APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 21-3297

UNITED STATES OF AMERICA

v.

JESSE BREWER

No. 1-13-cr-00013-003

SUR PETITION FOR REHEARING

Before: CHAGARES, *Chief Judge*, McKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, 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 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/ L. Felipe Restrepo
Circuit Judge

Date: June 30, 2022

*Judge Scirica's vote is limited to panel rehearing only.

cc: Carlo D. Marchioli, Esq.
Jesse Brewer
Enid W. Harris, Esq.

ALD-109

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-3297**

UNITED STATES OF AMERICA

VS.

JESSE BREWER, Appellant

(M.D. Pa. Crim. No. 1-13-00013-003)

Present: JORDAN, RESTREPO, and SCIRICA, Circuit Judges

Submitted is appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1),

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied because jurists of reason would not debate the District Court's denial of his claims or his proposed claims under 28 U.S.C. § 2255. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). We make that determination largely for the reasons explained by the Magistrate Judge. We separately address two points.

First, as part of appellant's claim that his trial counsel should not have conceded the interstate-commerce element of Hobbs Act robbery, appellant argued that the concession violated the rule of McCoy v. Louisiana, 138 S. Ct. 1500 (2018). It did not, and jurists of reason would not debate that point, both because appellant does not claim to have objected to the concession and because conceding that element was not tantamount to a concession of guilt of the offense, which counsel otherwise contested. See id. at 1510-11.

Second, the Magistrate Judge recommended denying appellant's motion to

supplement at ECF No. 369 for several reasons, including that appellant's proposed claims were untimely. Even if jurists of reasons could debate some of the points that the Magistrate Judge raised (which we do not decide), jurists of reason would not debate whether these claims were timely. Appellant did not raise these claims within one year of the date on which his conviction became final, see 28 U.S.C. § 2255(f)(1), and they do not relate back to any of the claims that appellant previously asserted, see Wilkerson v. Superintendent Fayette SCI, 871 F.3d 221, 236-37 (3d Cir. 2017); cf. United States v. Santarelli, 929 F.3d 95, 101-03 (3d Cir. 2019). Jurists of reason would not debate these points.

By the Court,

s/ L. Felipe Restrepo
Circuit Judge

Dated: April 6, 2022
cc: Carlo D. Marchioli, Esq.
Jesse Brewer
Enid W. Harris, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

PATRICIA S. DODSZUWEIT
CLERK

TELPHONE NO.
215-597-2995

OFFICE OF THE CLERK

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April 6, 2022

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RE: USA v. Jesse Brewer
Case Number: 21-3297
District Court Case Number: 1-13-cr-00013-003

ENTRY OF JUDGMENT

Today, **April 06, 2022** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very Truly Yours,
s/ Patricia S. Dodszuweit
Clerk

By: Desiree,
Case Manager
267-299-4252

cc: Mr. Peter J. Welsh

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

UNITED STATES OF AMERICA	:	Crim. No. 1:13-CR-0013-03
v.	:	
JESSE BREWER	:	Judge Jennifer P. Wilson

ORDER

Before the court is the report and recommendation of United States Magistrate Judge Martin C. Carlson recommending that Defendant's motion and amended motion to vacate or modify his sentence pursuant to 28 U.S.C. § 2255 for ineffective assistance of counsel, Docs. 303 & 332, be denied and that Defendant's motion to supplement the § 2255 motion, Doc. 369, be denied. (Doc. 377.) No party has filed objections to the report and recommendation, resulting in the forfeiture of de novo review by this court. *Nara v. Frank*, 488 F.3d 187, 194 (3d Cir. 2007) (citing *Henderson v. Carlson*, 812 F.2d 874, 878–79 (3d Cir. 1987)).

Following an independent review of the report and record, and affording "reasoned consideration" to the uncontested portions of the report, *EEOC v. City of Long Branch*, 866 F.3d 93, 100 (3d Cir. 2017) (quoting *Henderson*, 812 F.2d at 879), to "satisfy [the court] that there is no clear error on the face of the record," Fed. R. Civ. P. 72(b), advisory committee notes, the court finds that Judge

Carlson's analysis is well-reasoned and fully supported by the record and applicable law. Accordingly, **IT IS ORDERED THAT**:

1) The report and recommendation, Doc. 377, is **ADOPTED** in its entirety.
2) Defendant's motion to vacate under 28 U.S.C. § 2255, Doc. 303, and counseled amended motion, Doc. 332, are **DENIED**.
3) Defendant's motion to supplement the motion to vacate, Doc. 369, is **DENIED**.
4) The court finds no basis to issue a certificate of appealability because Defendant has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c).
5) The Clerk of Court is directed to close this case.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

Dated: December 3, 2021

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

UNITED STATES OF AMERICA,	:	**Criminal No. 1:13-CR-13-3**
	:	
v.	:	**(Judge Wilson)**
	:	
JESSE BREWER,	:	**(Magistrate Judge Carlson)**
	:	
Defendant.	:	

REPORT AND RECOMMENDATION

I. Statement of Facts and of the Case[1]

Jesse Brewer is a criminal recidivist who is serving a life sentence following his conviction for participating in a 2012 jewelry store robbery which nearly resulted in the fatal shooting of the store owner. This case comes before us for consideration of a motion to vacate or modify the defendant's sentence pursuant to 28 U.S.C. § 2255. (Doc. 332). Brewer was convicted in 2015 of the armed robbery of a jewelry store, during which the owner was shot numerous times and suffered serious injuries as a result. At trial, Brewer was found guilty of Hobbs Act Robbery in violation of 18 U.S.C. § 1951, and Use of a Firearm During a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A). Consistent with then-existing caselaw, Brewer was

[1] This factual recitation is taken from the parties' submissions and the evidentiary hearing held before the undersigned on January 21, 2021. (Docs. 352, 357, 375, 376).

designated as a Career Offender under the United States Sentencing Guidelines, and he was sentenced to life imprisonment. Brewer's § 2255 motion asserts a host of claims, alleging that Brewer's trial counsel was ineffective.

