

Appendix "A"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUITC.A. No. 17-2999

UNITED STATES OF AMERICA

VS.

AMIN A. RASHID, Appellant

(E.D. Pa. Crim. No. 2-08-cr-00493-001)

Present: CHAGARES, GREENAWAY, Jr., and FUENTES, Circuit Judges

Submitted is Application for a Certificate of Appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,  
Clerk

ORDER

The foregoing request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant has failed to make a substantial showing of the denial of a constitutional right with respect to his claim that his attorney was ineffective, see Strickland v. Washington, 466 U.S. 668, 687-88 (1984); that his indictment was defective, United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007); that the prosecutor withheld exculpatory evidence, see Brady v. Maryland, 373 U.S. 83 (1963), and suborned perjury, Bucci v. United States, 662 F.3d 18, 40 (1st Cir. 2011); and that the judges were biased against him and violated his civil rights, see Liteky v. United States, 510 U.S. 540, 555 (1994). In addition, jurists of reason could not debate that the District Court properly denied Appellant's motion for a declaratory judgment, motion for discovery and appointment of an investigator, motion for an evidentiary hearing, and motion under Federal Rules of Civil Procedure 59(e).

By the Court,

s/Michael A. Chagares  
Circuit Judge

Dated: 19 June 2018

AWI/CC: VG  
AAR

Appendix "B"

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

**UNITED STATES OF AMERICA**

**v.**

**AMIN A. RASHID**

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**CRIMINAL ACTION NO. 08-493**

**MEMORANDUM OPINION**

**Rufe, J.**

**June 20, 2017**

Before the Court are the following motions filed by *pro se* Petitioner Amin A. Rashid:

(1) Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255; (2) Motion to Amend Section 2255 Pleadings; (3) Motion for a Declaratory Judgment; (4) Motion for an Evidentiary Hearing; (5) Motion for Discovery and Appointment of a Private Investigator; (6) Motion for Release Pending Habeas Proceedings; (7) Motion for Return of Passport; and (8) Motion to Strike Government's Response to Defendant's Motions. For reasons that follow, the Court finds that these motions lack merit, and they will be denied without an evidentiary hearing.

**I. FACTS**

Petitioner is currently serving a sentence of 240 months' imprisonment, having been convicted by a jury of nine counts of mail fraud and eight counts of aggravated identity theft. Petitioner was briefly represented by counsel prior to trial, but represented himself at trial, during sentencing, and on appeal.<sup>1</sup> Along the way, Petitioner filed many motions, including several that raised the same arguments currently before the Court. The facts surrounding Petitioner's conviction are thus familiar. As the Third Circuit summarized when denying Petitioner's direct appeal:

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<sup>1</sup> Petitioner had standby counsel at his sentencing hearing, but represented himself *pro se* during that proceeding, and standby counsel withdrew his appearance afterwards.

Through his entity, the Center for Constitutional and Criminal Justice, Inc. (the “Center”), Rashid received fees in exchange for agreeing to help his clients prevent or reverse sheriff’s sales of their homes. Typically, Rashid’s clients still lost their homes and Rashid kept the fees. Rashid also stole his clients’ identities and used them to collect proceeds due to the prior owners of properties sold at sheriff’s sales. City Line Abstract Company (“City Line”), a title insurance company used in connection with the various sheriff’s sales, issued distribution policies that ultimately paid Rashid over \$600,000.<sup>2</sup>

The evidence of Petitioner’s guilt was overwhelming. It included Petitioner’s own incriminating statements to victims and his employees, drivers’ licenses that Petitioner altered so that he could use them to obtain proceeds owed to deceased homeowners, bank records showing that Petitioner deposited such proceeds into bank accounts he controlled, bogus corporate records, evidence that Petitioner’s family members posed as officers of defunct organizations, and documents Petitioner forged using the signatures of deceased homeowners.<sup>3</sup>

## II. STANDARD

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a prisoner serving a sentence in federal custody may petition the court which imposed the sentence to vacate, set aside, or correct the sentence by asserting 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.”<sup>4</sup> “Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors.”<sup>5</sup> Instead, “[h]abeas corpus relief is generally available only to protect against a fundamental defect which inherently results in a

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<sup>2</sup> *United States v. Rashid*, 593 F. App’x 132, 133 (3d Cir. 2014).

<sup>3</sup> See Doc. No. 394 (Government’s Response to Defendant’s Motion for New Trial) at 6-8 (listing evidence).

<sup>4</sup> 28 U.S.C. § 2255(a).

<sup>5</sup> *United States v. Howard*, Civil Action No. 11-6352, 2013 WL 5924876, at \*2 (E.D. Pa. Nov. 5, 2013) (citations and internal quotation marks omitted).

complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.”<sup>6</sup>

### III. DISCUSSION

#### A. Section 2255 Petition

Petitioner raises four sets of claims in his § 2255 petition: (1) ineffective assistance of counsel; (2) actual innocence; (3) prosecutorial misconduct; and (4) judicial misconduct. Each is discussed in turn.

