UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6079

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROGER KEITH LUNSFORD,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. N. Carlton Tilley, Jr., Senior District Judge. (1:14-cr-00190-NCT-1; 1:17-cv-00124-NCT-JLW)

Submitted: July 21, 2022 Decided: July 26, 2022

Before MOTZ, HARRIS, and RUSHING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Roger Keith Lunsford, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Roger Keith Lunsford seeks to appeal the district court's order denying his Fed. R. Civ. P. 60(b) motion for relief from the district court's prior order denying relief on his 28 U.S.C. § 2255 motion; his Fed. R. Civ. P. 52(b) motion to amend; and his motion to preserve evidence. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). *See generally United States v. McRae*, 793 F.3d 392, 400 & n.7 (4th Cir. 2015). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Lunsford has not made the requisite showing. Accordingly, although we grant Lunsford's motion to file an appendix, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: November 21, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6079
(1:14-cr-00190-NCT-1)
(1:17-cv-00124-NCT-JLW)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROGER KEITH LUNSFORD

Defendant - Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Harris, Judge Rushing, and Senior Judge Motz.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ROGER KEITH LUNSFORD,	)	
	)	
Petitioner,	)	
	)	1:17CV124
v.	)	1:14CR190-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

On April 14, 2020, the Court entered an order and judgment denying Petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. [Docs. #106-107.] Petitioner's subsequent appeal was dismissed. United States v. Lunsford, No. 20-6596, 2021 WL 2375922 (4th Cir. June 10, 2021) ("[W]e deny a certificate of appealability, deny Lunsford's motion to remand, and dismiss the appeal."), rehearing denied, Order (4th Cir. Aug. 23. 2021). Petitioner now has three pending motions before the Court, discussed below, which have no merit and which are therefore denied. [Docs. #108, 112, 113.]

A. Motion to Alter or Amend

First, referencing Federal Rule of Civil Procedure 59(e), Petitioner has filed a motion to alter or amend the judgment. [Doc. #112.] As explained below, regardless of whether this motion is considered a request for relief under Rule 59(e) (to the extent potentially applicable) or Rule 60(b), it is without merit and should therefore be denied.

i. Rule 59(e)

With regard to motions to alter or amend a judgment, the United States Court of Appeals for the Fourth Circuit has stated:

> A district court has the discretion to grant a Rule 59(e) motion only in very narrow circumstances: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or to prevent manifest injustice."

Hill v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002) (quoting Collison v. Int'l Chem. Workers Union, 34 F.3d 233, 236 (4th Cir. 1994)). Furthermore, "Rule 59(e) motions may not be used to make arguments that could have been made before the judgment was entered." Id. The circumstances under which a Rule 59(e) motion may be granted are so limited that "[c]ommentators observe 'because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied.'" Woodrum v. Thomas Mem'l Hosp. Found., Inc., 186 F.R.D. 350, 351 (S.D.W. Va. 1999) (quoting 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2810.1 (2d ed. 1995)). A Rule 59(e) motion must be filed within 28 days of the entry of judgment. Fed. R. Civ. P. 59(e).

Here, Petitioner's motion is untimely under Rule 59(e). Judgment on his § 2255 motion was entered on April 14, 2020. [Doc. #107.] Petitioner did not execute his Rule 59(e) motion [Doc. #112] until May 13, 2020 (id. at 57), and did not put it in the prison mailing system until May 14, 2020 (id., Attached

Envelope). Consequently, it was filed at least one day beyond the 28 days provided by Rule 59(e). Petitioner's motion fails under Rule 59(e) for this reason alone.

Additionally, even if the motion were timely, it would still be denied. Petitioner has not shown the existence of the limited circumstances under which a Rule 59(e) motion may be granted in any of the pleadings he has filed related to this issue. That is, Petitioner's pleadings do not present evidence that was unavailable when the Court denied his § 2255 motion, nor do they address an intervening change in the applicable law, nor has he shown that there was clear error of law, or that granting the motion would prevent manifest injustice. Indeed, Petitioner has failed to demonstrate any meaningful reason for the Court to alter its prior conclusions even under a de novo standard of review.[1]

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[1] Any efforts by Petitioner to amend his § 2255 motion post-judgment [Doc. #112 at 47-52] are futile and will be denied as such under Rule 15 of the Federal Rules of Civil Procedure. United States v. Shabazz, 509 F. App'x 265, 266 (4th Cir. 2013) (concluding that post-judgment motion to amend § 2255 motion should be evaluated according to Rule 15, including whether permitting the proposed amendment would be futile). In his Rule 59(e) motion, Petitioner contends that trial and appellate counsel were ineffective for failing to pursue a "Speedy Trial / Pre-Indictment" delay claim relating to the time Petitioner spent in state custody prior to being indicted in federal court. [Doc #112 at 47-52.] Assuming this is a proposed amendment (it is not entirely clear), it would be futile to permit it to proceed further. For the same reasons the Court gave in denying the pre-indictment delay claim in the original § 2255 motion, counsel had no reason to raise the issue Petitioner now seeks to raise and, in any event, counsel's failure to raise this issue did not prejudice Petitioner. [Doc #98 at 11-14.] See also United States v. Burson, No. 2:12-CR-00026-MR-DLH, 2013 WL 1798103, at *2 (W.D.N.C. Apr. 29, 2013) ("The Defendant relies solely on the delay caused by the action (or rather, inaction) of state authorities in prosecuting him on the state charges. Any delay caused by the state authorities, however, is not attributable to the charges brought by the federal government.") (collecting cases).

ii. Rule 60(b)

Additionally, Petitioner's motion also fails to satisfy the standard set forth in Federal Rule of Civil Procedure 60(b). "Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." Gonzalez v. Crosby, 545 U.S. 524, 528 (2005). "[I]n order to obtain relief from a judgment under Rule 60(b), a moving party must show that . . . he has a meritorious [claim or] defense . . . . If the moving party makes such a showing, he must then satisfy one or more of the six grounds for relief set forth in Rule 60(b) in order to obtain relief from the judgment." Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 896 (4th Cir. 1987). Here, Petitioner does not satisfy the threshold requirement of presenting a facially meritorious attack on the order and judgment denying his § 2255 motion. His motion is denied.

b. Motion to Amend or Supplement Findings and Conclusions

Second, Petitioner has also filed a motion referencing Rule 52(b) of the Federal Rules of Civil Procedure and moving "this court to amend and supplement its findings of fact and conclusions of law [and judgment] filed on April 14, 2020[.]" [Doc. #113] (first brackets in original.) Rule 52(b) provides that "[o]n a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly." Fed. R. Civ. P. 52(b). Here, Petitioner's motion was also

filed one day beyond the 28-day limitation period and fails for this reason alone. And, even if it was timely, Petitioner has failed to provide good cause or any meaningful reason, meritorious grounds, or persuasive argument as to why the Court should amend any of its findings of fact or conclusions of law. This motion will also be denied.

c. Motion to Preserve Evidence

Last, Petitioner has filed a motion requesting the entry of an order ordering the Government to preserve evidence—a videotape of a bank robbery—that was introduced at his criminal trial. [Doc. #108 at 1.] Petitioner contends that the videotape "will either exonerate petitioner of being guilty of 924(c) violation, or provide exculpatory evidence the gun/toy cannot be determined." (Id.) He contends further that "[f]orensic analysis of videotape will provide (as alleged by Petitioner) evidence he was provided ineffective assistance of counsel, resolving pending dispute." (Id. at 2.) Petitioner also asserts that he has a pending request with the Department of Justice requesting a copy of the videotape and that he anticipates that it will be submitted along with a § 1983 action. (Id.)

