No. 21-4226

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 22, 2022
DEBORAH S. HUNT, Clerk

DEANDRE FORREST,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: CLAY, BUSH, and MURPHY, Circuit Judges.

Deandre Forrest petitions for rehearing en banc of this court's order entered on July 12, 2022, denying an application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX "A"

No. 21-4226

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEANDRE FORREST,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: KETHLEDGE, Circuit Judge.

Deandre Forrest, a federal prisoner proceeding pro se, appeals from a district court judgment denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Forrest has filed an application for a certificate of appealability ("COA").

In July 2017, a grand jury indicted Forrest for conspiracy to distribute 280 grams or more of cocaine base with his co-defendant, Antoine Young (count 1), distribution of cocaine (counts 2-4), distribution of 280 grams or more of cocaine base (counts 5 and 6), possession with the intent to distribute cocaine (count 7), and possession of a firearm in furtherance of drug trafficking (count 8). Count 7 was dismissed.

In October 2017, trial counsel sent a letter to the district court stating that Forrest wanted to change his plea. The district court held a hearing, at which trial counsel stated that Forrest wanted to plead guilty but only to counts 2 through 4, and that he (counsel) did not believe that evidence of those offenses would be admissible in a trial for the remaining charges. Forrest shook his head and looked at trial counsel when the district court asked whether he understood that statements made during the guilty plea for counts 2 through 4 would be admissible at a trial for the remaining charges. Trial counsel stated that Forrest did not completely understand, and the trial court rejected the plea offer.

Trial counsel subsequently conceded guilt to counts 2 through 4 during his opening statement and closing argument at trial. The jury convicted Forrest of all charges. The district court sentenced Forrest to 120 months of imprisonment for each of the first six counts, to be served concurrently, and to 60 months of imprisonment for count 8, to be served consecutively. The district court imposed a 5-year term of supervised release for counts 1, 5, 6, and 8, to be served concurrently with a 3-year term of supervised release for counts 2 through 4.

We affirmed Forrest's convictions and sentence on direct appeal. *United States v. Forrest*, 763 F. App'x 466 (6th Cir. 2019).

Forrest filed a § 2255 motion raising three general claims with several subparts. As relevant here, however, Forrest claimed that he suffered a Sixth Amendment violation because trial counsel conceded his guilt at a pre-trial hearing, a critical stage, and also at trial. The government responded that trial counsel's concession of guilt before trial did not prejudice Forrest because it was made away from the jury and the district court rejected the plea offer. The government responded further that trial counsel's concession of guilt at trial was a valid trial strategy given the overwhelming evidence of Forrest's guilt as to counts 2 through 4, which bolstered the possibility of acquittal for the remaining charges. In reply, Forrest argued that trial counsel was ineffective for conceding guilt without obtaining his consent under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

A magistrate judge conducted an evidentiary hearing and recommended that the motion be dismissed. The magistrate judge determined that trial counsel devised a strategy to concede guilt on the less serious charges to avoid conviction on the more serious charges, that the strategy was pursued from the start, and that Forrest knew of the strategy and only objected to the strategy after the verdict. The magistrate judge did not find credible Forrest's testimony that he repeatedly informed trial counsel that he did not want to pursue that trial strategy, because Forrest made no attempt to notify the district court of his dissatisfaction. The magistrate judge found no structural error arising from trial counsel's concession of guilt. Forrest objected to the magistrate judge's credibility findings, arguing that the record showed that Forrest did not understand the trial

strategy, and trial counsel offered no evidence to support his testimony that he discussed the trial strategy with Forrest.

The district court overruled Forrest's objections and denied the § 2255 motion, explaining that the government had overwhelming evidence of Forrest's guilt for counts 2 through 4, which carried a less serious penalty than the remaining charges, that Forrest and his trial counsel met "no less than" 18 times before trial, and that Forrest had notice of the trial strategy at least by opening statements and made no obvious effort to express his opposition throughout trial. The district court declined to grant a COA.

Forrest now seeks a COA, arguing that trial counsel was ineffective for conceding guilt at trial without his consent.