We held an evidentiary hearing on this motion on January 21, 2021, during which Brewer's counsel orally requested to further supplement the counseled petition in this case to raise the claim that trial counsel did not challenge Brewer's career offender designation. The Government objected, arguing that an amendment adding a new claim at this juncture was barred by the statute of limitations and did not relate back to the original claims in Brewer's petition or his counseled amended petition. Brewer's counsel was instructed to file a written motion so both parties could brief the issue. The motion was filed on February 4, 2021, and it has been fully briefed. (Docs. 369, 370, 375, 376). Thus, this case comes before us for consideration of both Brewer's initial petition to vacate his conviction and sentence as well as his motion to supplement this petition.

Upon consideration of these motions, for the reasons set forth below, it is recommended that Brewer initial motion to vacate his conviction and his subsequent motion to amend this §2255 petition be denied.

The pertinent facts of this case are as follows: Brewer was charged in a multi-count superseding indictment on May 15, 2013. (Doc. 22). This indictment charged Brewer with a Hobbs Act Robbery and Using a Firearm During a Crime of Violence.

These charges arose out of a violent robbery of White Jewelers in York, Pennsylvania. Brewer's two co-defendants, Jamell Smallwood and Timothy Forbes, pleaded guilty to similar charges relating to this incident.

The evidence at trial showed that Smallwood, Forbes, and a third individual traveled from Smallwood's home in Allentown to York on the morning of July 12, 2012, switched vehicles, and drove to White Jewelers. Smallwood and a man identified by Forbes at trial as Brewer entered the jewelry store with guns. Brewer shot the owner of the store multiple times and then shot Smallwood, presumably by accident. Smallwood then retrieved Forbes from the car outside, requesting assistance. When Forbes entered the store, he broke the display cases and took approximately 52 Rolex watches. The three men fled the scene and went to New York City, where Brewer and Forbes dropped Smallwood off at a hospital to treat his gunshot wound. Soon thereafter, Smallwood was arrested in connection with the robbery.

In addition to the identification of Brewer by his codefendant, Brewer was tied to the case through two of the cell phones used on the day of the robbery. The cell phone Smallwood was using the day of the robbery, which he still had in the hospital, was registered to Brewer. Another cell phone registered to Brewer, ending in the digits 4252, was established through cell towers to have been in the Allentown area early in the morning, in Harrisburg after that but prior to the robbery, and

traveling northeast of Harrisburg toward New York City after the robbery. In the early afternoon, the cell phone utilized a tower within three miles from the hospital where Smallwood was dropped off. There was also a 2 hour and 47-minute window during the time of the robbery during which there were no phone calls involving the 4252 number.

Brewer was arrested and subsequently arraigned on July 30, 2013, and he entered a plea of not guilty to these charges. At his initial proceedings, Brewer was appointed counsel to represent him. However, on January 22, 2015, Brewer moved *pro se* for the appointment of new counsel, asserting that "there [was] an irreconcilable personality conflict and difference in opinion on the manner in which the case should be litigated," as well as a "lack of communication." (Doc. 155). Brewer's motion was granted, and attorney William Fetterhoff was appointed to represent him. (Doc. 156).

Prior to Brewer's trial, Attorney Fetterhoff received an email with a list of proposed stipulations from the Assistant United States Attorney assigned to the case. Attorney Fetterhoff visited Brewer at Dauphin County Prison on September 2, 2015. At that visit, Brewer and Attorney Fetterhoff both signed the stipulations. Most of the stipulations involved forensic evidence relating to the investigation, but one of them stated that "[t]he Rolex watches stolen from White Jewelers on July 12, 2012 were manufactured outside of the Commonwealth of Pennsylvania, specifically in

Switzerland. Therefore, the Rolex watches were 'article[s] or commodit[ies] in commerce' within the meaning of Title 18, United States Code, Section 1951." (Govt. Ex. 13, at 4).

At Brewer's trial, the Government presented an expert witness in cell site analysis, FBI Agent William Shute, to testify to the 4252 phone's location on the day of the robbery. Agent Shute used cell site mapping technology to determine the location of the phone on the day of the robbery. On this score, Agent Shute testified that the 4252 phone used a tower in Allentown, Pennsylvania on the morning of the robbery; used a tower in Harrisburg, Pennsylvania before the robbery; used a tower 50 or 60 miles northeast of Harrisburg toward New York City following the time of the robbery; and used a tower approximately 3 miles from the hospital in New York where Smallwood was dropped off after the robbery. Agent Shute also noted that there was no activity on the 4252 phone for the roughly 2 hours and 47 minutes during which the robbery took place.

There was also testimony regarding the communications to and from the phone in the days surrounding the robbery. This included text messages exchanged between that number and another phone number, which presumably belonged to a female friend. The messages indicated that the individual who had the 4252 phone was requesting help from the female friend to obtain bus tickets from Port Authority in New York to Allentown, Pennsylvania the day before the robbery; that the person

with the 4252 phone had to go out of town, and in fact out of state, at the last minute; a text to the friend female a few minutes after the robbery stating that he was on his way back; and a text indicating that he may be in trouble, which was sent the evening of the robbery. The female friend attempted to obtain more information, and the person with the 4252 phone responded, saying "[t]omorrow" and "[p]lease, I'm tired." The female friend then replied with "Jesse." The remainder of the messages consisted of the female friend requesting that Jesse be honest and transparent with her and begging him to stay out of trouble. For his part, he stated that he had to support his whole family and asked her not to text or repeat what they talked about unless they were face to face.

At the evidentiary hearing, Attorney Fetterhoff testified that he and Brewer agreed that their defense should be focused on showing that Brewer was not present in Pennsylvania the day of the robbery, and that Smallwood had stolen the phone from Brewer's brother's house in New York. They endeavored to prove this by demonstrating that Brewer lived with his brother, Joseph, and Joseph was married to Smallwood's sister, Tonia. Therefore, Smallwood would have had access to Brewer's belongings. This was evidenced by Smallwood using another phone that was registered to Brewer on the day of the robbery and Smallwood's use of Brewer's driver's license during a traffic stop a few months prior to the robbery.