This motion will also be denied. First, it is moot. There is no pending § 2255 motion. Petitioner filed his motion to preserve evidence after the Court denied his § 2255 motion. Nor, as explained above, has Petitioner provided any meaningful reason to alter or amend the judgment, or to alter, amend, or supplement the Court's findings of fact or conclusions of law. Second, Petitioner has failed to allege or show that the videotape in question is in jeopardy of

destruction; therefore, he has not shown good cause or any meaningful reason for the order he seeks. Third, Petitioner is also currently seeking other means to secure the videotape in question which apparently remain pending. For the reasons set forth above, all of Petitioner's motions are without merit and will therefore be denied.

IT IS THEREFORE ORDERED that Petitioner's motion to preserve evidence [Doc. #108], motion to alter or amend the judgment [Doc. #112], and motion to amend or supplement findings and conclusions [Doc. #113] all are **DENIED.**

This the 20th day of December, 2021.

/s/ N. Carlton Tilley, Jr.
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ROGER KEITH LUNSFORD,	)	
	)	
Petitioner,	)	
	)	1:17CV124
v.	)	1:14CR190-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

On October 10, 2019, the Order and Recommendation of the United States Magistrate Judge was filed and notice was served in accordance with 28 U.S.C. § 636(b). [Docs. #98, #99.] Petitioner objected to the Recommendation.

The court has appropriately reviewed the portions of the Magistrate Judge's report to which objection was made and has made a de novo determination which is in accord with the Magistrate Judge's report. The court therefore adopts the Magistrate Judge's recommendation.

IT IS THEREFORE ORDERED that Petitioner's motions for summary judgment [Docs. #72, #75], amended motion to vacate, set aside or correct sentence [Docs. #60, #79, #81], motion for Rule 11 Sanctions [Doc. #92], and motion to take judicial notice [Doc. #95] all are DENIED and that this action is DISMISSED.

Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is not issued.

This the 14th day of April, 2020.

/s/ N. Carlton Tilley, Jr.
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ROGER KEITH LUNSFORD,	)	
	)	
Petitioner,	)	
	)	**1:17CV124**
v.	)	**1:14CR190-1**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Roger Keith Lunsford has brought a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (Docket Entry 60.) In 2014, Petitioner was indicted on two counts of armed bank robbery in violation of 18 U.S.C. § 2113(d), one count of discharging a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii), and one count of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (Docket Entry 1.) After a jury trial, Petitioner was found guilty of all four counts. (Docket Entry 29; Minute Entry 8/15/2014.) He was subsequently sentenced to imprisonment for a total term of 454 months (37 years and ten months), a special assessment of $400, restitution in the amount of $9,859.15, and a supervised release term of five years. (Docket Entry 40; Minute Entry 11/20/2014.)[1]

[1] Petitioner was also sentenced to 36 months of imprisonment on his supervised release violation in Case No. 4:97CR98-1 and Case No. 4:97CR99-1 to run concurrently with each other and consecutive to the term imposed in the instant matter. (*See* Case No. 4:97CR98-1, Docket Entry 35; Case No. 4:97CR99-1, Docket Entry 34.)

After an unsuccessful appeal, Petitioner brought the initial motion under § 2255. *See United States v. Lunsford*, 629 F. App'x 518, 519-520 (4th Cir. 2015) ("We have reviewed the record with the requisite standards and conclude that there is a litany of strong circumstantial evidence linking Lunsford to both robberies. The evidence was sufficient to support the convictions."). The Government filed a response. (Docket Entry 69.) Petitioner, in turn, filed two motions for summary judgment (Docket Entries 72, 75), two motions to stay (Docket Entries 76, 78), a motion to expand the record (Docket Entry 77), two motions to amend under § 2255 (Docket Entries 79, 81), a motion for discovery (Docket Entry 83), a motion entitled "Motion to Withdraw or Correct Contention Under Rule 11 of Fed. R. Civ. P." (Docket Entry 86), a motion for a hearing pursuant to 21 U.S.C. § 853(a) (Docket Entry 90), a motion for Rule 11 Sanctions (Docket Entry 92), and a motion to take judicial notice (Docket Entry 95). This case is now ripe for a ruling.[2] *See* Rule 8, Rules Governing § 2255 Proceedings.

Background Facts

The evidence of record supports the following. Petitioner is a white male, born in December of 1966, who is 6'1" tall and who was self-employed as a brick mason in April of 2013. (Docket Entry 34 at 3, 18 and ¶¶ 80, 82.) For the month of March 2013, his total monthly cash inflow equaled his total monthly cash outflow. (Docket Entry 60, Attach 1 at 25, 30 referencing Gov. Ex. 2; Docket Entry 55 at 6, 15; Docket Entry 56 at 8.) He also owned a black, 1997 Mercedes-Benz C-Class automobile. (*Id.*) Petitioner resided in Shelby, North Carolina. (*Id.*) The financial records from his credit union, the North Carolina State

[2] Petitioner also filed a number of briefs in support of these motions. The Court has reviewed all of Petitioner's many pleadings and exhibits in this matter.

Employee's Credit Union, show that in February, March and April Petitioner had approximately $25 in his banking account. (Docket Entry 47 at 240.)

On April 16, 2013, at approximately noon a white man, wearing a black ski mask, dark-colored sweat shirt, gloves, blue jeans and an orange or yellow "traffic" vest entered the State Employees' Credit Union located at 1025 S. Peace Haven Road, Clemmons, North Carolina. (Docket Entry 46 at 5-10, 17, 21, 27, 30, 37-40.) He approached the teller counter, carrying a bag in his left hand and a small silver handgun in his right hand. (*Id.* at 10, 21-23, 28, 31, 37.) This man jumped the teller counter and proceeded to pull money from one of the teller drawers. (*Id.* at 10, 21-24, 27, 30.) He stated, "I don't want your money, lady, I want the government's money." (*Id.* at 22, 28.) While putting the money in the bag, the individual fired one round into the teller counter. (*Id.* at 10, 18, 22, 28, 31, 37, 41.) This startled the man and he made the comment, "Shit happens." (*Id.* at 10, 22, 28.)

The man then pulled money from additional teller drawers and placed the money in a trash bag, inside of a trash can. (*Id.* at 10, 23, 27, 42-43.) He next jumped back over the teller counter and exited the bank through the front door. (*Id.* at 10, 18, 22-24, 27-28, 37-38, 42-43.) The individual stated, "I'm getting too old for this shit" as he was exiting the bank and he also smelled of alcohol and appeared intoxicated. (*Id.* at 10, 17, 23-24, 28, 38.) Several witnesses described the robber as a white male with an older and rougher voice, near or approximately six feet tall. (*Id.* at 11, 18-19, 23, 30.) Witnesses said he did not sound young and seemed around forty years old. (*Id.* at 11, 18, 38.)

A law enforcement canine unit was called to the scene and began tracking the suspect's direction of travel. (Docket Entry 47 at 97.) During the search, officers located a trail of dye,

normally associated with dye packs hidden in bait money used by banks as a security measure. (Docket Entry 46 at 13, 38, 42-43, 61-66; Docket Entry 47 at 97.) Officers also located dye-stained United States currency in the parking lot of a Wake Forest University Baptist Medical Center healthcare facility, which the dog tracked from the bank and then through an apartment complex. (Docket Entry 46 at 62-63, 65.) Upon a further search of the area, officers found two pistol grips stained with red dye on the sidewalk leading away from the bank. (*Id.* at 67, 71.) Detectives on the scene examined the pistol grips and identified them as possibly belonging to a Derringer type pistol.[3] (*Id.*)

Officers also obtained video surveillance footage from the abovementioned medical facility moments after the bank robbery. (*Id.* at 55-56.) The video shows a black Mercedes-Benz sedan parked near a tree line. (*Id.* at 55-56, 77-78; Docket Entry 47 at 91.) The suspect parked the vehicle and sat in the vehicle for several minutes before exiting the vehicle wearing a yellow "traffic" vest. (Docket Entry 47 at 90-91.) The suspect later returned to the vehicle and dumped what was later determined to be $6,843 in United States currency, stained with red dye, on the ground. (Docket Entry 46 at 42-43, 61-62, 70, 76; Docket Entry 47 at 88, 98.) The suspect was seen driving the vehicle away from the area. (Docket Entry 46 at 58, 76.)