##### 1. Ground One – Ineffective Assistance of Pre-Trial Counsel

First, Petitioner claims his pre-trial counsel was ineffective for failing to investigate an allegedly fraudulent November 14, 2007 affidavit of Postal Inspector Mary Fitzpatrick in support of a search warrant for the Center’s offices, which yielded evidence of Petitioner’s guilt.<sup>7</sup> Petitioner claims that the affidavit was false because it referred to an interview with Robert Kirbyson, one of Petitioner’s victims, which Petitioner insists did not occur until July 31, 2008, months after the search warrant was executed.

To prevail on a claim for ineffective assistance of counsel, Petitioner must demonstrate both that his attorney’s performance was deficient and that the deficiency caused him prejudice.<sup>8</sup> An attorney’s performance is deficient only if it falls “below an objective standard of reasonableness,” and such deficiency prejudices the defense only where “there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>9</sup> Neither requirement is met here.

Petitioner’s argument rests on an apparent disparity between the date of Inspector

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<sup>6</sup> *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1989).

<sup>7</sup> Doc. No. 497 (Petition) at 4.

<sup>8</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Shedrick*, 493 F.3d 292, 299 (3d Cir. 2007).

<sup>9</sup> *Shedrick*, 493 F.3d at 299 (citation and internal quotation marks omitted).

Fitzpatrick's affidavit (November 14, 2007), and the date of Mr. Kirbyson's interview (July 31, 2008). But as the Third Circuit has already explained, there is an innocent explanation for this disparity: Mr. Kirbyson was interviewed twice. Inspector Fitzpatrick testified that she first interviewed Mr. Kirbyson on November 2, 2007, before her affidavit was executed, and then again on July 31, 2008.<sup>10</sup> Thus, pre-trial counsel was not ineffective for failing to investigate this issue, which the Third Circuit has already ruled is without merit.<sup>11</sup>

Even if there were any evidence that the affidavit contained false statements, Petitioner has not shown that he suffered prejudice from counsel's failure to investigate them. The affidavit included information from numerous other individuals in addition to Mr. Kirbyson, which provided a sufficient basis for the search warrant even absent the information gained from Mr. Kirbyson.<sup>12</sup> There is nothing to suggest that counsel's pursuit of this issue would have resulted in dismissal of the Superseding Indictment or altered the outcome of the trial, as Petitioner suggests.<sup>13</sup> Petitioner's ineffective assistance of counsel claim thus fails.

## **2. Ground Two – Actual Innocence**

Petitioner also claims he is innocent of the mail fraud and aggravated identity theft

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<sup>10</sup> See Doc. No. 293 (Sept. 21, 2011 Trial Tr.) at 159:18-160:9 (Fitzpatrick's trial testimony); Doc. No. 140 (Apr. 26, 2010 Hearing Tr.) at 28:12-21 (explaining that two interviews of Mr. Kirbyson took place).

<sup>11</sup> *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999) ("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument.") (citations omitted).

On appeal, Petitioner argued that the district court abused its discretion in denying his pre-trial motion to suppress evidence obtained from the Center pursuant to the search warrant. *Rashid*, 593 F. App'x at 133. Although Petitioner now casts his claim as one for ineffective assistance of counsel, it is in essence the same argument he raised on appeal, and he may not relitigate it here. *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993) ("Many cases have held that Section 2255 generally may not be employed to relitigate questions which were raised and considered on direct appeal.").

<sup>12</sup> Doc. No. 48, Ex. A (Inspector Fitzpatrick's Affidavit) at 5, 7; see also *United States v. Shields*, 458 F.3d 269, 281 (3d Cir. 2006) (holding that search warrant was not constitutionally defective despite false assertions because the untainted portions of the affidavit were sufficient to support a finding of probable cause); *United States v. Waxman*, 572 F. Supp. 1136, 1142 (E.D. Pa. 1983) (rejecting challenge to affidavit in support of search warrant because the statements at issue "either were not false or, if so, were immaterial").

<sup>13</sup> Doc. No. 513 (Petitioner's Reply) at 12.



counts. Regarding the mail fraud counts, Petitioner argues that the Superseding Indictment was defective because it failed to include the statutory language “Postal Service, U.S. Postal Service, United States Postal Service, U.S. Mail, or United States Mail.”<sup>14</sup> However, the Superseding Indictment referred to items sent “by mail and private commercial carrier” and thus permissibly tracked the statutory language, as the Court has twice explained.<sup>15</sup> Petitioner also argues that the Government failed to prove that he used the mail as part of a scheme to defraud. But there was sufficient evidence to support this element of Petitioner’s mail fraud convictions, including testimony that Petitioner mailed several of the fraudulent documents at issue, as the Third Circuit has already found.<sup>16</sup>

Regarding the aggravated identity theft counts, Petitioner argues that the Government failed to allege or prove that he used interstate commerce in connection with identity theft.<sup>17</sup> But “interstate commerce” is not an element of aggravated identity theft, as the Court has previously explained.<sup>18</sup> Petitioner’s claim of actual innocence utterly fails.<sup>19</sup>

### **3. Ground Three – Prosecutorial Misconduct**

Next, Petitioner claims that the Government committed prosecutorial misconduct.