As a part of this defense, Attorney Fetterhoff chose not to hire a competing cell site expert or cross-examine Agent Shute. As explained in the evidentiary hearing, Attorney Fetterhoff believed it would have been inconsistent with their defense, and could possibly confuse the jury, to argue over the location of the cell phone when their defense was that Brewer was not in possession of the phone that day.

Brewer did not testify at trial. Attorney Fetterhoff explained that it was his universal practice, during his more than 40 years as a criminal defense attorney, to discuss with his clients the decision to testify if the case went to trial. Attorney Fetterhoff stated that he spoke to Brewer about testifying, and they agreed that it was in Brewer's best interest not to testify. This decision was based in part on the fact that Brewer had a prior conviction for attempted armed robbery that would have been admissible to impeach him, and it was overall a difficult case for Brewer to testify. Attorney Fetterhoff could not recall Brewer insisting that he wanted to testify.

Moreover, Attorney Fetterhoff testified that at no point did Brewer advise him that Brewer had an alibi for the day of the robbery. While Brewer did advise that he was employed by a trucking company during that time, according to his own testimony, he never specifically advised Attorney Fetterhoff that he was working during the time the robbery occurred:

Q: So going back to 2012. You said you were working on the day that the robbery occurred?
A: Yes, sir.
Q: Where were you working?
A: S&H Glazer Brothers as a truck driver.
Q: And you told Ms. Harris that you had told Mr. Fetterhoff to investigate your job, is that correct?
A: No, it's not.
Q: Did you tell Mr. Fetterhoff to investigate your job?
A: No, I didn't.
Q: You never mentioned anything to him about your work at the S&H trucking company?
A: Yes, I mentioned I worked. As far as me telling him to investigate, that's on him. I can't tell him to do anything.
Q: So you never gave him that instruction?
A: No, I never gave him nothing. I just told him I was working. It's on him to do the rest.
[. . .]

Q: You never told Mr. Fetterhoff that you were working on the day of the robbery, is that right?
A: No, that's not right. I told him I was working the day of the robbery.
Q: Did you tell him you were working the entire day of the robbery?
A: I was working the day of the robbery.
Q: Did you tell him the specific times that you were working on the day of the robbery?
A: I worked the whole day of the robbery.
Q: Specifically, what times did you work on the day of the robbery?
A: My time is from 8 to 4 or my last delivery, whichever is later.

(Doc. 371, at 23-27).

Despite this testimony, Brewer conceded at the evidentiary hearing that even in his pro se petition for writ of certiorari to the United States Supreme Court, he never indicated that he had an alibi defense to present. Attorney Fetterhoff responded to similar questions at the evidentiary hearing and explained that Brewer advised

that he was employed during that time but never specified that his employer could verify what time he may or may not have been working on the day of the robbery. Attorney Fetterhoff explained that Brewer only gave him a general premise that Brewer was employed during that time frame was presented to him. However, there was nothing discussed regarding pay stubs (which would not have demonstrated specific hours worked) or any sort of verification of Brewer's whereabouts on the date of the robbery. Finally, it was noted that in the many detailed letters Brewer sent to his first attorney and to Attorney Fetterhoff, there was never any mention of presenting an alibi defense or that his employer may be able to verify his whereabouts.

Ultimately, after a two-day jury trial, Brewer was found guilty on both counts. Following the verdict, the Probation Officer prepared a Presentence Investigation Report ("PSR"). The PSR noted that Brewer had an initial offense level of 30 and a criminal history category of 3. However, at that time, Brewer was designated as a career offender because he was at least 18 years old at the time of conviction, the instant offense of conviction was a felony that was a crime of violence, and that Brewer had at least two prior felony convictions for crimes of violence—namely, an aggravated assault conviction in Lehigh County and an attempted robbery conviction in New York state. After the career offender enhancement, the PSR calculated Brewer's guidelines to be 360 months to life imprisonment.

On February 24, 2015, Brewer was sentenced to life imprisonment. In fashioning a sentence for Brewer, the district court discussed the factors set forth in 18 U.S.C. § 3553(a), noting that Attorney Fetterhoff had requested a sentence at the low end of the guideline range while the government had requested a sentence at the high end of the guideline range. Judge Caldwell first stated that the nature and characteristics of the offense were very serious, particularly given Brewer's criminal history involving prior armed robberies and gun charges. The court noted that Brewer had spent a significant portion of his adult life incarcerated. On this score, Judge Caldwell stated:

> . . . I think at age 16 Mr. Brewer was in possession of a firearm, got a one-year sentence.
>
> A couple of months later he was involved in an attempted robbery and got a concurrent sentence of one year, and I assume that he served that sentence of one year. After he got out of jail at the age of 18 he, initially got out of that sentence at age 18 he is convicted of grand larceny and served a sentence of eighteen to thirty-six months. Based upon when he was released it looks to me like he served about two years of that sentence, although I don't know.
>
> Not long after that at age 20 Mr. Brewer got a five-year sentence, nineteen months to five years, and it appears that he served the five years, because I think according to the notes in the presentence report he was released in November of 2000. The next year he is involved in this attempted robbery of a home. I don't know if it was a home invasion or what it was, but he got eight years for that and wasn't released until March of 2009.
>
> So I think he served the eight years there. Then he gets involved in the case before me, and he's been in jail on that charge for three years. I added up the total of those sentences. It appears to me that of the

> twenty-five years since he was 16, he has been in jail twenty years, and I think I added that correct.
>
> So, you know, I guess as a person gets older it gets less likely, but how much less likely it is in this case I can't imagine. I think Mr. Brewer is going to continue to be a threat to the community and has learned nothing and has been undeterred by these prior experiences, which are serious.

