012) ("Pro se litigants have no right to hybrid representation because a defendant does not have a constitutional right to choreograph special appearances by counsel.") (internal quotation marks omitted).

The record clearly contradicts Petitioner's claims that this Court, motivated by deep seated bias, forced Petitioner to proceed with unwanted counsel and deprived him of the right to represent himself. Petitioner has failed to establish any bias on the part of this Court and has provided insufficient evidence in support of his claim that we denied him the right to represent himself. Petitioner's claim of judicial bias is rejected.

C. Cumulative Error

Finally, Petitioner argues that even if each of the above alleged errors were insufficient to justify a new trial standing alone, their cumulative effect resulted in an unfair trial. We reject this argument. Petitioner has failed to bring forth any evidence that Morley's representation was deficient, let alone that he suffered prejudice as a result. Likewise, Petitioner has failed to support his claim that this Court demonstrated bias. Petitioner's claims are completely devoid of merit.

D. Certificate of Appealability

The Third Circuit's Local Appellate Rules instruct:

At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge will make a determination as to whether a certificate of appealability should issue. If the district judge issues a certificate, the judge must state the specific issue or issues that satisfy the criteria of 28 U.S.C. § 2253. If an order denying a petition under § 2254 or § 2255 is accompanied by an opinion or

a magistrate judge's report, it is sufficient if the order denying the certificate references the opinion or report.

Third Circuit L.A.R. 22.2. Under 28 U.S.C. § 2253, a defendant seeking a certificate of appealability must “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Defendant has raised no viable claims. No reasonable jurist could disagree with this assessment.

Therefore, a certificate of appealability will not issue.

IV. CONCLUSION

For the foregoing reasons, Petitioner’s Motion will be denied, and a certificate of appealability will not issue.

An appropriate Order follows.

BY THE COURT:



R. BARCLAY SURRICK, J.