"[A] COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (quoting 28 U.S.C. § 2253(c)(2)). A substantial showing is made where the applicant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

A traditional claim alleging the ineffective assistance of trial counsel requires the defendant to show that counsel performed deficiently and that this deficient performance resulted in prejudice for the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Forrest's argument that counsel conceded his guilt at trial involves a different reviewing standard, however. The Supreme Court has held that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *McCoy*, 138 S. Ct. at 1505. The denial of this right constitutes a structural error and is not subject to harmless-error review. *Id.* at 1511.

At the evidentiary hearing, Forrest testified that he learned of the plea hearing from a notice mailed by trial counsel. Forrest recalled that he shook his head in confusion at the pretrial hearing and that the presiding judge and prosecuting attorney, not trial counsel, explained that a guilty plea for counts 2 through 4 could be used against him in a trial for the remaining charges. Forrest testified that he had not stated an intention to plead guilty to counts 2 through 4. He testified that he told trial counsel after the hearing not to admit guilt to any charges. Forrest further testified that he believed that trial counsel would follow his instruction, that trial counsel did not state that he intended to concede guilt, that he did not remind trial counsel of his instruction, and that he would have rejected a concession strategy had he been aware of it. Forrest testified that trial counsel's concession of guilt as to counts 2 through 4 during the opening statement "devastated" him because trial counsel had not told him about that strategy, and he had given a note to trial counsel after jury selection that said that he was not guilty. Forrest testified that he gave another note to trial counsel after opening statements stating that he was not guilty. Forrest was "real mad" after trial and fired trial counsel before sentencing.

On cross-examination, Forrest acknowledged that trial counsel communicated through both in-person meetings and letters and also provided discovery. Forrest testified that he would have considered pleading guilty to counts 2 through 4 because they carried lesser penalties than the other charges. He stated that he did not express his concern at the pretrial hearing because the district court explained that the guilty pleas for counts 2 through 4 would support the conspiracy charge, and he ultimately did not plead guilty to any charges. Forrest stated that he did not recall meeting with trial counsel before or after the plea hearing and did not fire trial counsel afterwards because he did not have money to retain a new attorney. Forrest testified that he did not alert the district court to any concerns about trial counsel's representation because he did not know that he could. Forrest admitted that trial counsel urged the jury to convict Forrest for counts 2 through 4 but not for the remaining charges.

Trial counsel testified that he spoke with Forrest before and after the hearing and that he and Forrest discussed "several" times the trial strategy to concede guilt at both the hearing and the

trial to benefit from the acceptance of responsibility under the sentencing guidelines. Trial counsel testified that he advised Forrest that "very strong" evidence supported counts 2 through 4 and that attacking the conspiracy charge provided a better opportunity for success. Trial counsel testified that he did not seek verbal or written cues from Forrest indicating his acceptance of the trial strategy. Trial counsel also testified that he did not recall receiving any specific notes during trial from Forrest but did receive a letter critical of his representation after trial. Trial counsel provided an affidavit supporting his assertion that Forrest did not oppose the trial strategy.

On cross-examination, trial counsel acknowledged that he sent a letter dated October 26, 2017, to the district court stating Forrest's desire to change his plea and that he met with Forrest both on October 24 and 26, 2017, to discuss the upcoming hearing. Trial counsel testified that Forrest did not object to having the hearing either at those meetings or at the hearing itself. Trial counsel testified that he discussed trial strategy with Forrest before and after the hearing but could not recall a specific conversation. Trial counsel testified that Forrest fired him after the guilty verdict.

Forrest has not demonstrated that reasonable jurists would debate the denial of his *McCoy* claim. Forrest and trial counsel offered conflicting testimony at the evidentiary hearing. The district court had adequate support to find trial counsel more credible. *See Christopher v. United States*, 831 F.3d 737, 739 (6th Cir. 2016). The conflict focused on whether Forrest made his alleged disagreement with trial counsel's strategy known. In *McCoy*, the Supreme Court held that the defendant deserved a new trial once he insisted that he was not guilty, explaining that "[o]nce [McCoy] communicated that to court and counsel, strenuously objecting to [counsel]'s proposed strategy, a concession of guilt should have been off the table." 138 S. Ct. at 1512. Forrest did none of that, either at the pretrial hearing or at trial. Forrest expressed dissatisfaction with trial counsel only after the jury convicted him of all counts, at which point he fired trial counsel. Forrest's § 2255 testimony suggested that he, consistent with counsel's trial strategy, sought to avoid a conspiracy conviction. Taken together with his failure to voice concern with the trial strategy to the court, reasonable jurists would agree that Forrest has not demonstrated deficient

performance by trial counsel's concession of guilt under *McCoy*. *Cf. Florida v. Nixon*, 543 U.S. 175, 192 (2004) ("When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent.").

For the foregoing reasons, we **DENY** Forrest's COA application.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEANDRE FORREST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 2:20-cv-775
Crim No. 2:17-cr-158

Judge James L. Graham
Magistrate Judge Kimberly A. Jolson

ORDER

On August 11, 2021, Magistrate Judge Jolson issued a Report and Recommendation (ECF No. 204) recommending that Petitioner Deandre Forrest's Second Supplemental Brief (ECF No. 182), which the Court construes as a Motion to Amend his Motion to Vacate under 28 U.S.C. § 2255, be denied and that this action be dismissed. Magistrate Judge Jolson's review included Respondent's Response in Opposition (ECF No. 193), Petitioner's Reply (ECF No. 201), and the exhibits of the parties. Petitioner filed a Motion to Vacate Void Order and Judgment (ECF No. 212), which the Court construes as an Objection to the Report and Recommendation. For the reasons that follow, Petitioner's Objection (ECF No. 212) is **OVERRULED**. The Report and Recommendation (ECF No. 204) is **ADOPTED**, Petitioner's Motion to Amend is **DENIED**, and this action is **DISMISSED**.

I. BACKGROUND

In 2018, a jury convicted Petitioner on one count of conspiracy to distribute and to possess with intent to distribute 280 grams or more of cocaine base; three counts of distribution of cocaine; two counts of distribution of 280 grams or more of cocaine base; and one count of possession of firearms in furtherance of a drug trafficking crime. (Am. Judgment, ECF No. 105.)

"[O]n February 15, 2019, the Sixth Circuit affirmed Petitioner's convictions and sentence." (ECF No. 204, PAGEID 1802, citing *United States v. Forrest*, 763 F. App'x 466, 468-69 (6th Cir. 2019).) Petitioner's sentence became final on May 16, 2019, which was ninety days after the Sixth Circuit's February 15, 2019 dismissal of the appeal and when the time period to file a petition for a writ of *certiorari* to the United States Supreme Court expired. *Sanchez-Castellano v. United States*, 358 F.3d 424, 426-27 (6th Cir. 2004) (citing *Clay v. United States*, 537 U.S. 522, 532 (2003)). Therefore, the applicable one-year statute of limitations date to file a § 2255 motion was in May 2020. *See* 28 U.S.C. § 2255(f).

On February 10, 2020, Petitioner timely filed a Motion to Vacate (ECF No. 152) challenging his convictions by claiming a violation of the Fourth Amendment, that he was denied the effective assistance of counsel, and that his convictions violate due process. After conducting an evidentiary hearing on Petitioner's claim that his attorney unconstitutionally conceded guilt on certain charges, Magistrate Judge Jolson recommended dismissal of all three of Petitioner's claims on the merits. (ECF No. 192.) On July 8, 2021, the Court issued an Opinion and Order adopting and affirming Magistrate Judge Jolson's Report and Recommendation and dismissing Petitioner's three claims. (Order, ECF No. 202.)

On December 17, 2020, Petitioner filed a Second Supplemental Brief in support of his initial Motion to Vacate, "raising seven additional grounds for relief, which the Court therefore construe[d] as a request to amend the § 2255 motion under Rule 15 of the Federal Rules of Civil Procedure." (ECF No. 204, PageID 1803.) Petitioner seeks to amend his § 2255 motion to claim that the Court lacked subject-matter jurisdiction because charges were filed by the "United States of America" rather than the "United States," and he was denied the effective assistance of counsel when his attorney failed to object (Claim One); that the government violated Federal Criminal

Rules, the doctrine of separation of powers, and Petitioner's due process rights in the issuance of grand jury subpoenas, thereby depriving the Court of jurisdiction (Claim Two); that the arrest and search warrants violated Federal Criminal Rules and the Oath and Affirmation Clause of the Fourth Amendment (Claim Three); that the Indictment improperly failed to indicate that the firearm had a "smooth bore" (Claim Four); that Petitioner was denied the right to challenge the grand jury (Claim Five); that the government unlawfully placed Petitioner under electronic surveillance (Claim Six); and that Petitioner was denied the effective assistance of counsel at sentencing (Claim Seven). It is Respondent's position that these claims are time-barred and otherwise meritless.

After reviewing Petitioner's Motion to Amend, Respondent's Response in Opposition, Petitioner's Reply, and the exhibits of the parties, Magistrate Judge Jolson concluded that Petitioner's new claims were time-barred, as he waited more than six months after the May 2020 one-year statute of limitations deadline to file his second motion raising additional grounds for relief, and that denial was further warranted, because none of Petitioner's new claims related back to the original claims alleged in Petitioner's initial Motion to Vacate. Petitioner subsequently filed an Objection to the Report and Recommendation stating that Magistrate Judge Jolson's recommendation was improper, because issues challenging the court's subject-matter jurisdiction may be raised at any time. (ECF No. 212.)

II. STANDARD OF REVIEW

If a party objects within the allotted time to a report and recommendation, the Court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b). Upon review, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). As required by 28

U.S.C. § 636(b)(1)(C), the Court will make a *de novo* review of those portions of the Report and Recommendation to which Plaintiff specifically objects.

III. DISCUSSION

Petitioner's sole objection is that dismissal based on statute of limitations grounds is inappropriate because his amended claims challenged the Court's subject-matter jurisdiction, and the issue of the Court's subject-matter jurisdiction may be raised at any time. (Obj., ECF No. 212, PageID 1827, citing *In re Lewis*, 398 F.3d 735, 739 (6th Cir. 2005).) While Petitioner is correct that challenges to subject-matter jurisdiction may be raised at any point during the proceedings, his objection is unavailing for several reasons.

First, only one of the seven additional claims (Claim One) directly challenged the Court's jurisdiction. Even so, Petitioner's argument that this Court lacks subject-matter jurisdiction over the offenses in this case because "the government did not file charges in the name of the real party in Interest because the charges were filed in the name 'United States of America' rather than 'United States'" is facially dubious. Moreover, the legal authority he cites to, *Downes v. Bidwell*, 182 U.S. 244, 263 (1901) states that the case "may be considered as establishing the principle that, in dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located." This statement does not support Petitioner's argument that the "United States" rather than the "United States of America" is the real party in interest in this case, and that this somehow deprives this Court of subject-matter jurisdiction. Thus, even if the challenge to jurisdiction is timely, it is meritless, and Petitioner's objection is overruled.

Although Petitioner also argues in Claims Two through Five that the Court "lacked subject-matter jurisdiction," he bases these assertions on allegations such as the government's violation of

the Federal Criminal Rules, the doctrine of separation of powers, and the violation of Petitioner's due process rights, which resulted in this Court's lack of subject-matter jurisdiction (Claim Two); that the arrest and search warrants violated the Federal Criminal Rules and the Oath and Affirmation Clause of the Fourth Amendment, which caused this Court to lack jurisdiction (Claim Three); that because Petitioner, as an ex-felon, lost his right to contract or enter into agreements, this Court lacked jurisdiction over any conspiracy offenses (Claim Four); or that Petitioner was denied the right to challenge the grand jury, and the Court lacked subject-matter jurisdiction as a result (Claim Five). None of these arguments provide any basis to directly challenge the Court's subject-matter jurisdiction under 18 U.S.C. § 3231, which provides federal district courts exclusive original jurisdiction over "all offenses against the laws of the United States." As Petitioner was charged with offenses against the United States, this Court had subject-matter jurisdiction in this case. *United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008) (citing *United States v. Williams*, 341 U.S. 58, 65-66 (1951)). Therefore, Petitioner's subject-matter jurisdiction objection as it pertains to these claims is also overruled.

Additionally, the second portion of Claim One raises a claim of ineffective assistance of counsel in failing to object to the allegedly defective charging document (ECF No. 182, PageID 1597.) Unlike a challenge to jurisdiction, a challenge to counsel's effectiveness is subject to the one-year statute of limitations in 28 U.S.C. § 2255. Thus, that portion of Claim One is time-barred, and Petitioner fails to address in his Objections how that portion of Claim One relates back to his original filing. Similarly, Petitioner fails to explain how Claims Two through Seven relate back to his original filing, and moreover, does not object to that portion of Magistrate Judge Jolson's Report and Recommendation. Thus, there is no overcoming the time bar as to Claims Two through Seven.

IV. CONCLUSION

For the foregoing reasons, the Court **ADOPTS** Magistrate Judge Jolson's Report and Recommendation (ECF No. 204), Petitioner's Objections thereto (ECF No. 212) are **OVERRULED**, and Petitioner's Motion to Amend his Motion to Vacate under 28 U.S.C. § 2255 (ECF No. 182) is **DENIED**. As Claims One, Two, and Three of Petitioner's initial Motion to Vacate under 28 U.S.C. § 2255 were dismissed, and Petitioner's Motion to Amend that motion is denied, this action is hereby **DISMISSED**.

Judgment shall enter in favor of Respondent and against Petitioner. Because reasonable jurists would not disagree with the assessment that Petitioner has not made a substantial showing of the denial of a constitutional right, Petitioner shall not be granted a certificate of appealability. The Court certifies that any appeal would be objectively frivolous, and that Petitioner should not be permitted to proceed *in forma pauperis*.

IT IS SO ORDERED.

/s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: December 3, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEANDRE FORREST,

Petitioner,

v.

CASE NO. 2:20-CV-00775
CRIM. NO. 2:17-CR-00158
JUDGE JAMES L. GRAHAM
Magistrate Judge Kimberly A. Jolson

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION

This matter is before the Court on Petitioner's December 17, 2020, Second Supplemental Brief, which the Court construes as a request to amend the Motion to Vacate under 28 U.S.C. § 2255 (Doc. 182), Respondent's Response in Opposition (Doc. 193), Petitioner's Reply (Doc. 201), and the exhibits of the parties. For the reasons that follow, it is **RECOMMENDED** that Petitioner's motion to amend (Doc. 182) be **DENIED** and that this action be **DISMISSED**.

I. BACKGROUND

In June 2018, a jury convicted Petitioner on one count of conspiracy to distribute and to possess with intent to distribute 280 grams or more of cocaine base; three counts of distribution of cocaine; two counts of distribution of 280 grams or more of cocaine base; and one count of possession of firearms in furtherance of a drug trafficking crime. (*Amended Judgment*, Doc. 105). Petitioner sought relief from the United States Court of Appeals for the Sixth Circuit. But, on February 15, 2019, the Sixth Circuit affirmed Petitioner's convictions and sentence. *United States v. Forrest*, 763 F. App'x 466, 468-69 (6th Cir. 2019). Petitioner returned to this Court and filed a Motion to Vacate under 28 U.S.C. § 2255 on February 10, 2019. In his initial filing, he asserted that he had been denied the effective assistance of counsel, that his convictions violated the Fourth

Amendment, and that he had been denied due process due to procedural errors and the "accumulation of error." (*Motion to Vacate*, Doc. 152, PAGEID # 1351). On July 8, 2021, the Court issued an Opinion and Order dismissing those claims. (Doc. 202). In the meantime, however, on December 17, 2020, Petitioner filed a Second Supplemental Brief, raising seven additional grounds for relief, which the Court therefore construes as a request to amend the § 2255 motion under Rule 15 of the Federal Rules of Civil Procedure. (Doc. 182). Specifically, Petitioner requests to amend his § 2255 motion to claim that the Court lacked subject-matter jurisdiction because charges were filed by the "United States of America" rather than the "United States," and he was denied the effective assistance of counsel when his attorney failed to object (claim one); that the government violated Federal Criminal Rules, the doctrine of separation of powers, and Petitioner's due process rights in the issuance of grand jury subpoenas, thereby depriving the Court of jurisdiction (claim two); that the arrest and search warrants violated Federal Criminal Rules and the Oath and Affirmation Clause of the Fourth Amendment (claim three); that the Indictment improperly failed to indicate that the firearm had a "smooth bore" (claim four); that Petitioner was denied the right to challenge the grand jury (claim five); that the government unlawfully placed Petitioner under electronic surveillance (claim six); and that Petitioner was denied the effective assistance of counsel at sentencing (claim seven). It is the Respondent's position that these claims are time-barred and otherwise without merit.

II. STATUTE OF LIMITATIONS

As a threshold matter, the Court must consider whether Petitioner's request to amend is time-barred. A one-year statute of limitations applies to the filing of a Motion to Vacate under 28 U.S.C. § 2255. The statute provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-

> (1) the date on which the judgment of conviction becomes 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). Applied here, Petitioner's sentence became final in May 2019, ninety days after the Sixth Circuit's February 15, 2019, dismissal of the appeal, when the time period expired to file a petition for a writ of *certiorari* to the United States Supreme Court. *Sanchez-Castellano v. United States*, 358 F.3d 424, 426-27 (6th Cir. 2004) (citing *Clay v. United States*, 537 U.S. 522, 532 (2003)). The statute of limitations expired one-year later, on May 21, 2020. Yet Petitioner waited more than six months, until December 2020, to file the Second Supplemental Motion to Vacate under 28 U.S.C. § 2255 raising new additional new grounds for relief. (Doc. 182).

III. DISCUSSION

Attempts to raise new claims under Rule 15(c) are subject to this one-year statute of limitations. *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008). Consequently, a Rule 15(c) motion filed after the one-year deadline will be denied unless the proposed amendments relate back to the date of the original pleading. *Id.* Claims that "assert[ ] a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth" do not relate back to the date of the original pleading pursuant to Rule 15(c). *Id.* (quoting *Mayle v. Felix*, 545 U.S. 644, 662 (2005)). Only claims that are tied by "a common core of operative facts" to those raised in the initial and timely filed § 2255 motion may be raised in an amended motion to vacate. *Purnell v. United States*, No. 2:07-cv-1050, 2009 WL 1605402, at *3 (S.D. Ohio June

4, 2009) (quoting *Mayle*, 545 U.S. at 662-63). "It is not sufficient that the amendments to a § 2255 motion 'simply . . . relate to the same trial, conviction, or sentence as a timely filed claim.'" *United States v. Smith*, Nos. 12-cr-20095, 15-cv-13814, 2017 WL 491837, at *2 (E.D. Mich. Jan. 8, 2016) (citing *Mayle*, 545 U.S. at 662). "Amendments that seek to add new legal theories or present new claims based on different factual underpinnings are not permitted." *Id.* For example, new claims of ineffective assistance of counsel do not relate back to timely filed claims of ineffective assistance of counsel where the new claims are based on different sets of facts. *See Arrick v. United States*, Nos. 2:16-cv-00531, 2:14-cr-108(1), 2016 WL 5858945, at *3 (S.D. Ohio Oct. 7, 2016) (citations omitted).

Petitioner's proposed new claims do not relate back to his initial and timely filed claims. Petitioner's proposed new claims one through five challenge the jurisdiction of the District Court. The other claims challenge the government's purported use of electronic surveillance and his attorney's performance at sentencing. Petitioner raised no similar issues in his timely filed § 2255 motion. There, as discussed, he asserted that law enforcement violated the Fourth Amendment when they searched his home, that his attorney performed in a constitutionally ineffective manner during plea negotiations and by failing to file a motion to suppress evidence and conceding his guilt during trial, and that he was denied the effective assistance of appellate counsel. Plainly, these claims do not arise from the same "common core of operative facts" as Petitioner's new proposed time-barred claims.

IV. DISPOSITION

For the foregoing reasons, it is **RECOMMENDED** that Petitioner's motion to amend (Doc. 182) be **DENIED** and that this action be **DISMISSED**.

PROCEDURE ON OBJECTIONS

If any party objects to this *Report and Recommendation*, that party may, within fourteen days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo,* and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

The parties are further advised that, if they intend to file an appeal of any adverse decision, they may submit arguments in any objections filed, regarding whether a certificate of appealability should issue.

IT IS SO ORDERED.

Date: August 11, 2021

/s/ Kimberly A. Jolson
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE