APPENDIX

APPENDIX A — Magistrate Judges Report And Recommendation; District Court Judges Order; District Court Judges Order

APPENDIX B — Third Circuit Court Of Appeals Order Denying COA

APPENDIX C — Third Circuit Court Of Appeals Order Denying Rehearing And/Or Rehearing En Banc

APPENDIX D — Counsel's Letter

A P P E N D I X A

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

KADEEM THOMAS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Criminal No. 2012-02
	)	Civil No. 2014-56
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

REPORT AND RECOMMENDATION

Before the Court is petitioner Kadeem Thomas's Motion to Vacate, Set Aside or Correct Sentence [DE 123] pursuant to 28 U.S.C. § 2255. The government filed a response to which petitioner replied. [DEs 136, 140]. For the reasons that follow, it is recommended that petitioner's motion be denied.

I. BACKGROUND

As the parties are familiar with the underlying facts of this case, only those facts relevant to this discussion will be recited. On January 11, 2011, petitioner and Keven Fessale committed an armed robbery of Merchants Commercial Bank in St. John, Virgin Islands. They fled in a vehicle belonging to Shevaun Browne. On January 19, 2012, a grand jury returned a four-count indictment against petitioner and his two co-defendants. Petitioner was charged with a Hobbs Act conspiracy, in violation of 18 U.S.C. § 1951(a) (count one), bank robbery, in violation of 18 U.S.C. § 2113(a) and (d) (count two), and possession of a firearm during commission of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (count four).

On March 28, 2012, a jury convicted petitioner on all three counts.[1] [DE 68]. On September 17, 2012, the District Court sentenced petitioner to a term of 60 months on counts 1 and 2, to run concurrently, and a term of 84 months on count 4 to run consecutively with counts 1 and 2, a supervised release term of five years on count 2 and three years on counts 1 and 4, a $100.00 special assessment and $47,529.38 in restitution. *See* 2d Am. Judgment at 2-5 [DE 114]. Petitioner appealed his conviction, arguing the District Court erred by denying his motion to strike Juror 93 for cause. Petitioner argued in the alternative that the District Court erred by not allowing him to withdraw his final peremptory strike and use it on Juror 93. *United States v. Browne*, 525 Fed. App'x 213 (3d Cir. 2013).[2]

The Third Circuit Court of Appeals rejected petitioner's arguments and affirmed his conviction in a judgment issued on May 24, 2013. *Id.*; [DE 122]. Petitioner did not seek certiorari; thus, the judgment became final for purposes of the Antiterrorism and Effective Death Penalty Act's ("AEDPA") statute of limitations ninety days later on August 24, 2013.[3] Accordingly, the statutory period during which petitioner could timely file his petition ended on August 24, 2014.[4]

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[1] Petitioner's conviction followed a three-day jury trial. *See* Mar. 26, 2012 Trial Tr. ("TT1") [DE 119], Mar. 27, 2012 Trial Tr. ("TT2") [DE 119-1], and Mar. 28, 2012 Trial Tr. ("TT3") [DE 119-2].

[2] The Third Circuit consolidated the appeals of petitioner and co-defendant Shevaun Browne.

[3] A "judgment of conviction becomes final" under § 2255 when the Supreme Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or, if the prisoner does not seek certiorari, when the time for filing a certiorari petition expires. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 653 (2012); *United States v. Thomas*, 713 F.3d 165, 174 (3d Cir. 2013) (explaining when a petitioner does not pursue appeals through the United States Supreme Court, his judgment becomes final after the time for pursuing direct review in either the Supreme Court or in state court expires.) (citing *Gonzalez*, 132 S. Ct. at 641); *Johnson v. United States*, 2013 U.S. Dist. LEXIS 66189, at *7 (D.N.J. May 9, 2013) ("A federal prisoner's conviction becomes final when certiorari is denied or when the time for filing a petition for certiorari expires, which is ninety (90) days from the entry of judgment or denial of a rehearing petition.") (citations omitted); SUP. CT. R. 13(1), (3) ("[A] petition for a writ of certiorari . . . is timely when it is filed . . . within 90 days after entry of the judgment. . . . The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate[.]").

[4] The AEDPA establishes a one-year statute of limitations period for § 2255 motions, "running from the latest of" four specified dates. 28 U.S.C. § 2255(f). As in most 2255 cases, here, the relevant date is "the date on which the

Petitioner's petition, filed May 15, 2014, is thus timely.[5]

Petitioner raises two grounds for post-conviction relief, both asserted under the theory of ineffective assistance of trial counsel.

II. LEGAL STANDARDS

A. 28 U.S.C. § 2255

"Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution." *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002). Section 2255 allows petitioners to collaterally attack their sentences by moving "the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). The remedy is intended only where "the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974) (internal quotation marks omitted); *see also United States v. Addonizio*, 442 U.S. 178, 184 (1979) (explaining "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment"). A section 2255 evidentiary hearing is required unless "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *accord United States v. Padilla-Castro*, 426 Fed. Appx. 60, 63 (3d Cir. 2011).

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judgment of conviction becomes final." *Id.*

[5] Under the "prison mailbox rule," a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing. *Houston v. Lack*, 487 U.S. 266, 275-76 (1988); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998); *Irizarry v. United States*, 2012 U.S. Dist. LEXIS 161744, at *7 (E.D. Pa. Nov. 9, 2012). While the instant motion was docketed on June 6, 2014, petitioner properly certified therein that he placed the motion in the prison mailing system on May 19, 2014. *See* Rule 3(d), Rules Governing § 2255 Proceedings (explaining "timely filing may be shown by [*inter alia*] a declaration in compliance with 28 U.S.C. § 1746 . . ., which must set forth the date of deposit and state that first-class postage has been prepaid") (alteration added); FED. R. APP. P. 4(c)(1) (same).

In order to prevail on a section 2255 motion, a petitioner must show one of the following: (1) the sentence was imposed in violation of the Constitution or the laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). If a court finds any of these grounds, it must vacate the judgment, resentence the prisoner, or grant the prisoner a new trial as appropriate. *Id.* § 2255(b).

A section 2255 petition is not a substitute for an appeal. *Hodge v. U.S.*, 554 F.3d 372, 379 (3d Cir. 2009). Thus, the general rule is that a petitioner procedurally defaults on a claim if he "neglected to raise [it] on direct appeal." *Id.* (citation omitted); *Massaro v. United States*, 538 U.S. 500, 504 (2003).[6] Moreover, a 2255 petition may not "be used to relitigate matters decided adversely on appeal." *Gov't of Virgin Islands v. Nicholas*, 759 F.2d 1073, 1074-75 (3d Cir. 1985) (citation omitted). Because petitioner is proceeding *pro se*, the Court must construe his motion liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

B. Ineffective Assistance of Counsel

In order to succeed on an ineffective assistance of trial counsel claim, a petitioner must show (1) counsel's representation was deficient and (2) the deficient performance "prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).[7] Regarding the "deficient" prong,

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[6] A petitioner properly raises ineffective assistance of counsel arguments under section 2255 rather than on direct appeal. *See Massaro*, 538 U.S. at 504 (explaining it is "preferable" that such claims be considered on collateral review where the record for such claims may be properly developed); *accord United States v. Garcia*, 516 F. App'x 149, 151 (3d Cir. 2013) ("It is well-settled that this Court ordinarily does not review claims of ineffective assistance of counsel on direct appeal.") (citing *United States v. Thornton*, 327 F.3d 268, 271 (3d Cir. 2003)).

[7] A court has discretion to dispose of a claim at either prong, as there is no required order to the *Strickland* inquiry. *Strickland*, 466 U.S. at 697 (explaining 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" or "address both components of the inquiry if the defendant makes an insufficient showing on one"). "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

a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, assessing the facts of the case at the time of counsel's conduct. *Id.* at 688-89 ("the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"); *accord Jacobs v. Horn*, 395 F.3d 92, 102 (3d Cir. 2005). Counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 688. As for the prejudice prong, a petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The petitioner bears the burden of establishing his ineffective assistance of counsel claim by a preponderance of the evidence. *United States v. Serrano*, 798 F. Supp. 2d 634, 641 (E.D. Pa. 2011) (citing *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980)). Judicial scrutiny of counsel's performance is highly deferential and a petitioner must overcome a "strong presumption" that counsel's strategy and tactics "fall[] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Accordingly, "[s]urmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

III. DISCUSSION

A. Counsel's failure to preserve and raise the *Alleyne* issue at sentencing and on appeal (Ground one)

Petitioner argues that his counsel – who served as both trial and appellate counsel – rendered ineffective assistance in failing to preserve at sentencing and raise on appeal a future-change-in-the-law argument. In particular, petitioner claims that counsel rendered ineffective

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should be followed." *Id.*

assistance by failing to preserve a challenge to and appeal the judicial finding during sentencing that petitioner brandished a firearm, which increased his mandatory minimum sentence.

Petitioner's conviction included using or carrying a firearm during a crime of violence (here, robbery). *See* Jury Verdict [DE 68]. At trial, the jury was not charged with determining whether petitioner had brandished his firearm during the commission of the robbery. At sentencing, however, the District Court found petitioner had brandished a firearm during the commission of robbery. This judicial finding resulted in an increased mandatory minimum sentence pursuant to 18 U.S.C. § 924(c)(1)(A)(ii).[8] Petitioner asserts that his sentence runs afoul of the United States Supreme Court's holding in *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151 (2013), and claims counsel was constitutionally deficient for failing to anticipate the *Alleyne* holding and preserve it for direct review.

In assessing an attorney's performance, courts "reconstruct the circumstances of counsel's challenged conduct, and . . . evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. This principle is particularly relevant where, as here, there has been an intervening change in the law between a petitioner's sentencing and his judgment of conviction becoming final under § 2255. At the time of sentencing and the Third Circuit's decision on appeal, *Harris v. United States*, 536 U.S. 545 (2002) was controlling precedent, which held that, "as a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense. The statute regards brandishing . . . as [a] sentencing factor[] to be found by the judge, not [an] offense element[] to be found by the jury." *Id.* at 556.

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[8] A conviction for using or carrying a firearm in relation to a crime of violence carries a five-year (60 months) mandatory minimum sentence, 18 U.S.C. § 924(c)(1)(A)(i), that increases to a seven-year (84 months) mandatory minimum sentence "if the firearm is brandished." 18 U.S.C. § 924(c)(1)(A)(ii).

In *Alleyne* – decided after the Third Circuit's decision in this matter but prior to the deadline for petitioner to seek certiorari – the Supreme Court overruled *Harris*, holding that under the Sixth Amendment, brandishing a firearm, which triggers higher mandatory minimum sentences, must be treated as an element of a separate, aggravated offense to be alleged in the indictment and proved beyond a reasonable doubt. *Id.* More broadly, the Supreme Court held that, except for prior convictions, "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury" or admitted by the defendant. *Id.* at 2155. Nevertheless, "from counsel's perspective at the time," *Harris* governed. Because an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law,[9] counsel's performance did not fall below an objective standard of reasonableness in this case. "Strickland does not mandate prescience." *Sophanthavong v. Palmateer*, 378 F.3d 859, 870 (9th Cir. 2004).

The Court notes further petitioner's emphasis on the fact that the Supreme Court decided *Alleyne* prior to the judgment becoming final on August 24, 2013. It is unclear whether petitioner is arguing that counsel was ineffective for failing to file a petition for writ of certiorari regarding the brandishing issue. If so, his claim fails as a matter of law because defendants are not constitutionally entitled to the assistance of counsel in preparing petitions for certiorari. *See Wainwright v. Torna*, 455 U.S. 586, 587 (1982); Supreme Court Rule 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.").[10] "[W]here there is no constitutional

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[9] *See Dell v. United States*, 710 F.3d 1267, 1281 (11th Cir. 2013) ("We have never required counsel to anticipate future legal developments . . . "); *Harrington v. United States*, 689 F.3d 124, 131 (2nd Cir. 2012) ("[C]ounsel cannot be deemed constitutionally ineffective for failing to anticipate later Supreme Court rulings"); *Debrow v. Cain*, 286 F. App'x 158, 160 (5th Cir. 2008) ("Counsel does not render ineffective assistance by failing to anticipate changes in the law."); *Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999) ("[A] failure [to anticipate a change in law] does not constitute ineffective assistance."); *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993) ("The Sixth Amendment does not require counsel to forecast changes or advances in the law . . . .").

[10] *See United States v. Sturdivant*, 2008 U.S. Dist. LEXIS 32054, at *7 (W.D. Pa. Apr. 17, 2008) (holding that

right to counsel there can be no deprivation of effective assistance." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Because there is no right to counsel for a certiorari petition, a defendant cannot raise an ineffective assistance of counsel claim based on a failure to file such a petition.

B. Counsel's failure to object to inadmissible hearsay barred by the Sixth Amendment's Confrontation Clause (Ground two)

Petitioner argues that counsel rendered ineffective assistance by failing to raise a Confrontation Clause challenge to testimony of James Crites – the government's witness and the president and CEO of Merchants Commercial Bank ("Merchants") – related to the Federal Deposit Insurance Corporation ("FDIC") insured status of the bank.[11]

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. AMEND VI. Petitioner contends that Crites' testimony regarding the Merchant's insured status was based on an affidavit by FDIC's legal counsel. Petitioner is mistaken. During his direct examination, the government asked Crites to identify various exhibits, including Exhibit 1-c (a "certification" from FDIC's legal counsel, Thomas E. Nixon, and a "certificate of insurance from the FDIC"), which the District Court admitted. *See* Mar. 26, 2012 Trial Tr. at 104:11-17, 105:8 [DE 119]. Crites did not testify, however, that his knowledge of Merchant's insured status was based on any part of Exhibit 1-c. Rather, Crites' testimony regarding Merchant's insured status was based on his

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"[e]ven though Defendant requested that counsel file a writ on his behalf [], he was not prejudiced by counsel's failure to fulfill that request; a claim for ineffectiveness cannot stand"); *United States v. Dill*, 555 F. Supp. 2d 514, 519 (E.D. Pa. 2008) (stating "courts in the district have consistently held that failure to file a petition for certiorari is not grounds for granting habeas relief based upon the ineffective assistance of counsel" and collecting cases); *White v. United States*, 2013 U.S. Dist. LEXIS 52063, at *12-14 (W.D. Va. Apr. 11, 2013) (holding defendant's ineffective assistance of appellate counsel claim based on his attorney's failure to file a petition for rehearing "fails as a matter of law" and collecting cases).

[11] An element of bank robbery is that the bank was FDIC-insured at the time of the robbery. *See* 18 U.S.C. § 2113; *accord United States v. Harper*, 314 F. App'x 478, 482 (3d Cir. 2008).

personal testimony and not on an out-of-court statement. *See* FED. R. EVID. 602 ("Evidence to prove personal knowledge may consist of the witness's own testimony."); *see* 27 Charles Alan Wright & Victor James Gold, FED. PRAC. & PROC. EVID. § 6028 (2d ed.) ("[P]ersonal knowledge may be established by the testimony of an in court witness without any elaborate foundation separate from the witness' description of the events in question.").

In particular, Crites testified that Merchants had been insured by the FDIC since October 2006, it was insured on January 11, 2011 (the day of the robbery) and that its insurance had never lapsed.[12] Additionally, Crites was available for cross-examination. While counsel did not cross-examine Crites on this issue, petitioner does not point to any evidence that his counsel failed to present to refute the assertion that Merchants was in fact FDIC-insured.

Given the evidence in question does not raise Confrontation Clause concerns and that petitioner's counsel was presented with the opportunity to cross-examine Crites, the Court finds that counsel did not act in an objectively unreasonable manner by failing to raise a Confrontation Clause challenge to Crites' testimony. Nor does the Court find that petitioner was prejudiced by counsel's failure to raise this claim because petitioner has not pointed to any evidence to rebut the claim that Merchants was FDIC-insured.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's Motion to Vacate, Set Aside or Correct Sentence [DE 123] be DENIED without an evidentiary hearing.[13] It

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12 Mar. 26, 2012 Trial Tr. at 106:19-24, 107:1-7 [DE 119].

13 The question of whether to order an evidentiary hearing when considering a motion to vacate a sentence under section 2255 "is committed to the sound discretion of the district court." *Gov't of Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). Here, the record in this case conclusively shows that petitioner is not entitled to relief. *See Padilla-Castro*, 426 F. App'x at 63.

is further recommended that a certificate of appealability be DENIED.[14]

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

Dated: December 8, 2015

S_____
RUTH MILLER
United States Magistrate Judge

[14] When a district court issues a final order on a section 2255 motion, it must make a determination whether it will permit a certificate of appealability. 3d Cir. L.A.R. 22.2; FED. R. APP. P. 22(b)(1). A district court will issue a certificate of appealability only upon a finding of a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Here, the record fails to show a violation of petitioner's constitutional rights. Accordingly, a certificate of appealability should be denied.

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,

Plaintiff,

v.

KADEEM THOMAS,

Defendants.

Crim. No. 2012-02

ATTORNEYS:

Joycelyn Hewlett, Acting United States Attorney
David White, AUSA
United States Attorney's Office
St. Thomas, VI
For the United States,

Kadeem Thomas
Pro se.

ORDER

GÓMEZ, J.

Before the Court is the Report and Recommendation of Magistrate Judge Ruth Miller regarding the motion of Kadeem Thomas to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255.

On January 11, 2011, Merchants Commercial Bank in St. John, United States Virgin Islands (the "bank") was robbed. On January 19, 2012, a Grand Jury returned an indictment charging Kadeem Thomas ("Thomas"), Keven Fessale ("Fessale"), and Shevaun Browne ("Browne") with various crimes related to the robbery. The

Indictment consisted of four counts. Count I alleged Hobbs Act Conspiracy. Count II alleged Bank Robbery. Counts III and IV alleged Possession of a Firearm During the Commission of a Crime of Violence. Thomas was charged in Counts I, II, and IV.

A jury trial in this matter commenced on March 26, 2012. During the course of the trial, the government called James Crites ("Crites"), the president and CEO of Merchants Commercial Bank. Crites testified that the bank was insured by the Federal Deposit Insurance Company (the "FDIC").[1] During Crites's testimony, the government asked Crites to identify various exhibits, including a "certificate of insurance" from the FDIC. On March 28, 2012, the jury convicted Thomas, Fessale, and Browne on all counts.

On August 6, 2012, a sentencing hearing was held in this matter. The Court found that Thomas had brandished a firearm during the commission of the robbery. This finding resulted in an increased mandatory minimum sentence for Thomas's sentence on Count IV. The question of Thomas's brandishing of a firearm had not been presented to the jury. At the end of the hearing, Thomas was sentenced to a term of 60 months on Counts I and II. The sentences for Counts I and II were to run concurrently.

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[1] One of the elements of bank robbery is that the bank be insured by the FDIC. *See* 18 U.S.C. § 2113(f).

Thomas was sentenced to a term of 84 months on Count IV. The sentence for Count IV was to run consecutive to the sentence for Counts I and II.

Thomas appealed. The Third Circuit affirmed Thomas's conviction in a May 24, 2013, opinion. Thomas did not file a petition for a writ of certiorari to the Supreme Court of the United States. Thomas's judgment became final on August 24, 2013.

On June 17, 2013, the Supreme Court of the United States decided *Alleyne v. United States*, 133 S. Ct. 2151 (2013). In *Alleyne*, the Supreme Court held that "[a]ny fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt." *Id.* at 2155. The Supreme Court held that brandishing of a firearm, as it related to a potentially increased mandatory minimum sentence, must be presented to the jury. *See id.* at 2163-64. The decision in *Alleyne* overturned the prior controlling precedent which had stated that judicial fact finding could permissibly result in an increased mandatory minimum sentence. *See id.* at 2155.

On May 15, 2014, Thomas filed a motion to Vacate under 28 U.S.C. § 2255 (the "Motion"). In the Motion, Thomas argues that his counsel rendered ineffective assistance of counsel because

Thomas's counsel failed to challenge Thomas's sentence by raising the Supreme Court's holding in *Alleyne*. Thomas further argues that his counsel provided ineffective assistance of counsel because Thomas's counsel failed to raise objections under the confrontation clause when Crites testified regarding the bank's FDIC insurance. On September 11, 2014, the Court referred Thomas's Motion to Vacate to Magistrate Judge Ruth Miller for a Report and Recommendation. On December 8, 2015, the Magistrate Judge submitted her Report and Recommendation. The Magistrate Judge recommends that the motion be denied. On December 28, 2015, Thomas filed a Response to the Report and Recommendation (the "Response"). In the Response, Thomas objects to the Magistrate Judge's Report and Recommendation.

On June 23, 2016, Thomas moved to supplement the Motion (the "Supplement"). In the Supplement, Thomas argues that the Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551, 2555, 2557-58 (2015), further compels the Court to vacate the sentence imposed against him for Possession of a Firearm During the Commission of a Crime of Violence.[2]

[2] The *Johnson* court held that defining a crime of violence as "conduct that presents a serious potential risk of physical injury to another" was unconstitutionally vague. *Id.*

The Court will first address the Magistrate Judge's Report and Recommendation. The Court then will address Thomas's Supplement.

A. The Report and Recommendation

In the Report and Recommendation, the Magistrate Judge first addresses Thomas's argument involving *Alleyne*. The Magistrate Judge explains that the ineffective assistance of counsel is assessed according to the then current state of the law and an attorney is not required to foresee changes therein. The Magistrate Judge further explains that the Third Circuit had issued its judgment prior to the issuing of *Alleyne*. As such, for the entire period of time where Thomas's counsel represented Thomas, *Alleyne* was not the controlling precedent. Because Thomas's counsel could not raise an argument that did not yet exist, the Magistrate Judge concluded that Thomas's first argument supporting his allegation of ineffective assistance of counsel was without merit.

The Magistrate Judge then assesses Thomas's argumentthat counsel had failed to object to Crites's testimony regarding the bank's FDIC insurance. Thomas argues that his counsel should have objected to the testimony under the confrontation clause because of Crites's reliance on the government's exhibits. In the Report and Recommendation, the Magistrate Judge explains

that Thomas's recollection of the record was inaccurate. Crites did not rely on the government's exhibits in his testimony. Crites identified the exhibits. Crites testified from his personal knowledge that the bank was insured by the FDIC. Given Crites testified from personal knowledge and was available for cross examination, the Magistrate Judge determined that Thomas's rights under the confrontation clause were not violated.

Upon de novo review of the record, *see Equal Employment Opportunity Comm'n v. City of Long Branch*, 866 F.3d 93, 99 (3d Cir. 2017), the Court agrees with the Magistrate Judge. As such, the Court will adopt the Magistrate Judge's recommendation regarding Thomas's first two arguments.

B. Thomas's challenge under *Johnson v. United States*

In the Supplement, Thomas argues that *Johnson v. United States*, 135 S. Ct. 2551 (2015) compels the Court to vacate the portion of his sentence related to his conviction for Possession of a Firearm During the Commission of a Crime of Violence.

In *Johnson*, the Supreme Court held that defining a violent felony as a felony that "involves conduct that presents a serious potential risk of physical injury to another" was unconstitutionally vague. *Johnson*, 135 S. Ct. at 2555, 2557-58. The *Johnson* court's holding did "not call into question application of the . . . four enumerated offenses, or the

remainder of the . . . definition of a violent felony." *Id.* at 2563.

Section 924 of Title 18 provides:

> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

The language the Supreme Court declared as unconstitutional in *Johnson* is similar, but not identical, to 18 U.S.C. § 924(c)(3)(B). Even assuming arguendo that *Johnson* renders 18 U.S.C. § 924(c)(3)(B) unconstitutional, Johnson does not compel the result Thomas seeks. Thomas was charged with and convicted of bank robbery under 18 U.S.C. § 2113(a),(d). Bank robbery has an element that requires proof beyond a reasonable doubt of the use, attempted use, or threatened use of physical force against the person of another. 18 U.S.C. § 2113(a)("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control,

management, or possession of, any bank, credit union, or any savings and loan association"); *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016)("These allegations in the indictment mimic the requirements of § 2113(a) and (d). The statutory elements that these allegations of the indictment repeat clearly meet § 924(c)(3)(A)'s requirement that the underlying felony offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another."). Even without 18 U.S.C. § 924(c)(3)(B)'s language, the mandatory minimum would still apply to Thomas as a result of his conviction for the crime of bank robbery. *Johnson* does not compel the Court to provide Thomas with the relief he seeks.

The premises considered, it is hereby

ORDERED that that the Report and Recommendation of the Magistrate Judge is **ADOPTED**; it is further

ORDERED that Thomas's Motion to Vacate is hereby **DENIED**; and it is further

ORDERED that Thomas's Motion to Supplement is **DENIED**.

S_____
CURTIS V. GÓMEZ
District Judge

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Crim. No. 12-02
	)	
v.	)	
	)	
KADEEM THOMAS,	)	
	)	
Defendant.	)	
	)	
	)	

ATTORNEYS:

Gretchen Shappert, United States Attorney
David White, AUSA
United States Attorney's Office
St. Thomas, VI
For the United States of America,

George Hodge, Jr., Esq.
St. Thomas, VI
For Kadeem Thomas.

ORDER

GÓMEZ, J.

Before the Court is the motion of Kadeem Thomas for reconsideration of the Court's order denying his 28 U.S.C. § 2255 motion.

I. Factual and Procedural History

On January 11, 2011, Merchants Commercial Bank in St. John, United States Virgin Islands (the "bank") was robbed. On January 19, 2012, a Grand Jury returned an indictment charging Kadeem Thomas ("Thomas"), Keven Fessale ("Fessale"), and Shevaun Browne ("Browne") with various crimes related to the robbery. The Indictment consisted of four counts. Count I alleged Hobbs Act Conspiracy. Count II alleged federal Bank Robbery. Counts III and IV alleged Possession of a Firearm During the Commission of a Crime of Violence. Thomas was charged in Counts I, II, and IV.

A jury trial in this matter commenced on March 26, 2012. During the course of the trial, the government called James Crites ("Crites"), the president and CEO of Merchants Commercial Bank. Crites testified that the bank was insured by the Federal Deposit Insurance Company (the "FDIC").[1] During Crites's testimony, the government asked Crites to identify various exhibits, including a "certificate of insurance" from the FDIC. On March 28, 2012, the jury convicted Thomas, Fessale, and Browne on all counts.

On August 6, 2012, a sentencing hearing was held in this matter. The Court found that Thomas had brandished a firearm

[1] One of the elements of bank robbery is that the bank be insured by the FDIC. See 18 U.S.C. § 2113(f).

during the commission of the robbery. This finding resulted in an increased mandatory minimum sentence for Thomas's sentence on Count IV. The question of Thomas's brandishing of a firearm had not been presented to the jury. At the end of the hearing, Thomas was sentenced to a term of 60 months on Counts I and II. The sentences for Counts I and II were to run concurrently. Thomas was sentenced to a term of 84 months on Count IV. The sentence for Count IV was to run consecutive to the sentence for Counts I and II.

Thomas appealed. The Third Circuit affirmed Thomas's conviction in a May 24, 2013, opinion. Thomas did not file a petition for rehearing with the Third Circuit or a petition for a writ of certiorari to the Supreme Court of the United States. Thomas's judgment became final on August 24, 2013.

On June 17, 2013, the Supreme Court of the United States decided *Alleyne v. United States*, 133 S. Ct. 2151 (2013). In *Alleyne*, the Supreme Court held that "[a]ny fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt." *Id.* at 2155. The Supreme Court held that whether a defendant brandished a firearm--as it relates to a potentially increased mandatory minimum sentence--was an issue that must be presented to the jury. *See id.* at 2163-64. The decision in *Alleyne*

overturned the prior controlling precedent which had provided that judicial fact finding could permissibly result in an increased mandatory minimum sentence. *See id.* at 2155.

On May 15, 2014, Thomas filed a motion to Vacate under 28 U.S.C. § 2255 (the "Section 2255 Motion"). In that motion, Thomas argued that his counsel rendered ineffective assistance of counsel because Thomas's counsel failed to challenge Thomas's sentence by raising the Supreme Court's holding in *Alleyne*. Thomas further argued that his counsel provided ineffective assistance of counsel because Thomas's counsel failed to raise objections under the confrontation clause when Crites testified regarding the bank's FDIC insurance. On September 11, 2014, the Court referred Thomas's Motion to Vacate to Magistrate Judge Ruth Miller for a Report and Recommendation.

On December 8, 2015, the Magistrate Judge submitted her Report and Recommendation. The Magistrate Judge recommended that the Section 2255 Motion be denied. On December 28, 2015, Thomas filed a Response to the Report and Recommendation (the "Response"). In the Response, Thomas objected to the Magistrate Judge's Report and Recommendation.

On June 23, 2016, Thomas moved to supplement the Section 2255 Motion (the "First Motion to Supplement"). In that motion, Thomas argued that the Supreme Court's holding in *Johnson v.*

United States, 135 S. Ct. 2551, 2555, 2557-58 (2015), further compelled the Court to vacate the sentence imposed against him for Possession of a Firearm During the Commission of a Crime of Violence.[2]

On August 8, 2016, Thomas filed a "Motion to Supplement the Record Under Fed. R. Civ. P. Rule 15" (the "Second Motion to Supplement"). In that motion, Thomas asserted that the Supreme Court's holding in *Mathis v. United States*, 136 S. Ct. 2243 195 L. Ed. 2d 604 (2016), compelled the Court to vacate the sentence imposed against him for Possession of a Firearm During the Commission of a Crime of Violence because federal bank robbery is not categorically a crime of violence.

On August 31, 2017, the Court adopted the Magistrate Judge's Report and Recommendation, denied the First Motion to Supplement, and denied Thomas's Section 2255 Motion.

On September 18, 2017, Thomas placed a motion for reconsideration in the prison mail (the "Motion for Reconsideration"). That motion seeks reconsideration of the Court's August 31, 2017, order denying his Section 2255 Motion.

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[2] The *Johnson* court held that defining a crime of violence as "conduct that presents a serious potential risk of physical injury to another" was unconstitutionally vague. Id.

II. DISCUSSION

Motions for reconsideration are governed by Local Rule of Civil Procedure 7.3, which provides:

> A party may file a motion asking the Court to reconsider its order or decision. Such motion shall be filed within fourteen (14) days after the entry of the order or decision unless the time is extended by the Court. Extensions will only be granted for good cause shown. A motion to reconsider shall be based on:
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> 1. intervening change in controlling law;
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> 2. availability of new evidence, or;
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> 3. the need to correct clear error or prevent manifest injustice.

LRCi 7.3. The purpose of a motion for reconsideration "is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir.1985). Such motions are not substitutes for appeals, and are not to be used as "a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not." *Bostic v. AT & T of the V.I.,* 312 F.Supp.2d 731, 733 (D.Vi.2004). "Local Rule [7.3] affirms the common understanding that reconsideration is an 'extraordinary' remedy not to be sought reflexively or used as a substitute for appeal." *Id.*

III. ANALYSIS

Here, Thomas deposited his motion for reconsideration into the prison mail system on September 18, 2018, eighteen days after the Court entered its order and has not provided any argument or evidence that an extension is warranted.[3] As such, his motion is untimely and may be denied on that basis. *See* LRCi 7.3.

Regardless, even if the Court reaches the merits of Thomas's motion, Thomas is not entitled to the relief that he seeks. Thomas argues that reconsideration is warranted because the Court misunderstood his contentions in his Section 2255 Motion. Specifically, Thomas clarifies that he was not arguing that his counsel was ineffective because he failed to anticipate the Supreme Court's decision in *Alleyne*. Instead, he was contending that his counsel was ineffective because: (1) the time limit for filing a petition for a writ of certiorari from the Third Circuit's decision had not expired when the Supreme Court decided *Alleyne;* and (2) his counsel failed to secure his rights after *Alleyne* was decided.[4]

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[3] The "prison mailbox rule" provides that with respect to pro-se prisoners, "the date of filing occurs when a prisoner transmits documents to prison authorities for mailing." *See Spencer v. Beard*, 351 F. App'x 589, 590 (3d Cir. 2009).

[4] An *Alleyne* violation may only be raised on direct appeal, not collateral review. *See United States v. Reyes*, 755 F.3d 210, 212 (3d Cir. 2014) ("[W]hile *Alleyne* set out a new rule of law, it is not retroactively applicable to cases on collateral review . . . ."). Thus, Thomas's only

The Third Circuit affirmed Thomas's conviction on May 24, 2013. On June 17, 2013, the Supreme Court decided *Alleyne*. Thus, after *Alleyne*, Thomas's only legal options on direct appeal were to file a petition for rehearing before the Third Circuit or to seek review in the Supreme Court.

Significantly, a criminal defendant only has a constitutional right to counsel with respect to his first appeal as of right. *See Ross v. Moffitt*, 417 U.S. 600, 602-619, 94 S. Ct. 2437, 2440-48, 41 L. Ed. 2d 341 (U.S. 1974). Thus, "a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in th[e] . . . [Supreme Court]." *Wainwright v. Torna*, 455 U.S. 586, 587-88, 102 S. Ct. 1300, 1301, 71 L. Ed. 2d 475 (1982). Because no constitutional right to counsel exists, the Supreme Court has held that no claim for ineffective assistance of counsel lies with respect to such filings. *See id.* Similarly, there is no constitutional right to assistance of counsel with respect to a discretionary motion for rehearing, and as such, no claim for ineffective assistance of counsel lies with respect to those filings. *See Jackson v. Johnson*, 217 F.3d 360, 365 (5th Cir. 2000) ("We conclude that a criminal defendant

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potential avenue for relief on this issue is an ineffective assistance of counsel claim.