(Doc. 235, at 20-22). Furthermore, in evaluating the injuries of the victim in this case, Judge Caldwell noted:

> . . . He was shot three times, in the shoulder, the wrist, and the abdomen. He did nearly bleed to death except for the help that he got from Mr. Miller. Since then he's had five major surgeries on his arm and hand. He has a steel plate in his arm.
>
> Twelve inches of arteries and twelve inches of nerves were removed from his leg I guess to try to rehabilitate the arm, and three inches of bone was removed from his hip. He has a permanent loss to the use of his left hand and very limited use of his left arm. In addition to that he suffered a tremendous loss in the loss of his career and business and loss of income, and so you can't find any victim I don't think who's had more difficulty than Mr. White. [. . .] I can't imagine a case that's any more serious than this, and I think the government is surely justified in seeking this sentence that it requests.

(Doc. 235, at 22). Ultimately, Judge Caldwell imposed a sentence of 240 months on Count 1 and life imprisonment on Count 2, to run consecutively. Because the high end of the guideline range was life imprisonment, this sentence was within the guideline range calculated in the PSR.

Attorney Fetterhoff represented Brewer on direct appeal to the Third Circuit. Brewer also submitted a pro se filing to the Third Circuit raising additional issues.

The Third Circuit rejected all arguments put forth by Attorney Fetterhoff and Brewer in his pro se filing and affirmed his conviction and sentence. Brewer then filed a pro se petition for writ of certiorari to the Supreme Court, which was denied on March 25, 2019.

Brewer then filed a pro se motion to vacate his sentence pursuant to 28 U.S.C. § 2255, and counsel was appointed to represent him. (Doc. 303, 324). Counsel then filed an amended motion and supporting brief, and an evidentiary hearing was held before the undersigned on January 21, 2021. (Docs. 332, 352). Brewer's motion asserts several claims that his trial and appellate counsel, Attorney Fetterhoff, provided ineffective assistance. Brewer's claims can be placed into five categories—the handling of Agent Shute's testimony; Brewer's right to testify and his alibi defense; the interstate nexus stipulation; the jury instructions; and appellate errors.

We held an evidentiary hearing on January 21, 2021. Prior to hearing any testimony at the hearing, Brewer's appointed counsel requested to further supplement the petition to raise claims relating to Brewer's status as a career offender. The Government opposed the amendment and counsel was instructed to file a written motion to supplement the amended petition. That motion has been fully briefed. (Docs. 369, 370, 375, 376). Thus, these motions are ripe for resolution.

After review, for the following reasons, we recommend that the claims in Brewer's motion to vacate or modify his sentenced be denied, and that the motion to supplement to add the career offender claims be denied.

II. Discussion

A. Motion to Vacate, Set Aside or Correct a Sentence Based on a Claim of Ineffective Assistance of Counsel

Section 2255 allows a prisoner who is in custody to challenge his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack." 28 U.S.C. § 2255. Accordingly, the United States Court of Appeals for the Third Circuit has held that, "[a] § 2255 motion is a proper and indeed the preferred vehicle for a federal prisoner to allege ineffective assistance of counsel." United States. v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (citing United States v. Sandini, 888 F.2d 300, 311-12 (3d Cir. 1989)); see also United States v. Molina, 75 F. App'x 111, 113 (3d Cir. 2003) ("Because they are often highly fact-bound, claims of ineffective assistance of counsel are generally not considered on direct appeal. . . . Instead, 'the proper avenue for pursuing such claims is through a collateral proceeding in which the factual basis for the claim may be developed'") (internal citations omitted).

It is undisputed that the Sixth Amendment to the United States Constitution guarantees the right of every criminal defendant to effective assistance of counsel. Under federal law, a collateral attack upon a conviction and a sentence based upon

a claim of ineffective assistance of counsel must meet a two-part test established by the Supreme Court in order to survive. Specifically, to prevail on a claim of ineffective assistance of counsel, a petitioner must establish that: (1) the performance of counsel fell below an objective standard of reasonableness; and (2) that, but for counsel's errors, the result of the underlying proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687–88, 691–92 (1984). A petitioner must satisfy both Strickland prongs to maintain a claim of ineffective counsel. George v. Sively, 254 F.3d 438, 443 (3d Cir. 2001).

At the outset, Strickland requires a petitioner to "establish first that counsel's performance was deficient." Jermyn v. Horn, 266 F.3d 257, 282 (3d Cir. 2001). This threshold showing requires a petitioner to demonstrate that counsel made errors "so serious" that counsel was not functioning as guaranteed under the Sixth Amendment. Id. Additionally, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Id. However, in making this assessment "[t]here is a 'strong presumption' that counsel's performance was reasonable." Id. (quoting Berryman v. Morton, 100 F.3d 1089, 1094 (3d Cir. 1996)).

But a mere showing of deficiencies by counsel is not sufficient to secure habeas relief. Under the second Strickland prong, a petitioner also "must demonstrate that he was prejudiced by counsel's errors." Id. This prejudice

requirement compels the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." Id.

Thus, as set forth in Strickland, a petitioner claiming that his criminal defense counsel was constitutionally ineffective must show that his lawyer's "representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Thomas v. Varner, 428 F.3d 491, 499 (3d Cir.2005) (quoting Strickland, 466 U.S. at 689). The petitioner must then prove prejudice arising from counsel's failings. "Furthermore, in considering whether a petitioner suffered prejudice, '[t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" Rolan, 445 F.3d at 682 (quoting Strickland, 466 U.S. at 696) (internal quotations omitted).

It is against these legal benchmarks that we assess Brewer's current legal claims.

B. Brewer's Motion to Vacate or Modify His Sentence Should be Denied.

In his counseled petition, Brewer raises multiple issues alleging that his trial counsel was ineffective. On this score, Brewer claims that Attorney Fetterhoff: (1) failed to cross-examine Agent Shute, the government's cell site expert; (2) failed to retain a cell site expert; (3) failed to advise Brewer of his right to testify and present an alibi defense; (4) stipulated to the interstate nexus element; (5) failed to request Rosemond jury instruction; (6) acted under a conflict of interest on appeal; and (7) failed to argue on appeal that his life sentence violated Alleyne. As we will discuss, Brewer's allegations of trial and appellate counsel's ineffectiveness are without merit. Accordingly, we will recommend that the initial claims in his § 2255 motion be denied.