On April 23, 2013, Petitioner received a loan using his black 1997 Mercedes-Benz automobile as collateral. (Docket Entry 47 at 123-24.) The loan charged an interest rate in excess of 300 percent. (*Id.* at 131). A pre-loan inspection of the vehicle was performed prior to issuance of the loan, and there was no exterior damage on the vehicle. (*Id.* at 130-131.)

[3] Later, the pistol grips found at the scene were compared to a known DNA sample of Petitioner's DNA and he was excluded as the contributor of that DNA. (Docket Entry 47 at 146-147.)

On April 29, 2013, at approximately noon, a white man entered the State Employees' Credit Union located at 538 Lake Concord Road, Concord, North Carolina, wearing a black ski mask, black gloves, dark clothes, blue jeans, and work boots. (*Id.* at 109, 151-152, 161, 163-64, 169, 180-181, 185, 192.) The individual was carrying a black bag in one hand and a semi-automatic pistol in the other. (*Id.* at 151, 157, 164, 166, 169, 171, 176-77, 181-182.) He jumped over the teller counter and ordered the tellers to unlock their money drawers, as he approached each teller station. (*Id.* at 164, 174-175, 181, 184.) According to witnesses, the individual asked where the "large" or "big" bills were located and said that he did not want any dye packs. (*Id.* at 156, 164-165, 175, 181, 185.) After asking repeatedly about the location of the dye packs and finding them, the man discarded the dye packs and put the money in the black bag he was carrying. (*Id.* at 164-165, 175.) He then jumped back over the teller counter and exited the bank. (*Id.* at 165-66.) As he was leaving, the robber stated that he was "getting too old for this . . . S-H-I-T." (*Id.* at 165-166.) Witnesses also described the suspect as likely intoxicated. (*Id.* at 176, 181-182.) The robber was described as being approximately six feet tall. (*Id.* at 164, 166, 182.) The robber was described as in his early forties. (*Id.* at 166, 181.)

Witnesses at a nearby business informed officers that they observed the suspect exiting a dark-colored four door car prior to the robbery and heading towards the bank. (*Id.* at 188-195.) Following the robbery, the robber was seen running back to the vehicle and driving away in the same vehicle. (*Id.* at 188-195.) Law enforcement responded to the silent alarm triggered during the robbery and observed a black four-door Mercedes-Benz pulling out of Lee-Ann Drive on to Branchview Drive, Concord, North Carolina. (*Id.* at 195-199, 206.) As officers attempted to make contact with the suspect, he fled the area at a high rate of speed.

(*Id.* at 200, 206.) Officers attempted to initiate a vehicle pursuit; however, the suspect was able to evade apprehension. (*Id.* at 199-200.) A witness later flagged down police officers and stated that the suspect vehicle hit the back of another vehicle and sped away at a high rate of speed. (*Id.* at 200-203.) The right rear area of the suspect vehicle, a Mercedes-Benz, sustained damage, and pieces of that vehicle's right rear tail light were left at the scene of the accident. (*Id.* at 203, 206.) Those fragments were collected and later identified as belonging to a Mercedes-Benz C-class automobile. (*Id.* at 200-203 206, 211, 111-112.)

Another witness, Latonya Hulcey, testified that she had met Petitioner at a local bar, and they began dating and that he drove a four door Mercedes. (*Id.* at 214-215.) She stated that she stayed at Petitioner's home the night before the Concord State Employees' Credit Union robbery. (*Id.* at 215-216.) Hulcey advised that Petitioner left the home around 9:00 a.m., stating that he had a "job" to finish and that he had returned "around lunchtime." (*Id.* at 215-216.) She stated that she did not notice the damage to the vehicle's back immediately, but noticed it "shortly after." (*Id.* at 216) Hulcey indicated that when he returned Petitioner was upset because his vehicle was damaged. (*Id.* at 215.) She believed he had been drinking. (*Id.*)

On the afternoon of April 29, 2013, Petitioner and Hulcey travelled to Southern Imports in Glover, South Carolina, seeking to obtain a right rear taillight, bumper, and quarter panel for Petitioner's damaged Mercedes-Benz automobile. (*Id.* at 218, 247-249, 252.) Petitioner told the clerk that his daughter had wrecked the car. (*Id.* at 248.) Petitioner was adamant that the repair parts be delivered the same day. (*Id.*) He purchased the parts for $600 using hundred-dollar bills. (*Id.* at 252-53.) Petitioner and Hulcey coordinated with an individual for repairs to the Mercedes and later left the car in his custody along with

Petitioner's business card. (*Id.* at 257.) The repair person hired by Petitioner noted that the Mercedes-Benz was damaged on the rear area and that the damage was "new" or within a couple of days. (Docket Entry 48 at 280-81.) The automobile was later located by law enforcement and had damage to the right rear area. (Docket Entry 47 at 113-114.) During a subsequent search, officers noted a lime green traffic vest in the trunk of the Mercedes-Benz, though it was determined not to be the vest used in the Clemmons robbery. (*Id.* at 114.)

On April 30, 2013, Petitioner made a $500 cash deposit into his State Employee's Credit Union account at the Belmont, North Carolina branch. (*Id.* at 219, 241, 243.) The total deposit was for $1,280, and $780 of the deposit was in the form of a treasury check made out to Hulcey. (*Id.*) The cash that Petitioner gave Hulcey for the check was the same cash later seized by police officers. (*Id.* at 219, 223.)

On May 2, 2013, Petitioner and Hulcey were located at a Knights Inn Hotel in Gastonia, North Carolina, and Petitioner was taken into custody. (*Id.* at 220-223.) Petitioner and Hulcey had previously been in Myrtle Beach, South Carolina. (*Id.* at 219-220.) The hotel room in question was rented in the name of Carolyn Lunsford, Petitioner's mother. (Docket Entry 46 at 47, 50-51.) During Petitioner's arrest, officers seized several items from the hotel room, including a bag containing $3,351.85 in United States currency and a wallet. (Docket Entry 47 at 118, 267-69, 276.) The wallet was stained with a red substance, which was determined not to be bank dye. (*Id.* at 118; Docket Entry 48 at 318.) Officers also recovered papers with writing on them that included information regarding Southern Imports, where Petitioner had bought the replacement parts for his damaged Mercedes, and the address of the person he contacted to make repairs to his damaged automobile. (Docket Entry 48 at 327-

328.) Officers also seized $795 from Hulcey, which included a $20 bill that matched the serial number of a bait bill taken during the second robbery. (Docket Entry 47 at 236-237, 270.)

A few weeks after Petitioner's apprehension, FBI Agents in Charlotte received a call from the First National Bank in Shelby, North Carolina advising that personnel had received a cash deposit that morning and several of the bills were stained red. (Docket Entry 48 at 296, 298.) An agent responded to the bank where personnel turned over the stained money. (*Id.* at 298.) An agent compared the serial numbers of the red stained bills to the bait bill list from the April 19, 2013 Clemmons robbery and several of the bills matched the bait list from the Clemmons robbery. (*Id.* at 298-299.) Owners of a car wash business had deposited the money after retrieving it from the business' coin machines. (*Id.* at 28-89.) The owner thought that the dye stained money had come from their location on Ozark Avenue in Gastonia, North Carolina. (*Id.* at 290.) The location of this car wash business was close to the Knights Inn where Petitioner was apprehended. (*Id.* at 284, 299-300.)

Petitioner's residence was searched with no direct evidence from the robbery being located. (*Id.* at 310-312.) Officers did note and photograph several pairs of gloves. (*Id.* at 306, 311.) Petitioner was also found to have a watch that had similar shape and coloring to the watch the robber wore, but no definitive determination ruling out or matching the watch could be made. (*Id.* at 332-34.)

A witness with a field of expertise in the area of Mercedes-Benz parts and parts supplies examined the broken taillight pieces collected from the roadway of the April 29, 2013 Concord robbery. (*Id.* at 344-46.) The witness opined that the taillight pieces were left by a 1994 to 2000 Mercedes-Benz C-Class automobile. (*Id.* at 345-46, 350.) The financial records from

Petitioner's credit union, the North Carolina State Employee's Credit Union, show that in February, March, and April of 2013 Petitioner had approximately $25 in his banking account. (Docket Entry 47 at 240.)

Petitioner called as witnesses his sister, daughter and two employees. (Docket Entry 48 at 352-380.) These witnesses attempted to establish an alibi for Petitioner and also provided evidence of his work history. (*Id.*) Petitioner called his daughter who testified he was driving a truck on April 16, 2013, that she was with him on April 16, 2013 and April 29, 2013, and that approximately 15 different people drove Petitioner's Mercedes. (*Id.* at 363-67.) Petitioner's sister testified that she did not see him on April 16, 2013, but because he did work on her home in Charlotte starting April 15, 2013, and completed it by 4:00 p.m. on April 16, 2013, she concluded that he must have been there. (*Id.* at 358-59.) Petitioner's two employees also attempted to provide an alibi, but on cross-examination admitted they had told police that they did not remember the dates or times of the events in question. (*Id.* at 371-73, 375-79.)

Petitioner was arrested on May 2, 2013, and charged with Felony Robbery with a Dangerous Weapon (13CRS51935), in Cabarrus County Superior Court, Concord. (Docket Entry 34, ¶ 11.) The charge was dismissed on June 12, 2014, as Petitioner was federally indicted. (*Id.*) On May 10, 2013, Petitioner was charged with Felony Possession of a Firearm by a Felon and Felony Robbery with a Dangerous Weapon (13CR 54432), in Forsyth County District Court, Winston-Salem. (*Id.*) The charges were voluntarily dismissed on June 18, 2014, as Petitioner was federally indicted. (*Id.*) An audit of the State Employees' Credit Union, Winston-Salem, revealed a loss of $9,640 and an audit of the State Employees' Credit Union, Concord, revealed a loss of $10,434. (*Id.* at ¶ 12.)

Discussion

Petitioner's initial motion under § 2255 raises six grounds for relief. First, Petitioner asserts that he was subject to unreasonable delay and was not provided assistance of counsel for the thirteen-and-a-half months in which he was awaiting trial in jail on his state charges. (Docket Entry 60, Ground One.) Second, Petitioner contends that the Government engaged in prosecutorial misconduct by using false testimony during trial, misrepresenting facts, and failing to disclose evidence. (*Id.*, Ground Two.) Third, Petitioner asserts that he was prejudiced by the Government when it made an improper "flight" argument. (*Id.*, Ground Three.) Fourth, Petitioner claims that his rights were violated because the Government impermissibly used "compelled documents" to incriminate him. (*Id.*, Ground Four.) Fifth, Petitioner claims that he received ineffective assistance of counsel because his attorney "failed to request [Rule] 14 severance of the charges for trial." (*Id.*, Ground Five.) Finally, Petitioner contends that counsel was ineffective because he failed to proffer any defense for Count Four of the indictment, the second firearm enhancement. (*Id.*, Ground Six.) As explained below, Petitioner's arguments lack merit.[4]

Prosecutorial Misconduct (Grounds One, Two, and Three)

Petitioner's first three grounds for relief essentially allege prosecutorial misconduct. To prove prosecutorial misconduct, "a defendant bears the burden of showing (1) that the prosecutors engaged in improper conduct, and (2) that such conduct prejudiced the

[4] Petitioner's pleadings are voluminous. The pleadings, at times, are also difficult to follow. The undersigned has attempted to respond to all of the many variations of Petitioner's grounds and sub-grounds for relief. To the extent that any have not been specifically discussed, they should still be denied for essentially the reasons set out herein.

defendant's substantial rights so as to deny the defendant a fair trial." *United States v. Alerre*, 430 F.3d 681, 689 (4th Cir. 2005). None of these claims have merit.

Ground One

Petitioner first asserts that "the State[']s failure to provide [him] assistance of counsel, coupled to the [G]overnment's unreasonable delay, violate[ed his] 5th Amendment and 14th Amendments right to due process, and 6th Amendment right to counsel [thereby] denying him a fair trial[.]" (Docket Entry 60 at 17.)[5] More specifically, Petitioner asserts that he was arrested and held in custody for more than thirteen-and-one-half months by state law enforcement for crimes related to the two bank robberies, one in Forsyth County (the Clemmons robbery) and one in Cabarrus County (the Concord robbery). (*Id.* at 21-35.) During that time, Petitioner asserts further, he was appointed counsel (who did nothing useful and later abandoned him) for the state charges related to the Cabarrus County armed robbery, but was not appointed counsel for the state charges related to the Forsyth County armed robbery. (*Id.* at 31.) From this, Petitioner concludes that he lacked counsel entirely for this period that exceeded one year. (*Id.*)

During the course of this purported violation of his Sixth Amendment right to counsel, Petitioner continues, critical evidence that would have likely exonerated him was lost because a videotape of him purchasing construction supplies at Lowe's Hardware would have corroborated his alibi that he could not have robbed a bank in Clemmons. (*Id.* at 26.) This is because on the day and time of that armed bank robbery, he was instead purportedly working

[5] Pinpoint citations to Petitioner's pleadings are to the CM/ECF footer page number or the PDF page number where no footer is present.

on home improvements at his sister's home in Charlotte. (*Id.*) Petitioner further asserts that while he was working on his sister's home, rather than engaging in armed robbery, he "spied two doors down" a service van advertising "Bobs _____ services and phone number." (*Id.* at 27.) This evidence, Petitioner continues, would have further strengthened his alibi. (*Id.*) Petitioner asserts that all this evidence was irretrievably lost—the Lowe's videotape having been deleted and the memory of the serviceman having long since dimmed—during the period he was deprived of counsel. (*Id.* at 26-27.) Petitioner faults the state courts' failure to appoint him effective counsel for this loss of evidence. (*Id.*)

Petitioner's state charges were later dropped and he was arrested and indicted in this Court for the armed bank robberies. (*Id.* at 22.) Petitioner was appointed counsel by this Court soon after his federal indictment (*see* Docket Entries 1 and 4), but he contends that in light of the state court actions described above he was deprived of counsel for thirteen-and one-half months. (*Id.* at 21-35.) He also contends he suffered the "severe prejudice" described above (*i.e.*, lost evidence) as a result of the Government's "unreasonable pre-indictment delay" and that the state was "likely influenced by" its "communications with the Federal authorities, if not outright controlled by them." (*Id.* at 32, 35.)

These arguments are unpersuasive. First, a motion brought pursuant to § 2255 is generally not the proper forum to seek relief for violations of federal law or constitutional rights committed by the state courts. Second, it does not appear that Petitioner was ever convicted of any state court charges related to the armed bank robberies. Therefore, any constitutional violations he purportedly suffered in state court did not prejudice him. Third, the record clearly demonstrates that Petitioner had counsel at all material points in this federal

criminal proceeding. He was not without counsel in his criminal proceeding in this Court. (Docket Entries 1, 4, 37, 42, 53; Minute Entries 6/27/2014, 8/12-15/2014, 11/20/2014.)

Fourth, Petitioner's assertions that state court errors somehow prejudiced his federal proceedings also warrant no relief. Petitioner asserts the existence, and later the destruction, of a videotape which exonerates him. Yet Petitioner does not assert he has ever seen this tape or been notified of its existence. Instead, Petitioner presumes that the hardware store he purportedly visited routinely makes such recordings, that one of these recordings would have corroborated his alibi, and that an attorney who acted in an objectively reasonably manner would have been able to retrieve this recording before it was erased, and use it at trial to demonstrate his innocence. The stacking of these vague, conclusory, and unsupported assumptions warrants no relief. *See Nickerson v. Lee*, 971 F.2d 1125, 1136 (4th Cir.1992*), abrog'n on other grounds recog'd, Yeatts v. Angelone*, 166 F.3d 255 (4th Cir.1999). Petitioner further asserts the existence of a serviceman working two doors from his sister's house on the day of the armed bank robbery who could have ostensibly corroborated his alibi. Again, this is so vague, conclusory, and unsupported as to warrant no relief. *See Nickerson*, 971 F.2d at 1136. Petitioner has failed to identify this purported individual or to present any meaningful non-conclusory evidence of his existence. *Id.*

Fifth, Petitioner's assertion of undue delay on the part of the Government also fails. Petitioner was indicted a little over a year after he committed the two armed robberies for which he was ultimately convicted. The statute of limitations on this crime is five years, 18 U.S.C. § 3282, and Petitioner has not shown any meaningful likelihood that any preindictment delay violated his right to due process or any other constitutional right. *See United States v.*

Wager, 45 F. App'x 216, 218 (4th Cir. 2002) (denying relief under similar circumstances). Nor has Petitioner demonstrated any meaningful likelihood that the Government somehow used delay to gain a "tactical advantage." *See United States v. Marion*, 404 U.S. 307, 324 (1971) (noting that dismissal of indictment is only proper where a "pre-indictment delay . . . caused substantial prejudice to [a defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused"). Finally, any allegation of conspiracy between state and federal authorities to deprive Petitioner of his constitutional rights fails for being vague, conclusory and unsupported. *See Nickerson*, 971 F.2d at 1136. Ground One should be denied.

Ground Two

Petitioner next contends that the Government failed to disclose exculpatory evidence to the defense and to the jury and that the Government used false testimony, false evidence, and misrepresented facts and testimony throughout the trial. (Docket Entry 60 at 36.) In light of this, Petitioner reasons, he was deprived of his right to due process and to a fair trial. (*Id.* at 36-48.) As explained below, none of these arguments have merit.

Specifically, Petitioner claims that some of the photographs taken by police during the search of his home were not provided in discovery. (Docket Entry 60 at 40.) In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and its progeny, the failure by the prosecution to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) (citation omitted); *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972). As such, a *Brady* violation occurs if evidence is (1) favorable to the accused (either exculpatory or impeaching), (2) suppressed by the prosecution (willfully

or inadvertently), and (3) material (prejudicial). *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *see also Monroe v. Angelone*, 323 F.3d 286, 299-300 (4th Cir. 2003) (citation omitted).

Petitioner has failed to meet any of these elements. The Government has an open-file policy. As a result, all of the contents of the Government's file, including these photographs, were available to defense counsel. Defense counsel filed a motion to compel discovery. (Docket Entry 11.) Shortly thereafter, defense counsel withdrew the motion and stated that, "the Government has given defendant's counsel the opportunity to review the documents requested." (Docket Entry 14.) There was no suppression or failure to disclose any evidence. Further, Petitioner has failed to demonstrate that the photographs in question were somehow material or favorable to him in some meaningful degree. *See Nickerson*, 971 F.2d at 1136. This sub-claim is without merit.

Petitioner also asserts that his convictions were obtained by the use of false testimony of witnesses, which the prosecution knew, or had grounds to know was false. For example, Petitioner asserts that two witnesses falsely testified that during one bank robbery the robber was wearing gloves that were black with grips, but surveillance video and police reports clearly indicate that the suspect was wearing orange gloves. (Docket Entry 60 at 36-37.) He further faults the Government for introducing into evidence pictures of black gloves with rubber ball grips and two pairs of jeans. (*Id.* at 38.) Petitioner faults the Government for allegedly creating the false impression that these items were found in his bedroom and used in the robbery. (*Id.* at 39-40.) Petitioner asserts further that the Government referred at trial to "a blurry object at the edge of [a] photo" and claimed it was a black bag, rather than what it purportedly really was, his grandson's Halloween costume. (*Id.* at 39.)

The Court concludes that none of these arguments have merit. Petitioner has failed to demonstrate any likelihood that the prosecutors engaged in improper conduct. Petitioner has likewise failed to demonstrate that the purported conduct prejudiced his substantial rights so as to deny him a fair trial.

Petitioner also asserts a detective gave false testimony when she stated, "a 1) 'bag' was found in Lunsford's motel room, or 2) 'money' was found in Lunsford's motel room." (*Id.* at 37.) In support, Petitioner asserts "it was apparent that the government was leading the witness, and that she was uncomfortable." *Id.* However, Petitioner also asserts that an officer who "seized approximately $2,800.85 in cash from the front right pocket of [his] jeans, and approximately $500 in cash from his wallet located in the right back pocket of his jeans," was not present for trial or listed as a witness. *Id.* Here, Petitioner's attempt to show prejudice concerning the witness who allegedly gave false testimony because she was "uncomfortable" testifying about where the cash was found is directly undercut by his admission that an officer removed a similarly large amount of cash from his person. Again, Petitioner has failed to demonstrate the prosecutors engaged in improper conduct and has failed to demonstrate that the purported conduct prejudiced his substantial rights so as to deny him a fair trial.

Petitioner next makes a number of arguments related to his financial condition in early 2013. For example, Petitioner points out that a witness testified at trial that on April 23, 2013 he took out a loan for $1115 in the form of a check (rather than cash) on his Mercedes. (*Id.* at 28 referencing Docket Entry 46 at 131-132.) He then faults the Government for allegedly falsely asserting during closing arguments that this check was "not cashed" and thus Petitioner could not explain why, upon his arrest on May 2, 2013, he was found with $3,300 in cash. (*Id.*

referencing Docket Entry 56 at 9-10.) Petitioner also asserts that the Government knew or should have known (1) that his financial condition in early 2013 was not as dire as the Government made it out to be and (2) there were legitimate reasons why he was in possession of $3,300 in cash upon his arrest. (*Id.* at 47-48.)

Petitioner likewise faults the Government for insinuating that he paid Hulcey $795 in cash after she deposited her tax return check into his bank account, instead of the $495 he asserts he actually paid her. (*Id.* at 44-45.) He also faults the Government for allegedly falsely representing during closing arguments that Hulcey went "straight to the motel from the beach." (*Id.* at 45 referencing Docket Entry 56 at 14.) These misrepresentations, Petitioner contends, bolstered the Government's theory that Petitioner gave Hulcey the bait bill found in her possession upon her arrest. (*Id.* at 45.)

The Court does not find any of these arguments persuasive. Petitioner has not presented any facts that would lead a rational, reasonable person to conclude that the Government knew or had reason to believe that its witnesses testified falsely. Nor has Petitioner demonstrated that the purported conduct prejudiced his substantial rights so as to deny him a fair trial. For all these reasons, this ground for relief fails.

Ground Three

Petitioner next alleges that the Government made an improper argument in closing statements regarding flight which violated his due process rights and deprived him of a fair trial. (Docket Entry 60 at 6, 48.) This ground for relief is also without merit.

Here, the Government made no flight argument, but rather merely stated the facts that were presented at trial by witness testimony. For example, in closing arguments, the Government did address the fact that Petitioner went to a motel instead of his home,

> Interesting enough, they don't come back to his house. They go to a hotel in Gastonia. They go to a hotel and stay in that hotel under the name of Carolyn Lunsford. It's the defendant's mama who checks him in, the night of the 1st about 10:30 p.m. She's got -- according to the daughter, she's got a good house that's habitable and he's got a good house that's habitable, but he is found in a hotel in Gastonia under his mama's name. She pays for the room for him, even though he has $3,300 cash in his possession.

(Docket Entry 56 at 14.) However, this was simply a recitation of evidence presented during witness testimony. Moreover, even if this were construed as a flight argument, the evidence provided would have supported all the inferences in the causative chain between flight and guilt of the crimes for which Petitioner was charged. *See United States v. Obi*, 239 F.3d 662, 665 (4th Cir. 2001) (holding that jury's consideration of evidence of flight "requires evidence supporting all the inferences in the causative chain between flight and guilt"). The Government limited its argument to the facts in the evidence and used such facts to make reasonable inferences from the evidence. *United States v. Lighty*, 616 F.3d 321, 361 (4th Cir. 2010) (observing that prosecutor must adhere to the "fundamental rule, known to every lawyer, that argument is limited to the facts in evidence"). Because Petitioner has failed to show how the Government's statements of facts from evidence in its closing argument unfairly prejudiced him as to deprive him of a fair trial, his claims are without merit.

Last, Petitioner alleges that since the jury could not unanimously agree on a verdict and had to request additional time, "at least one if not more members of the jury were not

completely convinced by the government's case." (Docket Entry 60, Attach. 1 at 6.) However, the jury did not engage in a particularly lengthy deliberation process in this case, a trial with evidence that spanned over a total of four days. (*See* 8/14/2014 and 8/15/2014 Minute Entries.) Although "the time it takes the jury to decide is not the relevant factor[,] [t]he weight of the evidence is," the length of deliberations in this case were reasonable and, again, Petitioner's claim fails. *United States v. Cunningham*, 108 F3d. 120, 124 (7th Cir. 1997).[6] Petitioner has failed to demonstrate prosecutorial misconduct in any of his claims.

Ineffective Assistance of Counsel (Grounds Four, Five, and Six)

Petitioner next asserts ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must establish, first, that his attorney's performance fell below a reasonable standard for defense attorneys and, second, that he was prejudiced by this performance. *See Strickland v. Washington*, 466 U.S. 668, 688, 691-92 (1984). A petitioner bears the burden of affirmatively showing deficient performance. *See Spencer v. Murray*, 18 F.3d 229, 233 (4th Cir. 1994). To establish prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

Ground Four

Petitioner next asserts that counsel was ineffective for failing to have still photographs made and enhanced from the bank's surveillance footage of the April 29, 2013 robbery to

[6] In a footnote at the end of this argument, Petitioner asserts that the Government "[b]y omission" created the false impression that he deposited red stained money in a car wash change machine. (Docket Entry 60, Attach. 1 at 6.) He asserts that he could not have done this because he was in jail at the time. (*Id.*) This sub-claim is vague, conclusory, and unsupported and fails for those reasons alone. *See Nickerson*, 971 F.2d at 1136.

determine whether the alleged firearm in Count Four was in fact a real firearm or a toy gun. (Docket Entry 60, Attach. 1 at 7, 10.) Petitioner also faults counsel for failing to bring toy guns or Petitioner's BB gun to trial to give the jury an opportunity to consider whether the firearm used in the April 29, 2013 robbery was real. (*Id.*) Counsel's failure to do so, however, was not ineffective assistance of counsel.

First, there is no evidence that counsel could have enhanced the security footage as Petitioner contends such that it would yield additional material evidence. Second, Petitioner has failed to demonstrate that any such enhanced photograph would have benefited him in the eyes of the jury, rather than have bolstered the Government's case. Nor is there any meaningful reason to believe that the firearm used in the robbery in question was fake or a toy. Eyewitness testimony alone may be sufficient to prove that the object used, carried, or possessed was, in fact, a firearm. *United States v. Redd*, 161 F.3d 793, 797 (4th Cir. 1998). It is the jury's function to weigh the credibility of witnesses and to resolve conflicts in the evidence. *United States v. Dinkins*, 691 F.3d 358, 387 (4th Cir. 2012). The eyewitness testimony, coupled with the photographs that were presented to the jury, were found by the jury to be sufficient to establish that the firearm brandished in the April 29, 2013 robbery was indeed a real firearm.

Petitioner next alleges that the Government's notice of intent to offer evidence of his financial distress to show motive should have prompted defense counsel to investigate and formulate a defense strategy. (Docket Entry 60, Attach. 1 at 12-16.) Petitioner also mentions his work notebook that police had seized. (*Id.*) He alleges that its introduction into evidence, along with testimony from some of his customers and others, would have served to rebut the

Government's argument that he, prior to the robberies, was desperate for cash and then, when arrested, was found in the possession of unexplained wealth. (*Id.*)

This argument fails for a number of reasons. First, counsel had a defense strategy and his conduct was not unreasonable. Witnesses were presented at the trial to show consistent work and income for Petitioner and to provide an alibi. (Docket Entry 48 at 352-380.) More evidence from Petitioner's work notebook about his income was unlikely to have changed the outcome of Petitioner's trial. Additionally, counsel explains that to put the work notebook into evidence, both its authenticity and relevance would have needed to have been explained. (Docket Entry 69, Attach. 1 at 2.) If Petitioner testified at trial about the work notebook, he ran the risk that his prior felony convictions could have been used to impeach him.[7] *See* Fed.R.Evid. 609(a). Counsel explains further that he did not call Petitioner's mother to testify because statements she made during jail calls to Petitioner would have been admissible. (Docket Entry 69, Attach. 1 at 2.) It therefore appears that even assuming the work notebook contained non-cumulative evidence of Petitioner's work history, which has not been demonstrated, its admission into evidence was as likely to have harmed his case, as it was to have helped it. Second, even assuming counsel erred as to Petitioner's work notebook, there was no resulting prejudice. This is because the Court agrees with the Fourth Circuit that "there is a litany of strong circumstantial evidence linking [Petitioner] to both robberies." *Lunsford*,

[7] Federal Rule of Evidence 609(b) limits the admittance of prior convictions at trial "if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later." Fed.R.Evid. 609(b). Petitioner was released from imprisonment to a term of supervised release for two prior felony convictions for bank robbery on December 28, 2012 and so his convictions were not more than ten years old according to Rule 609(b). (Docket Entry 34, ¶ 50.)

629 F. App'x at 519-520. This would still be the case regardless of whether Petitioner's work notebook had been entered into evidence. For all these reasons, this claim fails.

Lastly, Petitioner alleges that defense counsel failed to conduct a proper investigation on his footwear, where the Government did not provide the defense any footwear comparison test results, or indicate that any field test/print comparisons had been done on any footwear found during the May 8, 2013 police search of Petitioner's home. (Docket Entry 60, Attach. 1 at 18-20.) Counsel states in his affidavit "There was evidence of a shoe print taken at the scene. There was no evidence to support that the shoe print was made by the Defendant. Instead of risking the creation of evidence that might assist the Government in its case, counsel chose to address the shoe print through cross examination." (Docket Entry 69, Attach. 1, ¶19 referencing Docket Entry 48 at 311-12.) Petitioner has failed to demonstrate either element of the *Strickland* analysis here and as a result this ground for relief should be denied.

Ground Five

Petitioner next alleges that defense counsel misrepresented certain facts and coerced him into stipulating his income and expenses exactly balanced for the month of March of 2013. (Docket Entry 60, Attach. 1 at 22.) Petitioner further alleges that the stipulation bolstered the Government's assertion that Petitioner was in possession of unexplained wealth. (*Id.*) Petitioner states in his motion that the stipulation was based on a Monthly Report Form that he mailed to his United States probation officer on April 25, 2013.[8] (*Id.* at 25.) He further

[8] Petitioner also contends that he was required to provide this information as a term of the period of supervised release he was then serving for his prior bank robbery convictions. (Docket Entry 60, Attach. 1 at 32.) He asserts that it was compelled evidence, that it violated his right against self-incrimination, and that it was impermissibly admitted into the record at trial. (*Id.*) As explained, Petitioner asserts that the financial evidence he did provide in the form was false. Beyond this, in light

states that "[a]s a test run only, [he] filled out the form for the month . . . of April 2013. (Not March 2013). He placed hypothetical numbers (liabilities) alongside income numbers so that they exactly balanced." (*Id.*) Petitioner states that he told counsel this, but that counsel still insisted that he sign the stipulation. (*Id.* at 28-29.) Petitioner states further that counsel ultimately tricked him into signing the financial stipulation by telling him it was instead a stipulation regarding his ownership of a Mercedes Benz. (*Id.* at 30.)

This argument is not persuasive. As stated by Petitioner himself, his explanation for why his income and expenses exactly balanced was fraudulently created by him as a "test run." He fails to provide any other persuasive reasoning as to why this alleged "coerced" stipulation prejudiced him. As demonstrated in the factual basis set forth above, the Government also presented documents and witness testimony to establish its "unexplained wealth argument," and a stipulation as to Petitioner's cash inflow and outflow in no way prejudiced him. Counsel's performance in this regard did not fall below that of a reasonable defense attorney in the same or similar situation. Nor has Petitioner shown how he was prejudiced by counsel's request that he sign the stipulation. This claim is without merit and should be dismissed.

Ground Six

Petitioner next contends that counsel's failure to request severance of the two robbery cases, and the subsequent joint trial that occurred because of that failure, harmed his defense as he wished to testify in one case and not in the other. (Docket Entry 60, Attach. 1 at 33.) Further, Petitioner contends that defense counsel's failure to object to the Government's

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of all of the other evidence presented at trial, any error here was harmless. *See Penry v. Johnson*, 532 U.S. 782, 795 (2001) (success on Fifth Amendment self-incrimination claim in habeas case requires showing that the error had "substantial and injurious effect or influence in determining the jury's verdict").

overlapping of evidence and failure to request a mitigating instruction caused the jury to "cumulate evidence." (*Id.*) For the following reasons, none of these arguments are persuasive.

In *United States v. Isom*, a case similar to this one, the defendant argued that the district court erred in joining the two bank robbery cases together. *United States v. Isom*, 138 Fed. App'x 574, 578-79 (4th Cir. 2005). The Government argued that it was proper pursuant to Fed. R. Crim. P. 8(a) as the two robberies were "of the same or similar character . . . or constitute parts of a common scheme or plan," with the addition of the fact that they were committed within eleven days of each other. *Id.* The Court held that the two robberies were committed in the same fashion in that a gun was brandished in both, cash was taken in a similar manner, and the clothing worn was similar. (*Id.*) The Court affirmed the district court's decision to try the two robberies together and stated, "[a]ny prejudice that Isom suffered by having the two robbery charges joined into one trial is substantially mitigated by the fact that much of the evidence of one robbery would be admissible in the other." *Id.* at 581.

Here, both bank robberies, which were committed within thirteen days of each other, were committed in the same fashion in that a gun was used, cash was taken in a similar manner, and the clothing worn was similar. Much of the evidence from one of the robberies would be admissible in the other if they had been tried separately. Therefore, even if defense counsel had filed a motion for severance, it is unlikely that the Court would have granted it in light of the Government's compliance with Fed. R. Crim. P. 8(a). Moreover, Petitioner has failed to put forth meaningful evidence of prejudice to support this claim.

Petitioner further alleges that defense counsel's failure to request a mitigating instruction caused the jury to "cumulate" evidence. (Docket Entry 60, Attach. 1 at 33.) In

cases where the risk of prejudice is high, severance may be necessary; nevertheless, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Zafiro v. United States*, 506 U.S. 534, 539 (1993); *see also United States v. Hayden*, 85 F.3d 153, 160 (4th Cir. 1996) ("The mere showing of prejudice is not enough to require severance. Rather, tailoring of relief, if any, for any potential prejudice resulting from a joint trial is left to the district court's sound discretion.") (citation omitted). This case did not present a high risk of prejudice. Therefore, this claim, in all its iterations, is also without merit.

In summary, Petitioner's allegations of ineffective assistance of counsel set forth in grounds four, five, and six are without merit. Even assuming for the sake of argument that Petitioner's assertions of attorney error are true, he suffered no meaningful prejudice as a result. As noted, "there is a litany of strong circumstantial evidence linking [Petitioner] to both robberies." *Lunsford*, 629 F. App'x at 519-520. This would still be the case even if counsel had erred as Petitioner contends. For these reasons, Petitioner's grounds all fail.[9]

First Motion to Amend

Petitioner has also filed a motion to amend seeking to add a ground contending that a 2017 Supreme Court decision, *Dean v. United States*, requires that he be resentenced. (Docket Entry 79.) *See Dean v. United States*, 137 S.Ct. 1170, 1178 (2017) (holding that sentencing court is not precluded from considering, in determining the sentence for a predicate conviction, that

[9] Petitioner also asserts later in this ground that counsel never explained to him that he could stipulate to being a felon and then testify at his criminal trial without fear that his prior bank robbery convictions would be revealed to the jury. (Docket Entry 60, Attach 1 at 41.) Even assuming this is so, the Court sees no prejudice as a result. Informing the jury that Petitioner was guilty of an unnamed felony was unlikely to have helped Petitioner's case. Petitioner further contends that counsel was wrong for telling him these convictions could be used to impeach him at trial, because of their age. (Docket Entry 75 at 19.) As explained earlier, Petitioner's prior felony bank robbery convictions were not more than ten years old for the purposes of Federal Rule of Criminal Procedure 609.

18 U.S.C. § 924(c) (2012) imposes a mandatory consecutive sentence for a § 924(c) offense). Any such argument along these lines fails, however, if for no other reason than "*Dean* has not been held to apply retroactively to cases on collateral review." *Habeck v. United States*, 741 F. App'x 953, 954 (4th Cir. 2018); *Crawford v. United States*, No. 1:14CR138-1, 2019 WL 4261847, at *7 (M.D.N.C. Sept. 9, 2019) ("[N]umerous district courts have found that the decision in *Dean* did not recognize a new rule of constitutional law that applies retroactively to § 2255 proceedings."). Nor was counsel's failure in 2014 to anticipate the 2017 holding in *Dean* ineffective assistance of counsel. *See Tomkins v. United States*, No. 16-CV-7073, 2018 WL 1911805, at *21 (N.D. Ill. Apr. 23, 2018) (citing *Lily v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993) and *United States v. Rucker*, 142 F.3d 441 (7th Cir. 1998) ("[W]e see no likely scenario in which failing to argue that established precedent ought to be changed amounts to ineffective assistance of counsel[.]").) Therefore, while the Court will permit Petitioner to amend his motion, his new ground for relief should ultimately be denied.

Second Motion to Amend

Petitioner has also filed a second motion to amend. (Docket Entry 81.) He contends that a Supreme Court decision, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), requires that he be resentenced without the two firearm sentencing enhancements. (Docket Entry 82.) The undersigned will grant the motion to amend, but recommends that the new ground be denied.

In 2015, in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court found the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) to be unconstitutionally vague. In light of this holding, in *Sessions v. Dimaya*, the Supreme Court considered the meaning of "crime of violence" under the residual clause of the Immigration and Nationality Act, 18 U.S.C. § 16(b).

Applying *Johnson* to § 16(b), the Supreme Court in *Dimaya* held that the residual clause was unconstitutionally vague. *Dimaya*, 138 S. Ct. at 1216. Then, most recently, the Supreme Court held that the residual clause in § 924(c)(3)(B) is unconstitutionally vague. *United States v. Davis*, 139 S.Ct. 2319 (2019). Nevertheless, while *Johnson*, *Dimaya*, and ultimately *Davis* had either an indirect or direct effect on the constitutionality of § 924(c)(3)(B), Petitioner here was convicted of armed bank robbery, which the Fourth Circuit has held is a "crime of violence" under § 924(c)(3)(A), or the "force clause." *United States v. McNeal*, 818 F.3d 141, 151 (4th Cir. 2016). Therefore, while the Court will permit Petitioner to amend his motion to raise this claim, it should ultimately be denied on the merits.

Motions for Summary Judgment

Petitioner has also filed two motions for summary judgment. (Docket Entries 72 and 75.) In these motions, Petitioner requests that that Court enter summary judgment on his behalf immediately as to some or all of his grounds for relief. However, as explained at length above, Petitioner's grounds have no merit. Consequently, these motions should be denied.

First Motion for Stay

Petitioner has also filed a motion to stay this proceedings for ninety days while he awaits the results of multiple requests he has made pursuant to the Freedom of Information Act. (Docket Entry 76.) The ninety days in question have long since passed. Consequently, this request is moot and will be denied as such.

Second Motion for Stay

Petitioner has filed a second motion seeking a stay while a case he filed in this Court pursuant to 42 U.S.C. § 1983 proceeds to completion and he is able to "enjoin several federal

and state agencies from improperly holding records under the Freedom of Information Act." (Docket Entry 78.) Petitioner did file an action in this Court mentioning the Freedom of Information Act and this appears to be the case he is referencing. (Case No. 1:18-cv-00249.) However, that case has ended without providing Petitioner any relief. (*Id.*, Docket Entry 5.) This motion will be denied.

Motion to Expand the Record

Petitioner has also filed a motion to expand the record. (Docket Entry 77.) In it, Petitioner includes additional argumentation for his first ground for relief, discussed above. The Court will grant this motion insofar as it will consider this additional argumentation. Nevertheless, it does not change the Court's conclusion that, for the reasons set forth above, Petitioner's first ground for relief lacks merit. Petitioner's conclusory allegation of a "working arrangement" between state and federal authorities designed to deprive him of his constitutional rights fails for being vague, conclusory, and unsupported. *See Nickerson*, 971 F.2d at 1136; *see also DeMarrias v. United States*, 453 F.2d 211, 214 n.3 (8th Cir. 1972) (concluding that a "bare allegation that [defendant] was placed in state custody under a 'working arrangement' between state and federal authorities" warranted no relief); *Walden v. United States*, No. 2:07-CR-54, 2014 WL 3908193, at *11 (E.D. Tenn. Aug. 11, 2014) (concluding that a "[p]etitioner must offer facts, not mere suspicion or speculation, showing an illegitimate 'working arrangement'" between state and federal authorities) (internal citation omitted).

Motion for Discovery

Petitioner has also filed a motion seeking discovery. (Docket Entry 83.) Rule 6 authorizes discovery in post-conviction proceedings but, "[u]nlike other civil litigants, a § 2254

habeas petitioner 'is not entitled to discovery as a matter of ordinary course.'" *Stephens v. Branker*, 570 F.3d 198, 213 (4th Cir. 2009) (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)), *cert. denied*, 130 S.Ct. 1073 (2010). Instead, before beginning discovery, a petitioner must obtain leave of court by showing good cause. *Bracy*, 520 U.S. at 904, 908-09; *Maynard v. Dixon*, 943 F.2d 407, 412 (4th Cir. 1991). "A showing of good cause must include specific allegations suggesting that the petitioner will be able to demonstrate that he is entitled to habeas corpus relief." *Stephens*, 570 F.3d at 204; *see also Brooks v. United States*, Nos. 3:08cv565, 3:06cv115-1, 2011 WL 719637 (W.D.N.C. Feb. 22, 2011) (unpublished) (applying same principles in 2255 proceeding). Importantly, the petitioner must be able to point to specific factual allegations when making his request; he "may not use discovery to go on a 'fishing expedition' through the Government's files in search of evidence to support an imagined and fanciful claim." *United States v. Lighty*, No. CIV. PJM 12-3065, 2014 WL 5509205, at *3 (D. Md. Oct. 30, 2014) (citing *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990)).

In the instant motion, Petitioner has not shown good cause as to why discovery is necessary for him to frame or further develop any of his pleadings or allegations, which, as explained, are all to one degree or another fatally vague, conclusory, speculative, unsupported, and/or without merit. The Court will therefore deny Petitioner's request for discovery.

Motion to Withdraw or Correct

Petitioner has also filed a "Motion to Withdraw or Correct Contention Under Rule 11 of Fed. R. Civ. P." (Docket Entry 86.) Petitioner seeks to withdraw an allegation in his § 2255 motion in which he asserts that the Government called a bench conference at trial in an effort

to cover up its efforts at procuring false testimony. (*Id.* citing Docket Entry 60 at 38.) The Court will grant this motion and will consider this allegation withdrawn.

Motion for Hearing

Petitioner has also filed a motion for a hearing pursuant to 21 U.S.C. § 853(a). (Docket Entry 90.) In support, Petitioner asserts that his bank account was improperly and without due process "frozen/seized shortly after [his] May 2, 2013 arrest." (*Id.* at 2.) However, "21 U.S.C § 853(a) . . . appl[ies] only to cases involving certain drug convictions." *United States v. Chittenden*, 896 F.3d 633, 637 (4th Cir. 2018). As noted, Petitioner was convicted of armed bank robbery not for any offense related to drugs. He is not entitled to a hearing pursuant to this statute, nor has he demonstrated good cause for a general evidentiary hearing as to any of his grounds for relief.

Motion for Sanctions

Petitioner has also filed a motion, along with a supporting brief, seeking sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. (Docket Entries 92 and 93.) He makes a series of conclusory and unsupported allegations of Government wrongdoing that warrant no relief. (*Id.*) This motion should be denied.

Motion to Take Judicial Notice

Petitioner has also filed a motion to take judicial notice. (Docket Entry 95.) This motion consists of additional argumentation in support of his grounds for relief, as well as a request that the Court "take judicial notice of the records and documents" that Petitioner has filed in this case. (*Id.* at 17.) Petitioner also seeks to have the Court take "judicial notice" of legal conclusions and findings of fact that he claims are supported by the documents and case

law. (*Id.* at 16-17.) The Court has reviewed the entire record, including all of Petitioner's pleadings and exhibits, and has also made its own findings of fact and conclusions of law. For the reasons set forth herein, Petitioner is entitled to no relief.

Conclusion

For the reasons set forth above, Petitioner is not entitled to any form of relief. Neither discovery, nor a hearing, nor the appointment of counsel are warranted in this matter.

IT IS THEREFORE ORDERED that Petitioner's motions to amend his motion to vacate, set aside or correct sentence (Docket Entries 79 and 81), motion to expand the record (Docket Entry 77), and "Motion to Withdraw or Correct Contention Under Rule 11 of Fed. R. Civ. P." (Docket Entry 86) all be **GRANTED** and that Petitioner's motions to stay this proceeding (Docket Entries 76 and 78), motion for discovery (Docket Entry 83), and motion for a hearing pursuant to 21 U.S.C. § 853(a) (Docket Entry 90) all be **DENIED**.

IT IS THERFORE RECOMMENDED that Petitioner's motions for summary judgment (Docket Entries 72 and 75), amended motion to vacate, set aside or correct sentence (Docket Entries 60, 79, 81), motion for Rule 11 Sanctions (Docket Entry 92), and motion to take judicial notice (Docket Entry 95) all be **DENIED** and that this action be dismissed.

Joe L. Webster
United States Magistrate Judge

October 10, 2019
Durham, North Carolina

Additional material from this filing is available in the Clerk's Office.