Petitioner primarily argues that the Government withheld *Brady* material, including evidence related to: (1) the Government’s investigation of individuals at the Philadelphia Sheriff’s Office

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<sup>14</sup> Doc. No. 497 at 6.

<sup>15</sup> Doc. No. 321 n.1; Doc. No. 486 at 8.

<sup>16</sup> *Rashid*, 593 F. App’x at 138 (explaining that this evidence included testimony that Petitioner “mailed the letters and documents charged” in six of the nine mail-fraud counts, among other things).

<sup>17</sup> Doc. No. 497 at 6.

<sup>18</sup> See Doc. No. 486 at 8; see also *United States v. Henderson*, Criminal No. 15-162-1, 2015 WL 5813305, at \*3 (E.D. Pa. Oct. 5, 2015) (“We are unaware of any authority that supports Defendant’s contention that the elements of the crime of aggravated identity theft include a requirement that . . . the production of the document occurred in or affected interstate or foreign commerce.”) (citation and quotation marks omitted).

<sup>19</sup> Petitioner also argues that the Government failed to allege or prove that he used the mail in connection with identity theft. Doc. No. 497 at 6. However, as noted above, the Superseding Indictment adequately alleged mail fraud, and the Government presented sufficient evidence of Petitioner’s use of the mail at trial.

(2) Inspector Bannon's presence at the November 2007 interview of Mr. Kirbyson; (3) a grand jury subpoena served on one Maurice Mander; and (4) "pictures and charts" used during the Government's closing arguments at trial.<sup>20</sup> Petitioner also raises other isolated allegations of prosecutorial misconduct, and these are addressed after the *Brady* claims.

To prevail on a *Brady* claim, Petitioner "must show that (1) the government withheld evidence, either willfully or inadvertently; (2) the evidence was favorable, either because it was exculpatory or of impeachment value; and (3) the withheld evidence was material."<sup>21</sup> "Evidence is material if there is a reasonable probability that the outcome would have been different had the evidence been disclosed to the defense."<sup>22</sup> "[A] defendant's ability to establish a *Brady* violation by arguing that suppressed evidence would have led to additional exculpatory materials requires more than speculation."<sup>23</sup>

None of the evidence cited by Petitioner meets these requirements. First, Petitioner points to an investigation into corruption at the Philadelphia Sheriff's Office, but fails to identify any exculpatory material related to that investigation. The mere fact that improprieties may have occurred at the Sheriff's Office, which conducted foreclosure auctions, does not call into question the weighty and unrelated evidence upon which Petitioner's conviction was based, and so cannot ground a *Brady* claim.<sup>24</sup> Moreover, Petitioner was aware of the investigation prior to trial and had the opportunity to seek exculpatory evidence through his court-appointed

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<sup>20</sup> Doc. No. 497 at 9-10, 17, 19.

<sup>21</sup> *Lambert v. Blackwell*, 387 F.3d 210, 252 (3d Cir. 2004) (citing *Banks v. Dretke*, 540 U.S. , 691 (2004)).

<sup>22</sup> *Riley v. Taylor*, 277 F.3d 261, 301 (3d Cir. 2001) (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

<sup>23</sup> *Maynard v. Gov't of Virgin Islands*, 392 F. App'x 105, 116 (3d Cir. 2010) (citations omitted); *see also United States v. Ramos*, 27 F.3d 65, 71 (3d Cir. 1994) ("We think it unwise to infer the existence of *Brady* material based upon speculation alone.").

<sup>24</sup> *See Maynard*, 392 F. App'x at 119-120 (petitioner's *Brady* claim based on conjecture failed in part because of the strength of the evidence against petitioner at trial); *see also generally United States v. Agurs*, 427 U.S. 97, 109-110 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

investigator.<sup>25</sup> The Court previously rejected Petitioner's arguments based on the investigation into the Sheriff's Office as an "open-ended fishing expedition," and that assessment remains true today.<sup>26</sup>

Petitioner also argues that the Government's failure to disclose that Postal Inspector Bannon was present at the 2007 interview of Mr. Kirbyson constitutes a *Brady* violation.<sup>27</sup> However, the fact that Inspector Bannon was present at the interview was neither favorable nor material to Petitioner's defense. Petitioner's speculation that Inspector Bannon could have provided exculpatory testimony is baseless, as is Petitioner's assertion that his trial strategy would have been different had he learned earlier that Inspector Bannon took part in the interview.<sup>28</sup>

Next, Petitioner suggests the Government withheld evidence regarding a subpoena served on Maurice Mander. Petitioner's arguments about the Mander subpoena have already been rejected by this Court and the Third Circuit, and there is no reason to believe any material evidence related to the subpoena was withheld.<sup>29</sup> Petitioner fixates on whether the subpoena was

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<sup>25</sup> See Doc. No. 202 (Motion for Sanctions against Richard Bell) (asking the Court to take judicial notice of accounting improprieties at the Sheriff's Office); Doc. Nos. 35, 218 (appointing private investigator in November 2008 and in May 2011); see also *United States v. Pelullo*, 399 F.3d 197, 202 (3d Cir. 2005) ("[T]he government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.") (citation omitted). Petitioner also had the opportunity to call a witness at trial to testify about the investigation, but declined to do so. See Doc. No. 291 (July 5, 2011 Trial Tr.) at 229:6-12 (withdrawing Inspector General Alan Butkovitz as a witness).

<sup>26</sup> Doc. No. 422.

<sup>27</sup> Petitioner learned of Inspector Bannon's presence at the interview while cross-examining Inspector Fitzpatrick at trial. Doc. No. 497 at 19.

<sup>28</sup> See *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (mere speculation that, had evidence been disclosed, witness would have provided exculpatory evidence at trial was insufficient to establish a *Brady* claim). Indeed, Inspector Fitzpatrick's affidavit (which Petitioner obtained before trial) plainly states that "Inspectors" (plural) took part in the interview of Mr. Kirbyson, so Petitioner's assertion that he was blindsided by the revelation that more than one inspector took part in the interview is not credible. Doc. No. 48, Ex. A (Inspector Fitzpatrick's Affidavit) ¶ 13 ("Inspectors interviewed Kirbyson[.]").

<sup>29</sup> See Doc. No. 393 (denying Petitioner's Motion for Evidentiary Hearing in Light of Newly Discovered Evidence of Grand Jury Subpoena Abuse and Fraud on Court); see also *Rashid*, 593 F. App'x at 133-34 (rejecting Petitioner's argument that the Mander subpoena was issued for an improper purpose).

served on Mr. Mander's attorney, rather than on Mr. Mander personally, but this distinction has no plausible bearing on the Government's proof or Petitioner's defense.<sup>30</sup>

Finally, Petitioner argues that the Government improperly used a PowerPoint presentation that had not been disclosed to him during closing arguments. This argument is frivolous.<sup>31</sup> As the Court explained during trial, the exhibits shown in the PowerPoint were admitted into evidence, so there was nothing improper about displaying them to the jury, and Petitioner was informed before closing arguments that the PowerPoint would be used. Petitioner thus fails to establish a *Brady* violation.

Aside from his *Brady* claims, Petitioner lobs various other arguments about prosecutorial misconduct, all of which miss the mark. Petitioner argues that the prosecution improperly objected to certain of his proposed witnesses, but to the extent the Court excluded any particular witness, it was because Petitioner could not establish the relevance or admissibility of the testimony.<sup>32</sup> Petitioner also claims the Government "surprised" him by not calling witnesses from the Philadelphia Sheriff's Office at trial, but fails to explain why this was improper or prejudicial.<sup>33</sup> Finally, Petitioner lodges unsubstantiated claims of perjury against certain witnesses and suggests that the Government elicited false testimony, but Petitioner had the opportunity to cross-examine these witnesses, and his dissatisfaction with their testimony does

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<sup>30</sup> Petitioner also appears to question whether the subpoena was served at all, but the record shows the subpoena issued and was served on either Mr. Mander or his attorney. *See* Doc. No. 235 (June 2, 2011 Hearing Tr.) at 73:9-18.

<sup>31</sup> At trial, Petitioner objected to the PowerPoint on the ground that it suggested connections between certain pieces of evidence. As the Court explained then, there is nothing improper about displaying evidence in that fashion during closing arguments. Doc. No. 295 (July 11, 2011 Trial Tr.) at 16:7-19:12 (describing Petitioner's objection to the PowerPoint as "completely frivolous"). The Third Circuit also rejected on appeal Petitioner's argument that the Government constructively amended the Superseding Indictment by showing the jury exhibits that had been admitted into evidence during closing arguments. *Rashid*, 593 F. App'x at 138 n.24.

<sup>32</sup> *See* Doc. No. 291 (July 5, 2011 Trial Tr.) at 188:10-241:2.

<sup>33</sup> Doc. No. 497 at 17.

not entitle him to relief.<sup>34</sup> To the extent Petitioner raises other arguments regarding prosecutorial misconduct, they are conclusory and duplicative of claims that have already been rejected by this Court; there is no need to detail them further.<sup>35</sup>

#### **4. Ground Four – Judicial Misconduct and Civil Rights Violations**

Finally, Petitioner repeats his claim of judicial bias and civil rights violations.<sup>36</sup> This claim largely rehashes Petitioner's other arguments, and fails for the same reasons. Petitioner also asserts that his sentence is "draconian" and that he is the victim of "racial bigotry,"<sup>37</sup> but his sentence was well within his Guidelines advisory range of 132-327 months, so it can hardly be said to be unjust or motivated by extrinsic factors.<sup>38</sup> Indeed, the Third Circuit has already held that Petitioner's complaints about the Court's rulings do not give rise to an inference of judicial bias.<sup>39</sup> This claim fails as well.

#### **B. Motion to Amend**

Petitioner seeks leave to amend his Petition to add claims concerning three prior convictions from 1975, 1980, and 1993.<sup>40</sup> Petitioner also seeks leave to add certain facts regarding the claims in his § 2255 petition. The Government argues that new claims based on Petitioner's prior convictions are untimely, and that the additional facts proffered by Petitioner

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<sup>34</sup> Doc. No. 513 at 13; *see also Rashid*, 593 F. App'x at 136-37 (rejecting Petitioner's argument that certain witnesses perjured themselves at sentencing because Petitioner "was able to cross-examine them").

<sup>35</sup> *See United States v. Thomas*, 221 F.3d 430, 437 (3d Cir. 2000) (explaining that conclusory allegations in a § 2255 petition "may be disposed of without further investigation by the District Court").

<sup>36</sup> Doc. No. 497 at 24-25.

<sup>37</sup> *Id.* at 25.

<sup>38</sup> *See* Doc. No. 371 (Government's Sentencing Memorandum) at 371; Doc. No. 444 (July 22, 2013 Sentencing Tr.) at 140:23-151:3 (explaining sentence); *see also United States v. Layton*, 455 F. App'x 196, 199 (3d Cir. 2011) (concluding that "sentence well within the Guidelines range . . . did not reflect any purported bias"); *United States v. Isaacs*, 301 F. App'x 183, 186 (3d Cir. 2008) (finding that district court's decision not to impose a below-Guidelines sentence "hardly indicates bias").

<sup>39</sup> *Rashid*, 593 F. App'x at 134-35.

<sup>40</sup> Doc. No. 512 (Motion to Amend).

do not remedy the defects with his other claims.

Under AEDPA, a petitioner must file a § 2255 petition within one year from “the date on which the judgment of conviction becomes final.”<sup>41</sup> “Under Fed. R. Civ. P. 15(c), an amendment which, by way of additional facts, clarifies or amplifies a claim or theory in the petition may, in the District Court’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.”<sup>42</sup> “An amended habeas petition . . . does not relate back . . . when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.”<sup>43</sup>

Petitioner’s conviction became final on May 18, 2015, when the Supreme Court denied review of his petition for certiorari.<sup>44</sup> The Motion to Amend was filed more than one year later on November 28, 2016. Petitioner’s claims based on his 1975, 1980, and 1993 convictions are therefore untimely, and they do not relate back to the original petition because they concern convictions that were not the subject of that petition.

Even if the Court were to consider these claims on the merits, they would fail. Petitioner argues that all of his prior sentences were invalid for one reason or another, and that they therefore should not have been taken into account during his sentencing. But as the Court stated at sentencing, the record in this case provided ample support for Petitioner’s sentence, so the purported invalidity of Petitioner’s prior convictions would not entitle Petitioner to a sentence

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<sup>41</sup> 28 U.S.C. § 2255(f).

<sup>42</sup> *United States v. Thomas*, 221 F.3d 430, 431 (3d Cir. 2000).

<sup>43</sup> *Mayle v. Felix*, 545 U.S. 644, 650 (2005).

<sup>44</sup> See *Rashid v. United States*, 135 S. Ct. 2340 (2015).

reduction.<sup>45</sup>

To the extent Petitioner seeks to amend his petition to allege new facts concerning his other claims—ineffective assistance of pre-trial counsel, actual innocence, prosecutorial misconduct, and judicial bias—his request is not untimely, but none of the “new” facts in his motion serve to clarify or amplify his claims. For instance, Petitioner argues that the Court failed to rule on his pre-trial witness list, but the Court ruled on that motion years ago, as the Court has explained.<sup>46</sup>

Accordingly, Petitioner’s motion to amend will be denied as time-barred as it relates to claims based on his 1975, 1980, and 1993 convictions, and futile as to his other claims.

### **C. Remaining Motions**

Petitioner’s other motions raise similar issues to those in his petition and his motion to amend, and they fail for similar reasons. The Court addresses each in turn.

#### **1. Motion for a Declaratory Judgment**

Petitioner moves for a declaratory judgment pursuant to 28 U.S.C. § 2201 regarding his prosecutorial misconduct claims.<sup>47</sup> Petitioner asserts that the Government failed to deny some of Petitioner’s allegations related to Inspector Fitzpatrick’s November 14, 2007 affidavit and the testimony of Mr. Kirbyson. That is incorrect. The Government addressed this claim in its

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<sup>45</sup> Doc. No. 444 (Sentencing Tr.) at 142:1-20 (explaining regarding the prior convictions that Petitioner’s sentence “would be the same no matter what”). To the extent Petitioner seeks to challenge his prior convictions directly, such claims are not cognizable on a § 2255 petition. *See United States v. Schweitzer*, Criminal Action No. 95-0200, 2010 WL 2649898, at \*2 (E.D. Pa. June 30, 2010) (petitioner could not challenge prior conviction under § 2255) (citing *Daniels v. United States*, 532 U.S. 374, 382 (2001)).

<sup>46</sup> More specifically, Petitioner claims the Court failed to rule on “Document No. 145,” which contained his pre-trial witness list. Petitioner subsequently filed another motion containing a revised pre-trial witness list, and the Court ruled on that motion and dismissed the first motion as moot. *See* Doc. No. 411.

<sup>47</sup> Doc. No. 507.

response to Petitioner's § 2255 petition and in various earlier filings and hearings.<sup>48</sup> Thus, the Government did not admit Petitioner's allegations or waive its ability to respond to them, and in any event, the underlying claim is meritless. Petitioner's motion will be denied.

## **2. Motion for Discovery and Appointment of a Private Investigator**

Petitioner seeks discovery and the appointment of an investigator to pursue several issues including: (1) the testimony of trial witness Karen Missigman; (2) alleged improprieties by a City Line employee; (3) the subpoena served on Maurice Mander; (4) Postal Inspector Bannon's presence at the November 2007 interview of Mr. Kirbyson; and (5) the prosecution's alleged misconduct in relying on Petitioner's 1993 conviction at sentencing.<sup>49</sup>

"[A] habeas petitioner, unlike the civil litigant in federal court, is not entitled to discovery as a matter of ordinary course."<sup>50</sup> Instead, a petitioner may seek discovery under Rule 6(a) of the Rules Governing Section 2255 Proceedings only upon a showing of "good cause."<sup>51</sup> "The Supreme Court has stated that 'good cause' exists under Rule 6(a) 'where specific allegations before the court show reason to believe that the petitioner may, if facts are fully developed, be able to demonstrate that he is . . . entitled to relief.'"<sup>52</sup> "This standard limits discovery to those cases where a defendant has made a preliminary showing that requested discovery will tend to support his entitlement to relief."<sup>53</sup>

Petitioner has not shown good cause for his discovery requests, which all relate to claims

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<sup>48</sup> See Doc. No. 504 (Government's Response to Petition) at 6-9 (responding to Petitioner's "Kirbyson" claim); see also Doc. No. 525 (Government's Omnibus Response to Petitioner's Motions) (recounting procedural history of this claim and noting some of the briefs and hearings in which the Government has addressed it).

<sup>49</sup> Doc. No. 515 at 1-3.

<sup>50</sup> *Peterkin v. Horn*, 30 F. Supp. 2d 513, 516 (E.D. Pa.1997) (citing *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)).

<sup>51</sup> *Id.*

<sup>52</sup> *United States v. Purcell*, 667 F. Supp. 2d 498, 518 (E.D. Pa. 2009) (quoting *Bracy*, 520 U.S. at 908-09).

<sup>53</sup> *Id.* (citations omitted).



that have been rejected by this Court or the Third Circuit. Instead, Petitioner's discovery requests are speculative and largely concern collateral issues that have little bearing on the Government's proof at trial or any colorable claim for relief.<sup>54</sup> It is well established that Rule 6(a) does not permit deep-sea fishing expeditions of the sort proposed here.<sup>55</sup> Petitioner's motion will be denied.

### **3. Motion for an Evidentiary Hearing**

Petitioner also seeks an evidentiary hearing pursuant to 28 U.S.C. § 2255(b).<sup>56</sup> "In evaluating a federal habeas petition, a District Court must hold an evidentiary hearing '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'"<sup>57</sup> But if the record as a whole "conclusively show[s] that the prisoner is entitled to no relief," a court is not required to hold an evidentiary hearing.<sup>58</sup> Most of the claims raised in the pending motions have been rejected in some form or another by this Court or the Third Circuit, and there are no remaining disputes that require further development of the record. Thus, Petitioner's motion will be denied.

### **4. Motion for Release Pending Habeas Proceedings**

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<sup>54</sup> The Court has already explained the irrelevance of evidence related to the Mander subpoena and Inspector Bannon's presence at the November 2007 interview of Mr. Kirbyson. In addition, Petitioner seeks an affidavit from fact witness Karen Missigman clarifying her trial testimony, but Petitioner had an opportunity to cross-examine Ms. Missigman, so there is no need for clarification. Relatedly, Petitioner suggests that a document about "reverse mortgages" is relevant to Ms. Missigman's testimony, but this document was produced to Petitioner before trial and remains in his possession, so further discovery on this issue is unnecessary. Doc. No. 515 at 2. Finally, Petitioner seeks the testimony of a former City Line employee about whether an entity known as the West Indian Beneficial Association was defrauded, but as Petitioner acknowledges, Petitioner was "not convicted of defrauding West Indian," so this testimony is irrelevant as well. Doc. No. 515 at 2.

<sup>55</sup> *E.g.*, *United States v. Noyes*, 589 F. App'x 51, 53 (3d Cir. 2015) (affirming district court's decision to deny petitioner's motion for discovery because it appeared that petitioner "sought to go on a fishing expedition for evidence, which does not constitute good cause for granting a discovery request"); *Deputy v. Taylor*, 19 F.3d 1485 (3d Cir. 1994) (affirming district court's denial of discovery where petitioner failed to identify any evidence that might support his claim).

<sup>56</sup> Doc. No. 514.

<sup>57</sup> *United States v. Kenley*, 440 F. App'x 78, 80 (3d Cir. 2011) (citing 28 U.S.C. § 2255(b)).

<sup>58</sup> *United States v. Dawson*, 857 F.2d 923, 927 (3d Cir. 1988) (quoting *Gov't of the V.I. v. Bradshaw*, 726 F.2d 115, 117 (3d Cir. 1984)) (internal quotation marks omitted).

Petitioner has moved for release pending habeas proceedings pursuant to Federal Rule of Appellate Procedure 23, which concerns the appeal of a “decision ordering the release of a prisoner.”<sup>59</sup> Because no court has ordered Petitioner’s release, Rule 23 does not apply. This motion will be denied.

## **5. Motion for Return of Passport**

Petitioner has also filed a motion for the return of his passport, which he surrendered as a condition of bail and was ultimately returned to the State Department pursuant to the administrative guidelines of this Court.<sup>60</sup> Petitioner argues that returning his passport to the State Department violated his due process rights, and asserts that his passport is material evidence in his ongoing attempts to challenge his 1993 conviction.

Petitioner’s due process rights were not violated by the return of his surrendered passport to the State Department. The return of Petitioner’s passport—a purely administrative procedure—has no bearing on Petitioner’s ability to recover it upon his release.<sup>61</sup> While Petitioner claims that his passport is relevant to his attempts to challenge his 1993 conviction, that conviction is not at issue here, as explained. Petitioner’s motion for the return of his passport will be denied.<sup>62</sup>

## **6. Motion to Strike Government’s Response**

Finally, Petitioner moves to strike the Government’s response to several of his motions as untimely and asks the Court to grant the motions as unopposed.<sup>63</sup> By way of background, after

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<sup>59</sup> Doc. No. 516.

<sup>60</sup> Doc. Nos. 6, 13, 14, 522.

<sup>61</sup> The State Department website provides a procedure for the return of surrendered passports. *See* Return of Surrendered Passports, <https://travel.state.gov/content/passports/en/passports/surrendered-passports.html>.

<sup>62</sup> Petitioner has sought the return of his passport on at least two other occasions, Doc. Nos. 303 & 463, and those motions were denied as well, Doc. Nos. 317 & 464.

<sup>63</sup> Doc. No. 529.

the Government responded to Petitioner's § 2255 petition, Petitioner filed five of the motions discussed above—his Motion for Declaratory Judgment, Motion to Amend, Motion for an Evidentiary Hearing, Motion for Discovery and Appointment of a Private Investigator, and Motion for Release Pending Habeas Proceedings. The Court ordered the Government to respond to these motions by March 6, 2017.<sup>64</sup> The Government failed to respond, and the Court then ordered the Government to show cause no later than March 21, 2017, why Petitioner's motions should not be treated as unopposed.<sup>65</sup> The Government responded, explained that it had missed the deadline due to a calendaring error, and sought a one-week extension until March 28 to file its brief.<sup>66</sup> The Court granted that request, and the Government filed its brief on March 28.<sup>67</sup>

Petitioner argues that the Government's response should be stricken as untimely because the Court erred in extending the deadline, and that his motions should be granted as unopposed. But under Federal Rule of Civil Procedure 6(b)(1)(B), the Court possessed discretion to extend the Government's time to respond if the Government's failure to act was "because of excusable neglect." Many courts have held that calendaring errors of the sort that occurred here constitute "excusable neglect" sufficient to warrant an extension of time.<sup>68</sup> Moreover, Petitioner—who himself has been afforded several extensions of time—has not identified any prejudice caused by

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<sup>64</sup> Doc. No. 518.

<sup>65</sup> Doc. No. 519.

<sup>66</sup> Doc. Nos. 523.

<sup>67</sup> Doc. Nos. 524, 525.

<sup>68</sup> E.g., *Gumbs-Heyliger v. CMW & Assocs.*, Civil Action No. 2012-0078, 2017 WL 1217153, at \*3 (D.V.I. Mar. 31, 2017) ("The Court finds that counsel's inadvertent calendaring error resulting in an eight-day delay is the type of 'minor neglect' that weighs in favor of a finding good cause and excusable neglect."); *Santiago v. N.Y. & N.J. Port. Auth.*, Civ. No. 2:11-cv-04254 (WJM), 2016 WL 3769353, at \*2 (D.N.J. July 14, 2016) (calendaring error warranted finding of excusable neglect).

the short extension.<sup>69</sup> There is no reason to strike the Government's response.

Even if the Court were to strike the Government's response, Petitioner's motions would not be granted as unopposed because, contrary to Petitioner's assertions, nothing obligates the Court to do so. Petitioner relies on Local Rule of Civil Procedure 7.1(c), but that Rule states only that the Court "*may*" grant a motion as uncontested in the absence of a timely response, not that the Court "*must*" do so.<sup>70</sup> Indeed, all of Petitioner's motions pertain to his § 2255 petition, and "a respondent's tardiness or failure to answer a habeas corpus petition is not grounds for granting federal habeas relief."<sup>71</sup> Thus, the Government's failure to abide by the Court's original response deadline does not require the Court to grant Petitioner's related motions as unopposed.

#### IV. CONCLUSION

For the reasons stated above, Petitioner conclusively fails to establish that his conviction and sentence was improper or that he is otherwise entitled to relief. As a result, his motions will be denied without a hearing. Because Defendant has not made a substantial showing of the denial of a constitutional right, a certificate of appealability shall not issue.<sup>72</sup>

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<sup>69</sup> Petitioner was granted two extensions of time to file his reply to the Government's response to his § 2255 Petition, Doc. Nos. 506, 509, and was also granted an extension of time to reply to the Government's omnibus response to his other motions. Doc. No. 528.

<sup>70</sup> *E.g., Avellino v. Herron*, 181 F.R.D. 294, 295 n.4 (E.D. Pa. 1998) ("Local Rule of Civil Procedure 7.1(c) permits, but does not require, a motion to be granted as uncontested in the absence of a timely response.").

<sup>71</sup> *Nesmith v. Common Pleas Ct. of Phila. Cty.*, Civil Action No. 09-4356, 2010 WL 3278042, at \*1 (E.D. Pa. Aug. 16, 2010) (citations omitted).

<sup>72</sup> 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

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

**UNITED STATES OF AMERICA**

**v.**

**AMIN A. RASHID**

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**CRIMINAL ACTION NO. 08-493**

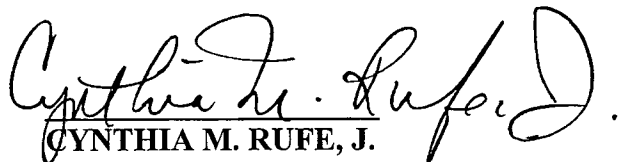
**ORDER**

**AND NOW**, this 20th day of June 2017, upon consideration of Petitioner's pending petition and motions, the briefing in support thereof, and the Government's responses thereto, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby **ORDERED** as follows:

1. Petitioner's Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 (Doc. No. 497) is **DENIED**. No certificate of appealability shall issue, and no evidentiary hearing shall be held.
2. Petitioner's Motion for a Declaratory Judgment Pursuant to 28 U.S.C. § 2201(a) (Doc. No. 507) is **DENIED**.
3. Petitioner's Motion to Amend § 2255 Pleadings (Doc. No. 512) is **DENIED**.
4. Petitioner's Motion for an Evidentiary Hearing (Doc. No. 514) is **DENIED**.
5. Petitioner's Motion for Discovery and Appointment of a Private Investigator (Doc. No. 515) is **DENIED**.
6. Petitioner's Motion for Release Pending Habeas Proceedings (Doc. No. 516) is **DENIED**.
7. Petitioner's Motion for Return of United States Passport (Doc. No. 526) is **DENIED**.
8. Petitioner's Motion to Strike Government's Omnibus Response (Doc. No. 529) is **DENIED**.

**IT IS SO ORDERED.**

**BY THE COURT:**

  
**CYNTHIA M. RUFÉ, J.**

Appendix "C"

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 17-2999

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UNITED STATES OF AMERICA

v.

AMIN A. RASHID,  
Appellant

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(E.D. Pa. No. 2-08-cr-00493-001)

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SUR PETITION FOR REHEARING

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Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN,  
HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO,  
BIBAS, and FUENTES\*, 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  
concurred in the decision having asked for rehearing, and a majority of the judges of the

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\* Hon. Julio M. Fuentes' vote is limited to panel rehearing.

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/ Michael A. Chagares  
Circuit Judge

Dated: 8 November 2018  
AWI/CC: AAR  
VG

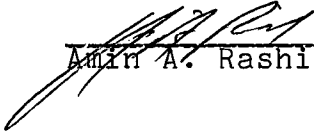


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Declaration of Amin A. Rashid In Support of Mailing was served on counsel by depositing into the "prison mail receptacle, first class postage-prepaid, said copy to:

The Solicitor General  
UNITED STATES DEPARTMENT OF JUSTICE  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

this 12th day of February, 1019.

  
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Amin A. Rashid