1. Failing to Cross-Examine Agent Shute and Retain a Cell Site Expert.

Brewer first asserts that trial counsel was ineffective because counsel failed to cross-examine Agent Shute, the government's cell site expert, and failed to retain a cell site expert to rebut Agent Shute's testimony. At trial, Agent Shute testified to the whereabouts of the 4252 phone on the day of the robbery based on cell site mapping technology. However, Agent Shute conceded that his mapping methods had no way of determining who possessed the phone on the day of the robbery. Brewer contends that trial counsel should have retained his own cell site expert and should have cross-examined Agent Shute regarding these mapping techniques,

arguing that Shute's testimony on cell site mapping had been called into question in another case. See United States v. Meehan, 2016 WL 4901128 (E.D. Pa. Sept. 14, 2016).

In Meehan, the defendant argued in a post-conviction motion that his counsel was ineffective for failing to hire a cell site expert to combat Agent Shute's testimony. Agent Shute's testimony in that case was similar to his testimony in Brewer's case. Agent Shute testified to the whereabouts of the defendant's cellphone based on the cell site mapping techniques, which placed the defendant's phone near the location of the robberies in that case. Meehan, 2016 WL 4901128, at *24-25. However, unlike in Brewer's case, there was no indication or argument that anyone other than the defendant possessed the cellphone in question. In addition, the disputed geographic location of the phone in Meehan was between one and twenty miles, unlike the greater distance in this case between York, Pennsylvania and New York City. Meehan's defense counsel attempted to cross examine Agent Shute to cast doubt on the defendant's location, focusing on the fact that the mapping technology could not pinpoint the exact location of the phone, nor did it show other places the defendant may have been that would exculpate him from the robberies. Id. at *26. Ultimately, the district court found that Meehan's claim of ineffective assistance of trial counsel was without merit, reasoning that counsel made a strategic decision not to retain a cell site expert. Id.

In the instant case, we similarly conclude that Attorney Fetterhoff did not render ineffective assistance when he failed to retain a cell site expert or cross-examine Agent Shute. At the outset, Brewer's defense in this case was that he did not possess the 4252 phone on the day of the robbery. He posited instead that Smallwood took the phone, which was registered to Brewer, and used it to help facilitate the robbery. The defense theory of the case was that Smallwood gave the phone to a third individual, and that other individual helped commit the robbery. Indeed, Attorney Fetterhoff focused on the fact that Smallwood possessed Brewer's driver's license and two other phones registered to Brewer.

At the evidentiary hearing, Attorney Fetterhoff elaborated on his decision not to call an expert or cross examine Agent Shute:

> A: The point of Mr. Brewer's case, however, was that it didn't matter. Mr. Brewer, our defense was, was not in the vehicle coming down from the Bronx to York and was not in the vehicle going back from York to the Bronx Lebanon Hospital emergency room with Mr. Smallwood and his gunshot wound.
>
> So to try -- just to summarize this again. Number one, I made a judgment it would have been very difficult and not quite credible with the jury to try and challenge the cell site location evidence over that distance for what it might be worth. And number two, it would certainly appear inconsistent with our defense to start cross-examining Agent Shute with great vigor when that wasn't even our defense.
>
> The jury would be left thinking, why was I, on behalf of Mr. Brewer, suffering such anxiety about the cell phone location evidence if indeed our defense was that Mr. Brewer wasn't even making that trip.

Q: And that's why you decided not to cross-examine Agent Shute?

A: I didn't want to ask him a single question.

Q: Is that also why you decided not to retain your own cell site expert?

A: That's exactly right.

(Doc. 371, at 41-42).

On this score, we conclude that Attorney Fetterhoff's decision to forego cross-examination of Agent Shute was a reasonable, sound tactical choice which fell squarely within the broad objective standard of reasonableness that we apply to legal challenges of this type. We are reminded that "[t]here is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." Harrington v. Richter, 562 U.S. 86, 109 (2011). Here, counsel's decision to keep with the theory of the defense case—that Brewer did not possess the phone—was entirely reasonable. As counsel noted at the evidentiary hearing, cross-examining Agent Shute on this issue would have turned the focus away from the defense theory, which could have in turn confused the jury.

Further, whereas counsel in the Meehan case may have had grounds to challenge Agent Shute's testimony, we conclude that this case does not present a sufficiently similar situation. As we have noted, there was no argument in Meehan that anyone other than the defendant possessed the phone in question. Additionally,

that case focused on a disputed geographic radius of 1-20 miles, which defense counsel in that case challenged by cross-examining Agent Shute regarding the inability to pinpoint a specific location. In contrast in this case, Agent Shute testified to the 4252 phone's whereabouts, which included an analysis of the trip from the Bronx to York, Pennsylvania and back, a distance far greater than the 1 to 20-mile radius challenged in Meehan. In any event, as Attorney Fetterhoff stated, challenging the location of the phone did not matter because the defense theory was that Brewer did not possess the phone. Accordingly, we cannot conclude that Attorney Fetterhoff was ineffective for challenging this testimony, either by way of an expert or by cross-examination.

Moreover, we cannot conclude that Brewer suffered any prejudice from counsel's failure to cross-examine Agent Shute or call an expert to rebut Agent Shute's testimony. Here, Brewer only speculates that if an expert witness testified, "there's a reasonable probability such testimony could have created reasonable doubt, and even an acquittal." (Doc. 303-1, at 14) (emphasis added). However, Brewer fails to establish how challenging Agent Shute's testimony, whether by cross-examination or by an expert witness, would have helped his case and possibly changed the outcome of the proceeding. This speculative showing falls well short of the specific, identifiable prejudice that is necessary to sustain an ineffective

assistance of counsel claim. Therefore, we conclude that this claim is without merit and does not warrant relief.

2. Failing to Advise Brewer of His Right to Testify

Brewer next argues that trial counsel failed to inform him of his right to testify, including testifying and presenting an alibi defense. Brewer contends that had he been advised of this right, he might have considered testifying at trial. He claims that he had an alibi for the time of the robbery—namely, that he was working at the time of the robbery as a truck driver for S&H Glazer. However, testimony at the evidentiary hearing established that Attorney Fetterhoff did advise Brewer of his right to testify, and he chose not to do so.

At the evidentiary hearing, Attorney Fetterhoff testified credibly that it was his universal practice, during his more than 40 years as a criminal defense attorney, to discuss whether his clients wanted to or should testify. He stated that he spoke to Brewer about testifying and they agreed that he should not do so. This decision was based, in part, on Attorney Fetterhoff's concern that Brewer's prior attempted armed robbery conviction, as well as other prior convictions, would be admissible if Brewer testified. (Doc. 371, at 45). He also stated his opinion that, in general, this would have been "a very difficult case for Mr. Brewer to testify." (Id., at 44-45). He further testified that he did not recall Brewer ever telling him that he wanted to testify. (Id., at 45). For his part, Brewer acknowledged that in his past criminal cases, he was

aware that he had the right to testify. (Id., at 22). He also testified that he did not inform the district judge at any time that he wanted to testify or that he had an alibi defense he wanted to present. (Id., at 22-23).

Brewer now belatedly asserts that if he were advised of his right to testify, he would have testified that he had an alibi for the day of the robbery. According to Brewer, he was working as a truck driver and would have provided pay stubs as proof that he was working the day of the robbery. (Id., at 28). At the evidentiary hearing, Brewer testified that he informed Attorney Fetterhoff that he was working the day of the robbery, but Fetterhoff never investigated his alibi or called his work to confirm his alibi. (Id., at 26). Attorney Fetterhoff, on the other hand, could not recall Brewer ever mentioning an alibi, although he had mentioned working as a truck driver at S&H Glazer. (Id., at 46). He testified that in the twenty-four letters Brewer sent to him and the nine or ten times they met prior to trial, Brewer never told him he had an alibi or asked him to confirm a specific time that he worked, nor did he mention how his work could confirm his hours. (Id., at 47).

We find Attorney Fetterhoff's testimony credible and conclude that he did not render ineffective assistance on this score. Rather, Attorney Fetterhoff had a discussion with Brewer, during which they agreed it would be in Brewer's best interest not to testify, particularly because of the admissibility of his prior conviction

for attempted armed robbery. Moreover, there is no indication that Brewer ever provided Attorney Fetterhoff with an alibi defense.

Further, even if we found that Attorney Fetterhoff's performance was deficient on this score, Brewer has failed to demonstrate that he was prejudiced. By his own admission, he is unsure whether he would have testified. Rather, he simply indicated that he would have considered it. As for his claim regarding the alibi defense, Brewer fails to acknowledge that there was other substantial evidence against him. This includes, but is not limited to, evidence of the 4252 phone being in the area the time of the robbery, evidence that the phone was not used during the time of the robbery, text messages sent before and after the robbery in which the female friend called him "Jesse," and the testimony of a co-defendant identifying him as the third individual involved in the robbery. Brewer has not proven that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different if he would have testified and presented his alibi defense. Accordingly, neither of the Strickland prongs have been met here and Brewer he is not entitled to relief on these grounds.

3. Interstate Nexus Stipulation

Next, Brewer contends that his counsel was ineffective when he stipulated that the Rolex watches were manufactured in Geneva and that they were therefore "article[s] or commodit[ies] in commerce" within the meaning of 18 U.S.C. § 1951.

On this score, Brewer initially argued that his rights were violated by this action in three ways—first, by violating his Confrontation Clause rights; second, that the stipulation constituted an admission of guilt; and lastly, that it constituted a structural error. Subsequent filings focus solely on the Confrontation Clause argument. However, regardless of which rubric is used to address the interstate nexus stipulation, this claim fails.

At the outset, we note that "an attorney's decision to stipulate to evidence and thereby waive his client's confrontation rights is a legitimate trial tactic and part of a prudent trial strategy as long as the decision does not constitute ineffective assistance of counsel." United States v. Williams, 403 F. App'x 707, 709 (3d Cir. 2010). On this score, nothing in the record suggests that Attorney Fetterhoff had any evidence with which to rebut the contention that the watches were articles or commodities in commerce. Brewer himself conceded in a letter to counsel that Rolex watches are manufactured in Geneva, Switzerland. (Govt. Ex. 8). Thus, the argument that these watches, which were manufactured overseas, were not articles or commodities in commerce, is unavailing. Equally unavailing is Brewer's contention that he did not know about the stipulation until the Assistant U.S. Attorney referenced it in her closing argument. Indeed, Brewer testified at the hearing that he signed the stipulation prior to trial. (Doc. 371, at 15-18).

We are likewise unmoved by Brewer's belated reference to what appears to be an article about a watchmaking school in Lititz, Pennsylvania. (Doc. 352, at 14-15). There is no evidence that the school manufactures watches, nor is there evidence that the watches stolen from White Jewelers came from Lititz, Pennsylvania. Moreover, had counsel not stipulated to the interstate commerce element, the Government would have only been required to show a de minimis effect on commerce to establish this element of a Hobbs Act robbery. See United States v. Walker, 657 F.3d 160, 180 (3d Cir. 2011) ("[W]e have held that in a Hobbs Act prosecution, proof of a de minimis effect on interstate commerce is all that is required") (internal quotations omitted). Given that White Jewelers was roughly 20 miles from the Maryland border and had annual sales of two million dollars, it is clear that the government could have proven this interstate nexus element. See United States v. Powell, 693 F.3d 398, 405 (3d Cir. 2012) (holding that a depletion of a business's assets is sufficient to establish a de minimis effect on commerce for Hobbs Act robbery).

Therefore, even if we were to conclude that counsel's performance was deficient, Brewer cannot establish that the decision to stipulate to the interstate nexus element prejudiced him. Accordingly, this claim does not warrant relief.

4. Rosemond Instruction

Brewer next argues that his counsel was deficient for failing to request a jury instruction in accordance with Rosemond v. United States, 572 U.S. 65 (2014). A Rosemond instruction is given in cases where a defendant is charged with aiding and abetting a crime of violence under 18 U.S.C. § 924(c), and it instructs the jury that the Government must prove that "the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." Id. at 67. This contention, however, is entirely unpersuasive in Brewer's case. Count II of the superseding indictment charged Brewer with carrying and using a firearm in relation to a crime of violence, as well as aiding and abetting. (Doc. 22, Count II). At trial, however, the Government proceeded under a theory of principal liability since the evidence showed that Brewer himself had a gun and shot the store clerk multiple times, and the jury convicted Brewer of the substantive § 924(c) offense.

On this score, given Brewer's role as an active participant and shooter in this armed robbery, Attorney Fetterhoff had no basis to request a Rosemond instruction. Accordingly, we cannot conclude that he was ineffective for failing to request such an instruction. Nor can we conclude that Brewer was prejudiced by the lack of a Rosemond instruction, as we have explained there was sufficient evidence to convict

Brewer of the substantive offense. Therefore, this claim does not entitle Brewer to relief.

5. Appellate Issues[2]

Brewer also argues that the life sentence he received violated the rule set forth by the Supreme Court in Alleyne v. United States, 570 U.S. 99 (2013), and that Attorney Fetterhoff was ineffective in failing to raise this challenge during Brewer's direct appeal. Brewer asserts that he asked Attorney Fetterhoff to raise this issue on direct appeal and that Attorney Fetterhoff declined to do so. Intertwined with this Alleyne argument is Brewer's contention that failing to raise this issue on appeal constituted a conflict of interest by Attorney Fetterhoff.

Brewer was found guilty of the use of a firearm during a crime of violence under 18 U.S.C. § 924(c). Under the statute, a defendant can be subject to either a five, seven, or ten-year mandatory term of imprisonment. If the firearm is discharged, there is a mandatory term of imprisonment of ten years. § 924(c)(1)(A)(iii). In Alleyne, the Supreme Court held that "facts that increase the mandatory minimum sentence are elements" and they therefore "must be submitted to the jury and found beyond a reasonable doubt." Id. at 108. Brewer curiously argues that this rule was somehow violated because he was sentenced above the mandatory minimum for these offenses when he was sentenced to a term of life

[2] Brewer asserted these claims in his initial pro se § 2255 motion (Doc. 303).

imprisonment. However, Brewer makes no argument that the mandatory minimum term of imprisonment was increased; he simply was sentenced above the mandatory minimum 10-year term of imprisonment when the court imposed a life sentence.

Accordingly, because there is no evidence that the mandatory minimum sentence was increased in violation of Alleyne, it cannot be said that the failure of counsel to raise this issue constitutes ineffective assistance of counsel since it is well established that "an attorney does not provide ineffective assistance by failing to raise improper or meritless claims." McCleaf v. Carroll, 416 F.Supp.2d 283, 293 (D. Del. 2006) (citing Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000)). Brewer simply is not entitled to relief on these claims.

In sum, while Brewer contends that his counsel was ineffective for a myriad of reasons, the record is clear that these claims are without merit. Quite the contrary, the record reveals that counsel had a clear defense theory that he adhered to throughout the trial. In doing so, he made legitimate, tactical trial decisions relating to Agent Shute's expert testimony, instructing Brewer of the risks of testifying, and stipulating to an easily established element to prevent additional and unnecessary testimony. While Brewer belatedly asserts that he had an alibi defense to present, nothing in the record indicates that he could have presented a credible, substantiated alibi that would have likely changed the outcome of his trial. Accordingly, we

recommend that the claims in Brewer's current motion to vacate or modify his sentence be denied.

C. Brewer's Motion to Further Supplement His Motion Should Be Denied.

As we have explained, at the evidentiary hearing on Brewer's motion, counsel requested to supplement the motion to vacate to add two new claims that Brewer's trial counsel was ineffective. Brewer asserts that counsel failed to object to Brewer's career offender designation under the Sentencing Guidelines, and that one of his prior convictions that was used to determine his career offender status is no longer a "crime of violence" as defined by the Guidelines in light of subsequent caselaw. See United States v. Nasir, 982 F.3d 144 (3d Cir. 2020). He also asserts that recent authority suggests the offense of conviction, a Hobbs Act robbery, is not a "crime of violence." See United States v. Rodriguez, 770 F. App'x 18 (3d Cir. 2019). He further contends that counsel failed to anticipate these changes in the law which took place years after his conviction and neglected to argue on appeal that Brewer's prior conviction for attempted armed robbery was not a valid predicate offense for a career offender designation. (Doc. 369).

The Government opposes the motion to amend, arguing that the amendment is untimely, and the claims do not relate back to Brewer's original petition. (Doc. 370). For the following reasons, we agree with the Government that the claims

advanced in the motion to supplement are untimely. Accordingly, we recommend that the motion to supplement be denied.

A brief overview of the cases on which Brewer relies is instructive. In Rodriguez, the Third Circuit held that a conviction for Hobbs Act robbery did not qualify as a "crime of violence" under the Sentencing Guidelines. Rodriguez, 770 F. App'x 18, 21 (3d Cir. 2019). The Court of Appeals reasoned that a Hobbs Act robbery could be accomplished by use of force or threat of force against a person or property, not just against a person as the generic definition of robbery, which the Guidelines relies on, requires. Id. Thus, the Court found that a Hobbs Act robbery was not a "crime of violence" under the Career Offender Guideline. Id., at 22. The Third Circuit solidified this holding in United States v. Scott, 14 F.4th 190 (3d Cir. 2021), and remanded that case on direct appeal for resentencing.

In Nasir, the Court of Appeals held that inchoate crimes do not qualify as "controlled substance offenses" for purposes of the Career Offender Guideline. Nasir, 982 F.3d at 160. However, the Court specifically noted that, with respect to the Guidelines' definition of a "crime of violence," that definition "does explicitly include inchoate crimes." Id. at 159 (citing U.S.S.G. §4B1.2(a)). The Court similarly remanded the case on direct appeal for resentencing.

At the outset, we note that these claims are not properly before us in a § 2255 motion to vacate or correct the defendant's sentence. In fact, the Third Circuit has

held that claims concerning an allegedly incorrect career offender designation are not cognizable in a § 2255 motion. See United States v. Folk, 954 F.3d 597, 604 (3d Cir. 2020) (holding that "an incorrect career-offender enhancement under the advisory guidelines is not cognizable under § 2255 because it is not a fundamental defect that inherently results in a complete miscarriage of justice"); see also United States v. Handy, 2021 WL 1812682, at *3 (M.D. Pa. May 6, 2021) (Brann, J.). Accordingly, these claims are not properly before us in a § 2255 motion.

But even if these claims were properly before us for consideration, they are barred by the statute of limitations. Section 2255 provides that a motion to vacate must be filed within a one-year period of limitation, running from the latest of:

> (1) the date on which the judgment of conviction became final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f)(1)-(4). In the instant case, Brewer's judgment of conviction became final on the day that the Supreme Court denied his writ of certiorari, March 25, 2019. Accordingly, his motion to supplement to add these claims concerning his

career offender designation, which was filed on February 4, 2021, is plainly barred by this one-year period of limitations.

Nor would the limitations period in § 2255(f)(3) apply in this case to save Brewer's otherwise untimely claims. The cases on which Brewer relies—Nasir and Rodriguez, and subsequently Scott—were decided by the Third Circuit Court of Appeals, not the Supreme Court. Thus, Brewer's motion does not fall into the narrow category of cases asserting a right recognized by the Supreme Court that has been made retroactive on collateral review. See e.g., United States v. Lipscomb, 2021 WL 3634674, at 3 (W.D. Pa. Aug. 17, 2021). Accordingly, Brewer's motion is time-barred under § 2255.

Because Brewer's motion is time-barred, in order to be considered timely, his claims must relate back to his original motion. Amendments to a § 2255 motion are governed by Rule 15 of the Federal Rules of Civil Procedure. See 28 U.S.C. § 2242. Under Rule 15, an amendment to a pleading "relates back" if it asserts a claim "that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Here, none of Brewer's filings related to his pro se or counseled § 2255 motions asserted a claim regarding his career offender designation. Accordingly, we cannot conclude that his new claims "relate back" to his original motion, and his claims are thus barred by the statute of limitations.

Finally, we note that even if Brewer's claims were not time-barred, his ineffective assistance of counsel claims would fail as a matter of law. In the instant case, at the time Brewer was sentenced in 2016 and took an appeal in 2017, his offense of conviction and his prior convictions all qualified as "crimes of violence" under the Career Offender Guideline.[3] On this score, "the Third Circuit has made clear "that failing to predict a change in the law is not deficient performance." Handy, 2021 WL 1812682, at * 6 (quoting United States v. Doe, 810 F.3d 132, 154 (3d Cir. 2015)). Accordingly, Attorney Fetterhoff could not have rendered ineffective assistance at the time of sentencing or on appeal because, at that time, the law unequivocally considered Brewer a Career Offender. Thus, Attorney Fetterhoff had no basis to challenge the designation of Brewer as a Career Offender under the

[3] With respect to his claim that his prior attempted armed robbery conviction does not qualify as a predicate offense after Nasir, Brewer's reading of Nasir is plainly incorrect. As we have explained, Nasir held that inchoate crimes do not constitute "controlled substance offenses" under the Career Offender Guideline. Nasir, 982 F.3d at 159. However, the Court of Appeals explicitly differentiated the definition of "controlled substance offenses" from the definition of "crime of violence," noting that §4B1.2(a)'s definition of a "crime of violence" "does explicitly include inchoate crimes." Id.; see U.S.S.G.§4B1.2(a) ("The term 'crime of violence' means any offense . . . that – (1) has an element the use, attempted use, or threatened use of physical force against the person of another . . .") (emphasis added). Thus, even if his claim was timely, Nasir does not afford Brewer any relief.

Guidelines.[4] Therefore, these claims, even if timely, do not afford Brewer relief, and his motion to supplement should be denied.

III. Recommendation

Accordingly, for the foregoing reasons, we recommend that the existing claims in the defendant's motion to vacate or modify his sentence pursuant to 28 U.S.C. § 2255 (Doc. 332), be DENIED, and that the defendant's motion to supplement his motion (Doc. 369) be DENIED.

The parties are further placed on notice that pursuant to Local Rule 72.3:

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[4] We note that we are constrained in the relief we may afford Brewer by the procedural posture of the case as it is before us. The recent caselaw we have examined suggests that Mr. Brewer's offense of conviction—a Hobbs Act robbery—is no longer considered a crime of violence under the Career Offender Guideline. See Scott, 14 F.4th 190 (3d Cir. 2021). Thus, it would seem that Brewer may not currently qualify as a career offender under the Guidelines following the Third Circuit's decision in Scott. However, Brewer's claims are before us in a § 2255 motion to vacate his sentence. As we have noted, the Third Circuit has held that claims concerning an allegedly incorrect career offender designation are not cognizable in a § 2255 motion. See Folk, 954 F.3d at 604 (holding that "an incorrect career-offender enhancement under the advisory guidelines is not cognizable under § 2255 because it is not a fundamental defect that inherently results in a complete miscarriage of justice"); see also Handy, 2021 WL 1812682, at *3. Therefore, this belated claim simply does not provide substantive grounds for relief for Brewer.

While we recognize that the application of the law to Brewer's conduct means that the sentence of life imprisonment imposed upon him will remain in effect, contrary to Brewer's suggestion, that outcome is not the result of incompetent counsel, or an unfair application of statutory gatekeeping rules like the limitations period prescribed by 28 U.S.C. § 2255(f)(1)-(4). Instead, Brewer's current legal dilemma is a function of the decision that he made in 2012 to nearly take the life of an innocent victim in the course of a brutal armed robbery.

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 12th day of November 2021.

S/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge