IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	
	)	
v.	)	Crim. Action No. 96-88-1-SLR
	)	Civil Action No. 99-428-SLR
DARRYL HANDY,	)	
	)	
Defendant/Petitioner.	)	

Darryl Handy, Fairton, New Jersey, petitioner, pro se.

Richard G. Andrews, United States Attorney, United States Attorney's Office, Wilmington, Delaware. Attorney for respondent.

MEMORANDUM OPINION

Dated: May 30, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Darryl Handy is an inmate at the Federal Correctional Institution in Fairton, New Jersey. Currently before the court is petitioner's application for habeas relief filed pursuant to 28 U.S.C. § 2255. (D.I. 99) Because the court finds that petitioner's claim for ineffective assistance of counsel is without merit, his petition for habeas relief is denied.

II. BACKGROUND

On June 13, 1997, petitioner was convicted of one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1).[1] (D.I. 72) On September 5, 1997, the court sentenced defendant to 120 months imprisonment. (Id.) On April 2, 1998, the Third Circuit affirmed petitioner's conviction. (D.I. 88) Petitioner did not seek a writ of certiorari to the Supreme Court.[2] On September 27, 1999, petitioner filed a pro se

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[1]A jury found defendant guilty of an additional count, and the court granted defendant's motion for judgment of acquittal as to that count. (D.I. 59)

[2]Petitioner and his former defense attorney, David Weiss, Esquire, disagree on whether petitioner was advised of his options to file for rehearing en banc in the Third Circuit Court of Appeals or to petition for a writ of certiorari. The government has submitted an April 6, 1998 letter from Mr. Weiss to petitioner, to which Mr. Weiss attached a description of the procedures for filing a petition for rehearing in the Third Circuit. The description also mentions a "petition for writ of certiorari" to the Supreme Court. (D.I. 114, Ex. A)

petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255.[3] (D.I. 99) In a memorandum order dated February 14, 2001, the court dismissed all of petitioner's habeas claims except his claim for ineffective assistance of counsel. The court ordered additional briefing on that claim, and denied petitioner's motions for appointment of counsel and post-rehabilitation relief. (D.I. 108)

III. DISCUSSION

At the outset, the court notes that petitioner's addendum to his habeas application is limited to his claim for ineffective assistance of counsel. See United States v. Thomas, 221 F.3d 430, 436 (3d Cir. 2000) (holding that addendum to habeas petition cannot include separate or new claims, but may amplify existing claims); United States v. Duffus, 174 F.3d 333, 337-38 (3d Cir.), cert. denied, 120 S.Ct. 163 (1999) (same). Thus, the court will consider only those arguments in petitioner's additional filings that are related to ineffective assistance of counsel.

The Sixth Amendment guarantees an accused the assistance of counsel in all criminal proceedings, and the Supreme Court has interpreted this right to mean the effective assistance of counsel. See Strickland v. Washington, 464 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, petitioner must demonstrate that: (1) counsel's performance fell

[3]The court granted petitioner's request to extend the time to file a Section 2255 petition to September 28, 1999. (D.I. 91)

below an objective standard of reasonableness, and (2) there exists a reasonable probability that the proceeding, but for counsel's unprofessional errors, would have concluded with a different result. See id. at 687, 694; Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996) (holding that petitioner must demonstrate "a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different"). However, when evaluating counsel's performance, a court should not "focus . . . solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). A court must consider the totality of the circumstances of the case and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688, 689.

Petitioner alleges that he was denied effective assistance of counsel on three grounds. The court shall address each of these grounds seriatim.

A. Defense Counsel Failed to Inform Petitioner of His Ability to Petition for Rehearing En Banc or to File a Petition for Writ of Certiorari

An attorney for an indigent criminal defendant does not have a duty to file a petition for rehearing or a petition for writ of certiorari. See United States v. Coney, 120 F.3d 26, 27-28 (3d

Cir. 1997) (stating that in order to avoid frivolous petitions for rehearing or certiorari, "[t]he determination whether to file rests in the sound professional judgment of the attorney in light of all circumstances"). See also Ross v. Moffitt, 417 U.S. 600, 617-18 (1974) (holding that Fourteenth Amendment does not require state to provide any counsel to defendant seeking discretionary review); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987 ("[T]he right to appointed counsel extends to the first appeal of right, and no further."). Therefore, because petitioner had no constitutional right to counsel in connection with the filing of a petition for rehearing or certiorari, he had no constitutional right to the effective assistance of counsel for that purpose. See Wainwright v. Torna, 455 U.S. 586 (1982) (per curiam) (holding that Fourteenth Amendment right to effective assistance of appellate counsel is derived entirely from Fourteenth Amendment right to appellate counsel, and former cannot exist where latter is absent).

B. Defense Counsel Failed to Argue that the Court Lacked Jurisdiction Over Petitioner's Case

Petitioner's second claim of ineffective assistance of counsel is that his attorney failed to make two arguments challenging the court's jurisdiction over petitioner's case. First, petitioner contends that his counsel was ineffective for failing to argue that 18 U.S.C. § 922(g)(1) is unconstitutional. Petitioner asserts that it was beyond Congress's power under the

Commerce Clause to pass that statute, and any sentence imposed pursuant to it is unconstitutional. Petitioner fails to take into account that Section 922(g)(1) has been upheld as a permissible exercise of the Commerce Clause power because the explicit language of the statute itself makes it applicable only when "interstate or foreign commerce" is involved. See 18 U.S.C. § 922(g)(1); United States v. Gateward, 84 F.3d 670, 672 (3d Cir. 1996). Because the constitutionality of 18 U.S.C. § 922(g)(1) has been upheld, petitioner's attorney could not be ineffective for failing to raise this fruitless argument.

Second, petitioner claims that his counsel was ineffective for failing to argue that the United States had no jurisdiction to prosecute petitioner because the government did not file an "acceptance of jurisdiction" of the home where the ammunition at issue was seized. This claim also fails because jurisdiction in this case is based not on the place of seizure of the ammunition, but the fact that it previously moved in interstate commerce. See 18 U.S.C. § 922(g)(1). In sum, petitioner's arguments that his counsel failed to challenge the court's jurisdiction are without merit and, therefore, do not rise to ineffective assistance of counsel.

C. Petitioner Was Not Represented Adequately in the Brown Trial

Petitioner argues that Jan Jurden, Esquire, counsel appointed to represent him as a witness in the trial of United

States v. Royce Brown, No. 95-69-SLR, was ineffective. Petitioner alleges that Ms. Jurden did not make appropriate objections

> to protect [his] rights when the trial judge in the Brown case indicated that [he] could not invoke his Fifth Amendment right against self incrimination, and that any given testimony would be on an all or nothing basis.

(D.I. 99 at 6) In addition, petitioner claims that Ms. Jurden did not investigate the facts or discuss the applicable law with petitioner, and that Ms. Jurden "acted as an advocate for the Government in the Brown trial to block [him from giving] testimony on defendant Brown's behalf." (Id. at 7)

The court agrees with the government's argument that inadequate representation in a collateral proceeding is not a cognizable claim of ineffective assistance of counsel in a Section 2255 proceeding. Counsel's conduct in the Brown trial cannot suggest that there is some doubt as to the accuracy of the verdict in petitioner's own trial. Nevertheless, the court has reviewed the substance of petitioner's allegations, and finds that the record presents no evidence of ineffective assistance of counsel. The issue of the scope of petitioner's testimony at the Brown trial was raised in a motion to suppress, which was denied by this court (D.I. 34) and affirmed by the Third Circuit. (D.I. 111, Ex. D) Thus, petitioner's claim for ineffective assistance of counsel in the Brown trial is without merit.

IV. CONCLUSION

For the reasons stated, petitioner's application for habeas relief is denied. An appropriate order shall issue.

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DARRYL HANDY,	)	
	)	
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O R D E R

At Wilmington, this 30th day of May, 2001, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Petitioner Darryl Handy's above captioned application for habeas corpus relief (D.I. 99) filed pursuant to 28 U.S.C. § 2255 is dismissed and the writ denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3rd Cir. Local Appellate Rule 22.2 (1998).

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United States District Judge