E X H I B I T [A] .

ORDER FROM 3rd CIRCUIT COURT

OF APPEAL

Exhibit A

BLD-310 **July 20, 2017**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **17-1962**

UNITED STATES OF AMERICA

VS.

ERIC SIJOHN BROWN, Appellant

(E.D. Pa. Crim. No. 2-13-cr-00176-001)

Present: AMBRO, GREENAWAY, JR. and SCIRICA, Circuit Judges

Submitted are:

(1) Appellant's motion for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellant's second motion for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

MMW/HCF/jk

ORDER

The requests for a certificate of appealability are denied. Appellant has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); see also Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). For substantially the reasons given by the Magistrate Judge in recommending the denial of Appellant's 28 U.S.C. § 2255 motion, Appellant has not shown that jurists of reason would find debatable the District Court's ruling that his claims lack merit. See Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003); Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). Although jurists of reason might conclude that counsel should have filed an appeal because the period of supervised

A

release for Counts 21 and 23 exceeded the statutory maximum, the trial court imposed sentence for Counts 21 and 23 to run concurrently with roughly twelve other counts, and thus Appellant is not entitled to relief. See United States v. Ross, 801 F.3d 374, 379 (3d Cir. 2015).

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: September 20, 2017
JK/cc: Randall Hsia, Esq.
Michael S. Lowe, Esq.
Salvatore C. Adamo, Esq.
Eric Sijohn Brown

A True Copy
Marcia M. Waldron

Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

EXHIBIT B

Exhibit D

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

UNITED STATES OF AMERICA,	:	
	:	**CRIMINAL ACTION**
v.	:	
	:	**No. 13-176**
ERIC SIJOHN BROWN	:	

ORDER

AND NOW, this 1st day of **May, 2017**, it is hereby **ORDERED** that Petitioner's Motion for Certificate of Appealability Pursuant to 28 U.S.C. § 2253(a) (Document No. 310) is **DENIED**.

BY THE COURT:

Berle M. Schiller, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1962

UNITED STATES OF AMERICA

v.

ERIC SIJOHN BROWN,
Appellant

(D.C. Crim. No. 2-13-cr-00176-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and SCIRICA*, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

*As to panel rehearing only.

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Dated: December 21, 2017
sb/cc: All Counsel of Record
Eric Sijohn Brown

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

UNITED STATES OF AMERICA	:	CRIMINAL
	:	NO. 13-CR-176
v.	:	
	:	CIVIL
	:	NO. 15-CV-6180
ERIC SIJOHN BROWN		

ORDER

BERLE M. SCHILLER, J.

AND NOW, this 26 day of April, 2017, upon careful and independent consideration of, upon careful and independent consideration of the Motion to Vacate, Set Aside, or Correct a Federal Sentence, and after review of the Report and Recommendation of United States Magistrate Judge Jacob P. Hart, and objections thereto, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The Motion for § 2255 Relief is DENIED.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

BERLE M. SCHILLER, J.

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

4/17/2017

RE: USA V. ERIC SIJOHN BROWN
CA No. 13-CR-176-1

NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Hart, on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

KATE BARKMAN
Clerk of Court

By:/s/ Thomas Giambrone_____
Thomas Giambrone, Deputy Clerk

cc: Eric Sijohn Brown
Alexandre N. Turner
Salvatore C. Adamo
Michael S. Lowe
\ Randall Hsia
Courtroom Deputy to Judge Schiller

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

UNITED STATES OF AMERICA	:	CRIMINAL
	:	NO. 13-CR-176
v.	:	
	:	CIVIL
	:	NO. 15-CV-6180
ERIC SIJOHN BROWN		

ORDER

AND NOW, this 17th day of April, 2017, upon consideration of Petitioner's Pro Se Motion to Amend Motion to Vacate, Set Aside, or Correct Sentence (Doc. No. 268), the Motion is hereby GRANTED, as the Court has considered the Motion as an Amended Petition and addressed the claims raised therein along with those raised in the originally filed counseled Motion to Vacate, Set Aside, or Correct Sentence (Doc. No. 261) in its Report and Recommendation filed in this matter on this same date.

BY THE COURT:

/s/Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

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

UNITED STATES OF AMERICA	:	CRIMINAL
	:	NO. 13-CR-176
v.	:	
	:	CIVIL
	:	NO. 15-CV-6180
ERIC SIJOHN BROWN		

REPORT AND RECOMMENDATION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

April 17, 2017

This is a counseled[1] Motion to Vacate, Set Aside, or Correct a Federal Sentence filed pursuant to 28 U.S.C. § 2255, on behalf of an individual who is currently incarcerated at FCI Fort Dix. For the reasons that follow, I recommend that the motion be denied.

I. FACTS AND PROCEDURAL HISTORY:

On April 11, 2013, a federal grand jury returned an indictment charging Eric Sijohn Brown ("Brown") "with conspiracy to commit loan and wire fraud in violation of 18 U.S.C. § 371 (Count 1); false statements in connection with an FHA loan, and aiding and abetting, in violation of 18 U.S.C. §§ 1010 and 2 (Counts 2 and 3); loan fraud, and aiding and abetting, in violation of 18 U.S.C. §§ 1014 and 2 (counts 5 through 7, and 9 through 19); aggravated identity theft and aiding and abetting, in violation of 18 U.S.C. §§ 1028A(a)(1) and 2 (Count 20); wire fraud, and aiding and abetting, in violation of 18 U.S.C. §§ 1343, 1349, and 2 (Counts 21 and 23); and tax evasion, in violation of 26 U.S.C. § 7201 (Counts 25, 26 and 28)." Commonwealth's Resp. (Doc. No. 276) at 1-2. These charges stem from a conspiracy between Brown and a large number of co-conspirators, including mortgage brokers, home developers, appraisers, accountants and

[1] Petitioner retained counsel who filed his petition for writ of habeas corpus (Doc. No. 261). He later discharged the attorney and filed a pro se amended petition (Doc. No. 268).

settlement agents, wherein they obtained fraudulent mortgage loans using straw borrowers and false personal information between May 2004 and December 2009. Brown recruited individuals to act as straw buyers, using their personal information and credit history to obtain mortgages, purchase properties, and take title to the properties, while Brown and his co-conspirators owned and controlled the properties. Brown and his co-conspirators split the proceeds from the difference between the low price quoted to the unwitting sellers and the high price quoted to the unwitting lenders. They even formed a title agency, KREW Settlement Services, which was involved in many of the transactions. There were over 100 transactions with more than $20 million in loan proceeds and the loss sustained by the lenders was approximately $10 million.

Brown appeared before the Honorable Berle M. Schiller on April 8, 2014, at which time he entered a guilty plea to Counts 1, 2-3, 5-7, 9-13, 16-19, 21, 23, 25, 26 and 28. Counts 14, 15, and 20 were dismissed.

On October 30, 2014, Judge Schiller sentenced Brown to the following: 60 months imprisonment and 3 years of supervised release for (Count 1) conspiracy to commit loan and wire fraud; 24 months imprisonment and 1 year supervised release for (Counts 2 and 3) false statements in connection with an FHA loan, and aiding and abetting; 180 months imprisonment and 5 years supervised release for (Counts 5 through 7, 9 through 13, and 16 through 19) loan fraud and aiding and abetting; 180 months imprisonment and 5 years of supervised release (Counts 21 and 23) wire fraud and aiding and abetting; and 60 months imprisonment and 3 years of supervised release for (Counts 25, 26 and 28) tax evasion. All sentences were to run concurrently and Brown was ordered to pay $10,849,873 in restitution and a $2,000 special assessment. Brown was represented by Alan J. Tauber, Esquire from the time of his arrest through sentencing.

On November 13, 2015, newly retained counsel, Alexandre N. Turner, Esquire, filed this Motion to Vacate, Set aside, or Correct Sentence, pursuant to 28 U.S.C. § 2255, on behalf of Brown. On March 2, 2016, Brown filed a pro se Motion to Amend his previously filed Motion.

Brown also filed a Motion for Extension of Time and for Appointment of Counsel, which this Court denied. (Doc. Nos. 277, 278) However, after receiving the government's response to the petition, this Court appointed CJA counsel, Salvatore Adamo, Esquire to represent Brown in this matter and scheduled an evidentiary hearing to address the issue of Brown's claim that his plea counsel failed to advise him of the enhancement he would receive by entering a plea. (Doc. No. 280).

On January 31, 2017, an evidentiary hearing was held before the undersigned, at which time Brown's plea counsel, Mr. Tauber and Petitioner testified.[2]

II. DISCUSSION:

A. Ineffective Assistance of Counsel

Brown alleges that his plea counsel was ineffective. In order to obtain relief under § 2255 after a petitioner has entered a guilty plea, the petitioner must demonstrate that the plea was not knowing and voluntary. Hill v. Lockhart, 474 U.S. 52, 56 (1985). A claim of ineffective assistance of counsel can in some cases serve as the basis for relief since a plea by a petitioner who was denied his Sixth Amendment right to counsel is not knowing and voluntary. Id. at 59.

In Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), the Supreme Court set forth a two-prong test — both parts of which must be satisfied — by which claims alleging

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[2] Although counsel was appointed to represent Petitioner in this matter, following the evidentiary hearing Brown submitted a pro se letter as well as a request for the transcript from the evidentiary hearing. Both submissions were forwarded to Petitioner's counsel in this matter, Mr. Adamo.

counsel's ineffectiveness are reviewed. Id. at 687. First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Id. at 688. The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Because of the difficulties in making a fair assessment, eliminating the "distorting effect" of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 163-164 (1955)). It is well established that counsel cannot be ineffective for failing to raise a meritless claim. Strickland, 466 U.S. at 691; Holland v. Horn, 150 F. Supp. 2d 706, 730 (E.D. Pa. 2001). Pursuant to the second prong, the defendant must establish that the deficient performance prejudiced the defense. It requires a demonstration that counsel's errors were so serious as to deprive the defendant of a fair trial or a trial whose result is reliable. Strickland, 466 U.S. at 687. More specifically, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Petitioner must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

1. Counsel's Failure to Advise Petitioner of Enhancement to Guidelines:

In his original counseled petition, Brown alleges that his plea counsel provided ineffective assistance of counsel by failing to advise him that if he pleaded guilty pursuant to the plea

agreement, the guideline range would be increased by a 20-level enhancement. He alleges that if he was aware of the enhancement he would not have entered the plea. Petition at 4; Petitioner's Mem. of Law at 7-9. Brown admits that he agreed that the actual loss that he and his co-conspirators caused was more than $7,000,000 but less than $20,000,000, but now denies that he was able to comprehend the effect that the stipulation would have on the guidelines.

His original habeas counsel alleged on his behalf that "[w]hen defense counsel agreed to the fraud loss calculation proposed by the Government, without either fully explaining their consequences to Eric Brown, attempting to negotiate the amount in question, or compelling the Government to prove their allegations, he unnecessarily bargained away Eric Brown's most important asset without ensuring that Mr. Brown understood the consequences." Doc. No. 261-1 at 8. The government conceded that Petitioner was entitled to a hearing to determine whether counsel advised Brown of this increase. Accordingly, this court conducted an evidentiary hearing on January 31, 2017, during which Petitioner and his plea counsel, Alan Tauber, both testified.

Mr. Tauber's billing records reflect that he spent 32 hours researching and discussing sentencing issues and 14 hours specifically addressing the sentencing guidelines in this case. Evid. Hearing Tr. at 13:10-16. He met with Brown approximately 12 times regarding sentencing and testified that it is his practice with any client to always run a guideline calculation before discussing a guilty plea and he is certain that he did so in this case. Id. at 14:20- 15:1. Contrary to Petitioner's claim that his plea counsel, Mr. Tauber accepted the fraud loss calculation proposed by the government without attempting to negotiate the amount or examining the consequences, it is clear that Mr. Tauber considered and addressed the impact that the stipulation would have on the sentencing guidelines and he even retained a forensic accountant to see if it was possible to lower

the fraud amount. Id. at 15:1-15. Mr. Tauber testified that the forensic accountant came up with a number higher than the low end of the government's range, somewhere around ten million. Id. 17: 4-12. He testified that with considerable effort they may have been able to get the calculation to $10 million, but certainly not below $7 million, which is why there was no reason not to accept the government's proposed range. Id. at 17:10-14.

Furthermore, Mr. Tauber testified that he absolutely informed Brown of the guideline range and the 20 level enhancement due to the fraud loss range. Id. at 22:14-22. Mr. Tauber also testified that although he didn't have specific recollection in this case, it is his general practice to go over with his clients both the pre-trial detention motion, which in this case included the guideline range, and the Change of Plea Motion, which included the calculations for the actual fraud loss amount. Id. at17:19-25, 23:4-24. He specifically recalled reviewing with Brown the list of properties in the government's change of plea memo. Id. at 23:15-24:4. After Brown pleaded guilty and the pre-sentence investigation report was issued, Mr. Tauber also reviewed the calculations as reflected in the report with Brown. Id. at 24:5-12. He testified that Brown had some objections to some of the properties on the list being attributed to him, but that they did not materially change the numbers. The real difference concerned the actual values of the properties, which were addressed by the forensic accountant. Id. at 26:3-6.

Brown testified that his attorney informed him of the guidelines as well as the "20 point enhancement plus 7 points" and he thought the range was about 100 to 110 months. Id. at 32:17-23. He acknowledged that his counsel informed him of the guideline range, but alleges that he was told that the judge is usually lenient. Id. at 33:1-8. At the hearing Brown testified that he was not happy with what the pre-sentence investigation report said. Id. at 33:16-23. He

acknowledged that he testified that he understood the plea agreement, but now states that he was intimidated because he had wanted to postpone the hearing, but he had a "drop dead date" to enter the plea. Id. at 35:3-15. Brown admits, however, that he did not tell Judge Schiller that he felt intimidated. Id. at 35:19-36:8.

Petitioner testified at the evidentiary hearing that he had not reviewed the Plea Memorandum and stated that although Judge Schiller asked him if he had the document, it was Mr. Tauber that answered "yes". Id. at 38:6-11. However, the Transcript from the Change of Plea Hearing shows that Judge Schiller asked Brown whether he had seen the document before, to which Brown answered "yes" and then directed Brown to specific pages of the document before asking him whether he had seen the factual basis for his plea and whether he had read it, discussed it with his attorney and whether he agreed to it. Change of Plea Hearing Tr. at 17:9-18:1.

The record reflects that although Brown was expecting a lower sentence, he was advised that he faced a maximum sentence of 424 years imprisonment. Ex. A. (Guilty Plea Agreement at p. 3); Ex. E (Guilty Plea Memo at p. 2). He testified at the evidentiary hearing that although he was informed of the maximum sentence and it was set forth in the plea agreement, his belief is "nobody gets the maximum." Evid. Hearing Tr. at 37:4-18. However, this claim is belied by the fact that he was also clearly advised by the Court at the change of plea hearing that he would be unable to withdraw his plea if Judge Schiller imposed a sentence more severe than he expected or than was recommended. Change of Plea Hearing Tr. at 20:16-24.

Although Brown was aware of the maximum penalty and received a sentence far below both the maximum sentence and the maximum of the guideline range, Brown's position at the evidentiary hearing was that "everything changed" once he became aware of the enhancements set

forth in the pre-sentence investigation ("PSI") report. Contrary to this claim, Brown testified at the Change of Plea Hearing that he understood that the Court would not be able to determine how the sentencing guidelines would be applied in his case until after the PSI would be completed and that he was aware that he could be sentenced above the guideline range. Id. at 19:21-20:7. As the government notes, the sentence that Petitioner received was also lower than the guideline range of 316-389 months imprisonment, which was set forth in the government's detention motion and served on Brown. The fraud loss stipulation with the enhancements put Brown in the guideline range of 160 to 210 months imprisonment and Judge Schiller sentenced him to a term of 180 months, also below the maximum of this range.

Petitioner was informed of the correct statutory maximum before entering his guilty plea and the 180 month sentence he received was far less than the possible sentence of which he was advised. Furthermore, the record demonstrates Mr. Tauber properly advised Brown regarding the impact that his plea would have on the guideline range. Having considered the testimony at the evidentiary hearing as well as the rest of the record in this case, Petitioner has failed to demonstrate that Mr. Tauber provided ineffective assistance of counsel as he has failed to establish that his conduct fell below the bar of reasonable professional conduct. The Third Circuit has found that a petitioner does not have a cognizable habeas claim when the total sentence received by the petitioner is equal to or less than the maximum sentence of which the petitioner was advised before entering his or her guilty plea. See United States v. DeLuca, 889 F.2d 503, 507 (3d Cir. 1989) (holding that a Petitioner who receives a sentence equal or less than the possible sentence of which he was advised before entering a plea does not have a cognizable habeas claim). Brown was aware of the enhancement that stemmed from his stipulation of the fraud loss range. Petitioner

was informed of the statutory maximum and guideline ranges, both of which exceeded the sentence he received. Therefore, this claim clearly lacks merit and must be denied. Id.

2. **Counsel's Failure to Raise Claim Regarding Court's Consideration of Trial Testimony:**

In claims two and three of Petitioner's counseled petition, he argues that his plea counsel was ineffective for not asking that the Court recuse itself at sentencing, or, in the alternative, for failing to file a post-sentence motion raising the issue of Judge Schiller's prejudice as a result of presiding over the trials of his co-defendants. Brown alleges that Mr. Tauber was ineffective for failing to recognize that the Court was prejudiced by the arguments and evidence it heard at the trial of Brown's co-defendants prior to his sentencing. He alleges that the bias was reflected by Judge Schiller's comment during sentencing that the Court must consider "the parade of women that came in front of me in the courtroom and talked about what they and you did together."

The government contends that the Court's consideration of the testimony of Brown's co-conspirators during sentencing was proper and therefore his counsel cannot be deemed ineffective for failing to raise this meritless claim. We agree that Brown is not entitled to relief on this claim.

Pursuant to 18 U.S.C. § 3661 the trial court may consider a broad range of evidence in determining an appropriate sentence:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

April 24, 2018

Eric Sijohn Brown
#27816-037
FCI Fort Dix
PO Box 2000
Joint Base MDL, NJ 08640

RE: Brown v. United States
USCA 3 No. 17-1962

Dear Mr. Brown:

The above-entitled petition for writ of certiorari was originally postmarked March 20, 2018 and received again on April 24, 2018. The papers are returned for the following reason(s):

They are returned for failure to reflect the changes requested in prior correspondence.

The petition fails to comply with the content requirements of Rule 14, in that the petition does not contain:

The questions presented for review must be followed by the list of parties (if all do not appear on the cover), corporate disclosure statement (if applicable), table of contents, table of authorities, citations of the official and unofficial reports of opinions and orders entered in the case, statement of the basis for jurisdiction, constitutional provisions, treaties, etc., statement of the case, reasons for granting the writ, and the appendix. Rule 14.1.

The appendix to the petition does not contain the following documents required by Rule 14.1(i):

The opinion of the United States district court must be appended.

The report and recommendation of the magistrate must be appended.

The order denying rehearing must be appended. Rule 14.1(i)(iii).

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
Scott S. Harris, Clerk
By:

Jacob C. Travers
(202) 479-3039

Enclosures

The Court's discretion and the information it may rely upon during sentencing is, however, subject to the limitations of fairness and due process. United States v. Berry, 553 F.3d 273, 280 (3d Cir. 2009). Courts have held that the information relied upon at sentencing must have "sufficient indicia of reliability to support its probable accuracy." Id., citing United States v. Warren, 186 F.3d 358, 364–65 (3d Cir.1999). A defendant has the right to be sentenced based upon accurate information, "which implicates the corollary right to know what evidence will be used against him at the sentencing hearing." See United States v. Nappi, 243 F.3d 758, 763 (3d Cir. 2001), quoting United States v. Jackson, 32 F.3d 1101, 1105 (7th Cir. 1994).

Petitioner argues that the fact that Judge Schiller presided over the trials of Petitioner's co-defendants made it necessary for him to recuse himself from Petitioner's case. He asserts that his attorney was ineffective for failing to ask the Court to recuse itself and for failing to object to the Judge's consideration of testimony from the trials. However, "the fact that the trial judge presided over a jury trial which resulted in a guilty verdict against a co-conspirator is not a sufficient ground for disqualification of the same Judge in a subsequent jury trial involving other co-conspirators." United States v. Clark, 398 F. Supp. 341, 363 (E.D. Pa 1975). It has been held by various federal courts, including the Third Circuit that a trial judge may rely upon information beyond the scope of a trial when imposing a sentence, including evidence obtained during a plea hearing or trial of a co-defendant. See United States v. Knobloch, 131 F.3d 366, 370 (3d Cir.1997) (finding no plain error where the district court imposed an enhancement based on evidence from a co-defendant's trial, explaining that "[n]o rule of law prohibits the [sentencing] court from making its factual conclusions at sentencing based on testimony from a separate proceeding...."); United States v. Rios, 893 F.2d 479, 481 (2d Cir.1990) ("A district court has

broad discretion to consider any information relevant to sentencing, including information adduced at a trial at which the defendant was not present."); United States v. Hardamon, 188 F.3d 843, 850 (7th Cir. 1999); Serapo v. United States, 595 F.2d 3, 3-4 (9th Cir. 1979) (Sentencing judge may consider information obtained during co-defendants' trials during sentencing); United States v. Mitchell, 377 F.Supp. 1312, 1322 (D.D.C. 1974) (noting that "in multi-defendant criminal cases, it is not unusual that one or more defendants enter guilty pleas just before trial and disclose to the trial judge the facts of their misconduct" and "[a]lthough other defendants are not heard at proceedings wherein voluntariness is assessed, and although the court may there become acquainted with evidence tending to incriminate remaining defendants, no one suggests that disqualification should follow"). Therefore, there was nothing improper about Judge Schiller considering the testimony he heard during the trials of Brown's co-conspirators. Id.

While such testimony, like any evidence considered at sentencing must meet certain standards of reliability, the testimony of Brown's co-defendants was given under oath and subject to cross-examination. See United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir.1982) (evidence need only possess "some minimum indicium of reliability"). Brown and his counsel were aware that Judge Schiller had presided over the other trials. Furthermore, even if the evidence was not included in the pre-sentence report and Brown was not provided with notice of the Court's intent to rely on evidence from the other trials, there still is not sufficient proof of a due process violation. See United States v. Hart, 273 F.3d 363, 380 (3d Cir. 2001). As was the case in Hart, Brown has not offered any concrete proof as to how he would have rebutted the evidence. He also has the burden of demonstrating that the District Court would have imposed a lesser sentence absent consideration of the testimony. Id.

We agree with the government that Judge Schiller's consideration of the testimony that he heard during Petitioner's co-defendants' trial was not a violation of clearly established federal law. Mr. Tauber cannot be deemed to have provided ineffective assistance as a result of his failure to seek recusal or to challenge the sentencing on this basis. Given that the underlying claim lacks merit, Petitioner's counsel cannot be deemed ineffective for failing to raise the claim and the claim should be denied. See Strickland, 466 U.S. at 691; Holland v. Horn, 150 F. Supp. 2d at 730.

B. Additional Claims Raised in Pro Se Motion to Amend

In Petitioner's pro se amended petition (Doc. No. 268), he raises multiple additional claims. He argues that pursuant to Federal Rule of Civil Procedure 15(a), he should be permitted to amend his petition to add these claims because the government had not yet filed its reply. As the government notes, Petitioner filed an amended petition on March 2, 2016, well after his one year statute of limitations for filing a timely § 2255 petition had lapsed.

An amendment to a petition filed pursuant to 28 U.S.C. §2255 which is filed after the limitations period has expired will be dismissed unless the proposed amendment "relates back" to the date of the original pleading. Under Federal Rule of Civil Procedure 15(c), an amendment of a pleading relates back to the date of an original pleading. Fed. R. Civ. P. 15(c). Rule 15(a) goes on to provide that leave to amend a pleading is to "be freely given when justice so requires." Id. at 15(a). Such a liberal amendment policy, however, stands in sharp contrast to the AEDPA's efforts to strictly limit the time in which a federal habeas petitioner can bring his claims to the attention of the federal courts. See United States v. Duffus, 174 F.3d 333, 337 (3d Cir. 1999). The Third Circuit has therefore held that allowing a completely new claim to be added after the expiration of the limitations period would be contrary to the policy of the AEDPA because it

"would have frustrated the intent of Congress that claims under 28 U.S.C. § 2255 be advanced within one year after a judgment of conviction becomes final...". Id. at 337-38. "A prisoner should not be able to assert a claim otherwise barred by the statute of limitations merely because he asserted a separate claim within the limitations period." Id. at 338.

In United States v. Thomas, 221 F.3d 430 (3d Cir. 2000), the Third Circuit held that "Rule 15(c)(2) [regarding relation back of amendments] applies to habeas petitions insofar as a District Court may, in its discretion, permit an amendment to a petition to provide factual clarification or amplification after the expiration of the one-year period of limitations, as long as the petition itself was timely filed and the petitioner does not seek to add an entirely new claim or theory of relief." Id. at 436. Thus, Rule 15(c)(2) applies to § 2255 petitions insofar as a District Court may, in its discretion, permit an amendment to a petition to provide factual clarification or amplification after the expiration of the one-year period of limitations, as long as the petition itself was timely filed and the petitioner does not seek to add an entirely new claim or new theory of relief. Id. Therefore, the critical inquiry in determining whether an amendment to a habeas petition following the expiration of the statute of limitations may relate back to the date of the filing of the original petition is "whether the proposed amended claims constitute new claims or theories, or whether they instead merely clarify or amplify those contained within the original petition." Abu-Jamal v. Horn, Civ. A. No. 99-5089, 2001 WL 1609761, *4 (E.D. Pa. Dec. 18, 2001) (discussing standard since the Third Circuit has ruled in Thomas and Duffus).

In this matter, Brown's counseled petition was timely filed before the expiration date of his one-year limitations period, but his amended petition was filed after the limitations period had lapsed. Therefore, Petitioner may only amend his petition to the extent that he is clarifying

or expanding upon the claims already raised. Since Brown instead attempts to raise new claims in his pro se petition, rather than simply clarifying or expanding upon the claims alleged in his timely petition, the amendments do not "relate back" and are untimely. Id. Furthermore, as the government set forth in its Response, the claims also lack merit.

1. **Failure to File an Appeal:**

In his pro se petition Brown alleges that his counsel was ineffective for failing to file an appeal when he requested him to do so (Doc. No. 268- Points One and Five). Counsel advised Brown that he could not file an appeal because of the appellate waiver contained in the plea agreement. However, the government concedes that Brown correctly notes that the 5 year period of supervised release imposed by the Court on Counts 21 and 23 exceeded the statutory maximum of 3 years supervised release on each of these two counts. Therefore, this issue was in fact ripe for appeal.

As the government claims, however, Brown cannot demonstrate that he was prejudiced by his counsel's deficient performance because the Court properly imposed a 5 year period of supervised release on other counts for which he was found guilty.[3] Brown did not suffer any prejudice as a result of his counsel's failure to file an appeal on this basis since his aggregate

[3] The Supreme Court has held that an attorney who "disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Flores-Ortega 528 U.S. 470, 477, 120 S. Ct. 1029 (2000) (citing Rodriguez v. United States, 395 U.S. 327, 89 S. Ct. 1715 (1969)). The Third Circuit has held that in such cases, prejudice is presumed from counsel's failure to file a notice of appeal when so requested by a client, thereby also satisfying the second prong of the Strickland test. Solis v. United States, 252 F.3d 289, 293-94 (3d Cir. 2001). Based upon Mr. Tauber's testimony at the evidentiary hearing that he consulted with Brown about an appeal, we find that prejudice is not presumed in this case. According to Mr. Tauber's testimony, he did not disregard specific instructions to file an appeal, but rather informed Petitioner that there were no grounds for an appeal as a result of the waiver. He testified that if Petitioner insisted that he file an appeal he would have done so. While the waiver in Petitioner's guilty plea agreement allowed for claims based upon ineffective assistance of counsel, these claims would have been appropriate for collateral appeal rather than direct appeal. Furthermore, as stated herein, they lack merit.

sentence would not change even if the error was corrected. See Glover v. United States, 531 U.S. 203 (2001) (holding that any additional amount of jail time has Sixth Amendment significance).

The government argues that under Rule 36 of the Federal Rules of Criminal Procedure, the Court may modify the period of supervised release. Federal Rule of Criminal Procedure 36 provides: "After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." Fed. R. Crim. P. 36. As the Rule states, it permits corrections to orders or judgments only for clerical errors. United States v. Bennett, 423 F.3d 271, 277 n.4 (3d Cir. 2005). "A clerical error involves a failure to accurately record a statement or action by the court or one of the parties." Id., quoting James Wm. Moore et Al., Moore's Federal Practice ¶ 636.02[2] (3d ed. filed through 2005). The Third Circuit has noted that the Rule "is normally used to correct a written judgment of sentence to conform to the oral sentence pronounced by the judge." Id. However, while Rule 36 may not be used to add an additional term of imprisonment, fine or imposition of costs, the Court allowed the Rule to be used to add an obviously warranted order of forfeiture, where the defendant was on notice and it was the court's intent. Id. at 278.

In this case, the sentencing transcript reflects that Judge Schiller sentenced Brown to be placed on supervised release for a term of 5 years, which he stated "consists of a term of three years on each of counts 1, 25, 26 and 28, terms of one year each on counts 2 and 3, and terms of five years on each of counts 5, 6, 7, 9, 10, 11, 12, 13, 16, 17, 18, 19, 21 and 23. All such terms to run concurrently." Sentencing Tr. at 44:13-19. Therefore, even on the record counts 21 and 23 were mistakenly included in the list of counts for the term of five years rather than three. However, the

maximum sentence of supervised release for counts 21 and 23 was listed properly in Brown's Guilty Plea Agreement, the Government's Guilty Plea Memorandum and was properly stated on the record at the Change of Plea Hearing. See Ex. A at p. 3; Ex. E at p. 2; Change of Plea Hearing Tr. at 18:17-20. Furthermore, the correction on these two counts is actually a reduction of the term of supervised release, rather than an increase and has been brought to the Court's attention by Brown, himself. Although the error did not change Brown's overall term of supervised release as he was properly sentenced to a five year period on the remaining counts, we recommend that the error be corrected pursuant to Rule 36.[4]

While Judge Schiller may correct the judgment of sentence to properly reflect the periods of supervised release on Counts 21 and 23, as was properly stated in the plea agreement, Petitioner's claim of ineffective assistance of counsel, even if it was properly raised, still lacks merit since he has suffered no prejudice as a result of the error. See Strickland, 466 U.S. at 687. Brown is not entitled to have his sentence vacated based on this error and a correction does not constitute double jeopardy. See Bozza v. United States, 330 U.S. 160 (1946) ("[T]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner").

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[4] To the extent that the error could be considered more substantive than clerical, the prior version of Rule 35, allowed the Court to correct a substantive error in sentencing at any time. However, Rule 35(a) was modified to allow such sentencing errors to be corrected within seven days. See Fed. R. Crim. P. 35(a). While the time period permitted by Rule 35(a) has passed in this case, the Court could still correct the error which Brown has brought to the Court's attention by way of his § 2255 motion. Although this claim of ineffective assistance for failing to file an appeal is now untimely, the Government does not oppose the sentence being modified. Since the AEDPA statute of limitations is not jurisdictional, it is subject to equitable considerations such as waiver and the government may waive the statute of limitations under both §§ 2254 and 2255. United States v. Bendolph, 409 F.3d 155, 164 (3d Cir. 2005). The government concedes that the sentence of supervised release as to Counts 21 and 23 is incorrect and should be corrected. Accordingly, we recommend that the Court grant relief only to the extent that the sentence on these two counts be corrected to reflect the statutory maximum sentence.

2. Failure to Challenge Factual Basis of Plea and Indictment:

Brown also now attempts to argue that his plea counsel was ineffective for failing to challenge the lack of a factual basis for his plea (Doc. No. 268- Point Three). However, the transcript from his change of plea hearing demonstrates that Brown informed the court that he had reviewed the factual basis for the plea in the memorandum, discussed it with his counsel and agreed with it. Ex P at 17-18. Judge Schiller even directed Petitioner to the relevant pages of the guilty plea memorandum. Ex. F at 17-18. As the government contends, since the guilty plea memorandum sets forth a sufficient factual basis for the plea and Brown accepted it during the hearing, the Court had a sufficient factual basis to accept the plea and Brown's counsel cannot be ineffective for failing to raise this meritless claim. See Sistrunk v. Vaughn, 96 F.3d at 670.

Brown further attempts to argue that his counsel was ineffective for failing to challenge the sufficiency of the indictment with respect to the charges for wire fraud (Doc. No. 268- Point Four). Since the indictment was sufficient to give notice of the charges for wire fraud and aiding and abetting and properly set forth the elements of the offenses, his counsel also cannot be deemed ineffective for failing to raise this frivolous claim. Id. Therefore, in addition to being untimely these claims lack merit.

3. Request for Appointment of Counsel:

In his pro se petition Brown also requests that the court appoint counsel to represent him for purposes of this motion (Doc. No. 268- Point Seven). He asks that the Court order that the attorney he retained return all fees he paid to him in connection with the preparation and filing of the petition in this matter so that he can use those funds to retain new counsel of his choice. This request is now moot since this court has previously ruled on Petitioner's motion for the

appointment of counsel (Doc. No. 277, 278) and subsequently when ordering an evidentiary hearing, appointed CJA counsel, Mr. Adamo to represent Petitioner in this matter (Doc. No. 280).

4. Request for Bail:

Finally, Brown argues that he should be released on bail pending disposition of this motion (Doc. No. 268- Point 6). "In this circuit, in order to grant [Brown] bail, we must find not only that he has 'a high probability of success' on the merits but also that 'extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective.'" United States v. Stewart, 127 F.Supp.2d 670, 672 (E.D. Pa. 2001), citing Landano v. Rafferty, 970 F.2d 1230, 1239 (3d Cir. 1992). In this case, we find that the claims alleged lack merit and recommend that habeas relief be denied. There is certainly no basis for Brown to be released on bail.

III. CONCLUSION:

Petitioner's claims are meritless and relief must be denied. Although Petitioner's claim for ineffective assistance of counsel for failing to file an appeal was not timely raised, having become aware of the error in Brown's term of supervised release on counts 21 and 23, I recommend that the Court correct Petitioner's sentence of supervised release to conform to the statutory maximum. This will not change Petitioner's overall sentence.

RECOMMENDATION

AND NOW, this 17th day of April, 2017, IT IS RESPECTFULLY RECOMMENDED that that the motion to vacate, set aside, or correct a federal sentence be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of

appealability. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/S/ JACOB P. HART

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE