No. _____

In The
Supreme Court of the United States

TERRY PENNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may prohibit a prisoner from amending his timely first motion under 28 U.S.C. § 2255 to add an actual-innocence/ineffective assistance of counsel claim, on the threshold procedural ground that the amendment is untimely, without evaluating the merits of the actual-innocence/ineffective assistance of counsel claim as required by *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013).

PARTIES TO THE PROCEEDING

The parties to the proceeding are Terry Eugene Penney and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Terry Penney respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, in *Penney v. United States of Americ*a, No. 13-6621.

OPINION BELOW

The opinion of the Court of Appeals was filed on August 4, 2014 (No. 13-6621, Doc. 19-2), and is reproduced in the Appendix. It was not published in the Federal Reporter. The order denying rehearing en banc was issued on December 17, 2014 (No. 13-6621, Doc. 36-1), and is reproduced in the Appendix.

JURISDICTION

The Court of Appeals denied rehearing en banc on December 17, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 2255 of Title 28 of the United States Code provides in relevant part:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was

imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) 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.

INTRODUCTION

This Petition presents a narrow and straightforward issue, one that for many prisoners is a question of life or death, and on which the circuits are split. In *McQuiggin v. Perkins*, this Court held that "a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief." 133 S. Ct. 1924, 1931 (2013). When a district court receives an untimely petition raising an actual-innocence claim, this Court commanded, the district court must consider "the merits of a petitioner's actual-innocence claim" as part of its analysis of the untimeliness or procedural defect in the petition. *Id*. at 1935. District courts, this Court held, may not "treat[ ] timeliness as a threshold inquiry." *Id*.

Thus, under *McQuiggin*, a prisoner who raises a claim of actual innocence in conjunction with ineffective assistance of counsel (an "innocence/IAC claim") in an untimely first petition has the right to have the Court evaluate the merits of his claim – and not

reject it solely on procedural grounds. This Petition presents a simple question: does a prisoner who raises an actual-innocence claim in an *untimely amendment* to a timely first petition have the same right?

Petitioner filed a timely first motion to vacate his sentence under 28 U.S.C. § 2255, and then, after the one-year filing period had expired, moved to amend his motion to add an actual-innocence claim. Had he made his actual-innocence claim in an untimely first petition, *McQuiggin* would squarely control. Does *McQuiggin* also control when the procedural defect is the untimeliness of an *amendment* to a timely first petition, rather than the petition itself? In other words, should Petitioner be penalized for filing *on time* and then amending late, as opposed to filing late in the first place?

A circuit split has already developed on this question. The Ninth Circuit followed *McQuiggin* and evaluated the merits of an actual-innocence claim made in an untimely amendment to a timely first petition. The Sixth Circuit, in the identically-situated case at bar, held that the district court properly refused to allow Petitioner to amend to add his actual-innocence claim – on purely procedural grounds and without ever evaluating the merits of the claim.

In short, the Sixth Circuit "treat[s] timeliness as a threshold inquiry" for actual-innocence amendments, in contravention of *McQuiggin*'s command. As

a consequence, if this Court does not act, then Petitioner, and untold additional actual-innocence petitioners in the Sixth Circuit with meritorious but procedurally defective claims, will be denied their basic, equitable right to have their claims of actual innocence considered by a court.

STATEMENT OF THE CASE

1. Testimony from trial was as follows. On the night of January 13, 2004, law enforcement officers executed a search warrant at Petitioner's home. (App. 21.) Approximately five officers approached the front of the house and attempted to break down the front door. (Trial Transcript, *United States v. Penney*, No. 04-cr-0036 (E.D. Tenn. July 27, 2005) ("Trial Tr."), at 182:19-24.) When they were unable to do so, ATF Agent Paris Gillette moved away from the group at the front door and went to a window at the side of the house. (Trial Tr. 450:22-24.)

2. Detective Mark King stepped away from the front porch as well and stationed himself along the wall of the house between the group at the front door and Agent Gillette at the window. (*Id.*) Agent Gillette then broke the window where he was standing. (*Id.* at 440:12-18.) Petitioner was inside the house. (*Id.* at 441:25-442:1.) He had recently been violently robbed at gunpoint by a Mexican gang, and thus, he believed that the forcible entry by the officers was another robbery. (*Id.* at 586:15-587:20.)

3. When Agent Gillette broke the window, Petitioner fired one shot with a shotgun at the window, striking and wounding Agent Gillette. (*Id.* at 440:12-18.) Detective King was slightly injured by the flying glass from the broken window. (*Id.* at 445:2-12.)

4. At the same time, Detective Marty Dunn was stationed at the back of the house. (*Id.* at 498:9-16.) When he heard the shotgun blast, he entered the open back door by himself. (*Id.* at 500:9-24.) After he entered the house, Petitioner fired a second shot, striking Detective Dunn. (*Id.* at 502:4-5.) Those were the only shots Petitioner fired.

5. The officers' testimony at trial was unambiguous that neither Detective Dunn nor Agent Gillette was standing in a group when each was separately shot by Petitioner.

6. On February 11, 2004, a federal grand jury indicted Petitioner in 13 counts. (Indictment, No. 04-cr-0036, Doc. 408, at 2.) A second superseding indictment was filed on December 15, 2004, charging 11 defendants in 37 counts. (Second Superseding Indictment, No. 04-cr-0036 ("Indictment"), Doc. 372-2.) Petitioner was charged in 16 of those counts, including drug conspiracy charges, gun charges, and, relevant here, a charge under the "drive-by shooting" statute, 18 U.S.C. § 36 ("Section 36"). (App. 14-15.)

7. Specifically, Count 24 of the Indictment charged Petitioner with a violation of Section 36(b)(1), which reads as follows:

18 U.S.C. § 36 – Drive-by shooting

. . .

(b) Offense and Penalties. –

(1) A person who, in furtherance or to escape detection of a major drug offense and with the intent to intimidate, harass, injure, or maim, ***fires a weapon into a group of two or more persons*** and who, in the course of such conduct, causes grave risk to any human life shall be punished by a term of no more than 25 years, by fine under this title, or both.

18 U.S.C. § 36(b)(1) (emphasis added).

8. Count 24 charged that Petitioner, "in furtherance of a major drug offense, as charged in Count Two of this Indictment and incorporated fully herein, and with the intent to intimidate, harass, injure, and maim, did ***fire a weapon into a group of two or more persons***. . . . "[1] (Indictment at 11 (emphasis added).)

9. A jury convicted Petitioner on 15 of the 16 counts, including the Section 36 charge. (App. 17.) Petitioner was sentenced to 895 months' imprisonment on November 28, 2005, including 235 months on

[1] Count Two charges Petitioner with conspiracy to distribute "100 kilograms or more of a mixture and substance containing a detectable amount of marijuana, a Schedule I controlled substance; in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(B)."

the Section 36 count. (*Id.*) Petitioner appealed his conviction to the United States Court of Appeals for the Sixth Circuit. (*Id.* at 18.) The Sixth Circuit affirmed his conviction in an opinion issued on August 7, 2009. (*Id.*) Petitioner then filed a petition for rehearing *en banc*, and subsequently filed a petition for writ of certiorari to the United States Supreme Court, which was denied on February 22, 2010. (*Id.*) Neither Petitioner's trial counsel nor his appellate counsel made the argument that, given the undisputed evidence at trial, Petitioner was actually innocent of the Section 36 charge.

10. On February 15, 2011, Petitioner filed a timely motion under 28 U.S.C. § 2255 in the District Court, alleging ineffective assistance of counsel. (*Id.*)

11. On August 12, 2013, prior to any ruling by the District Court on his February 15, 2011 motion, Petitioner filed a pro se motion for leave to amend his § 2255 motion in order to raise, *inter alia*, an innocence/IAC claim as to the Section 36 charge. (App. 2-3.) Petitioner's attempted amendment argued that he was actually innocent of the Section 36 offense, because he did not fire "into a group of two or more persons" as required under Section 36.[2] (Motion for Leave to Supplement ("Amended 2255 Motion"), No. 04-cr-0036, Doc. 421, at 9-10.) Petitioner argued that the trial testimony established that he fired his gun

[2] Petitioner's amended § 2255 motion is ambiguous as to the number of shots he fired, but, based on the trial testimony, it is undisputed that he fired only twice.

at *single* individuals attempting to force entry into his residence from a *different* entry point. Accordingly, no reasonable jury could have found that Petitioner fired "into a group of two or more persons." Rather, Petitioner fired at two separate individuals, each on a *different side* of the trailer. (Trial Tr. 450:22-24, 502:4-5.)

12. On November 20, 2013, the District Court denied Petitioner's motion to amend his § 2255 motion, and also denied the motion itself. (App. 10.) The District Court did not cite *McQuiggin*, and did not evaluate the merits of the proposed innocence/IAC claim as part of its analysis of the motion to amend. (*Id.* at 12-13.) The District Court denied the motion to amend on three procedural grounds: first, that the motion to amend was untimely; second, that the proposed additional claims did not relate back; and third, that the pro se motion to amend would not be considered because Petitioner's prior counsel had not filed a notice of withdrawal with the court. (*Id.*)

13. Petitioner filed an application for a certificate of appealability as to the district court's denial of his § 2255 motion and his motion for leave to supplement with the United States Court of Appeals for the Sixth Circuit. (App. 1.) The Sixth Circuit denied Petitioner's application in an order issued on August 4, 2014. (*Id.* at 9.) As to Petitioner's motion for leave to amend, the Sixth Circuit's ruling, in its entirety, was the following:

> Finally, the district court denied Penney's motion to amend his § 2255 motion, concluding that the claims were filed approximately

> two years beyond the applicable one-year statute of limitations, and that the newly proposed claims did not relate back to his original § 2255 motion because the claims were supported by facts different from the claims presented in the original motion. *See Mayle v. Felix*, 545 U.S. 644, 650 (2005). The district court also concluded that Penney was prohibited from filing a pro se motion to amend because he was represented by counsel. Reasonable jurists would not debate the district court's ruling.

(*Id.* at 9.)

14. Neither the District Court nor the Sixth Circuit cited *McQuiggin*. Petitioner filed a petition for rehearing *en banc* with the Sixth Circuit on September 22, 2014. It was denied on December 17, 2014. (App. 62.)

15. No court has ever evaluated the merits of Petitioner's actual-innocence claim.

REASONS FOR GRANTING THE PETITION

In 2013, in *McQuiggin v. Perkins*, this Court announced an extraordinarily important procedural protection for habeas petitioners: a first petition alleging actual innocence, in conjunction with a constitutional claim (such as ineffective assistance of counsel), can no longer be denied on purely procedural grounds (such as timeliness), without any court ever examining the merits of the actual innocence

claim. 133 S. Ct. 1924, 1931 (2013). Instead, this Court held, courts reviewing innocence claims with procedural defects must evaluate the merits of the innocence claim as part of their determination whether to excuse the procedural defect (the "*McQuiggin* procedure"). *Id.*

Here, Petitioner filed a timely § 2255 motion, and then, after the one-year filing period had run, sought to amend his petition to include an actual-innocence claim. (App. 18.) The District Court never considered Petitioner's actual-innocence claim. (*Id.* at 9, 12.) In contravention of *McQuiggin*, the District Court denied the motion to amend on purely procedural grounds. And the Sixth Circuit affirmed the denial, on the same procedural grounds.

This Court's holding in *McQuiggin* could not have been clearer: actual-innocence claims must be substantively reviewed even where they have procedural defects. In such cases, the merits of the claim must be incorporated into the analysis of the procedural defects. The rule is easy to understand and easy to follow, and the District Court and the Sixth Circuit disregarded it entirely. Not only will the Sixth Circuit's decision deny future actual-innocence petitioners the substantive review to which they are entitled, but it also creates a conflict between the Sixth Circuit and the Ninth Circuit – which follows *McQuiggin* and properly engages in substantive review of untimely actual-innocence amendments. *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014).

I. Lower Courts Are Divided About Whether, After *McQuiggin*, Amendments Raising Actual-Innocence Claims Made to Timely First Motions Under § 2255 May Be Denied on Purely Procedural Grounds

A. The *McQuiggin* Procedure

In *McQuiggin*, the petitioner, Floyd Perkins, filed a first habeas petition more than 11 years after his conviction became final. *McQuiggin*, 133 S. Ct. at 1929. Perkins asserted claims of ineffective assistance of counsel and actual innocence. *Id.* The Sixth Circuit ruled that Perkins's claim of actual innocence allowed him to present his claim of ineffective assistance of counsel as if it had been timely filed. *Id.* at 1930. Upon review, this Court ruled that procedural bars, including the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), cannot prevent courts from substantively reviewing a petitioner's claim of actual innocence. *Id.* at 1930.

The *McQuiggin* rule can be put very succinctly: prisoners asserting actual-innocence/IAC claims on their first collateral attack *have a right* to have the district court consider the substantive merits of those claims. They *have a right* not to have their actual-innocence/IAC claims rejected solely on procedural grounds. If there is a procedural defect in the filing, the court must analyze that defect *in conjunction with* the merits of the innocence/IAC claim. *Id*. at 1936.

The *McQuiggin* procedure provides a vital protection for prisoners with viable actual-innocence claims who face procedural bars, and it offers an assurance that the courts may – and must – carry out their duty "to see that federal constitutional errors do not result in the incarceration of innocent persons." *Id.* at 1931 (citing *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). Under *McQuiggin*, the District Court had an obligation to evaluate the merits of Petitioner's actual-innocence claim as part of its analysis of the application of the one-year AEDPA time bar. The District Court did not do so.

It is undisputed that a prisoner filing an untimely first petition alleging actual innocence is entitled to the protection of the *McQuiggin* procedure. This Petition concerns the application of the *McQuiggin* procedure to an untimely *amendment* seeking to add an innocence/IAC claim to a *timely* petition. Is a prisoner who files a *timely* § 2255 motion, and then attempts to amend his petition to add an innocence/IAC claim after the one-year filing period has run, entitled to the protection of the *McQuiggin* procedure, just as he would be if his original petition had been untimely?

There is a split among the circuits on this question. While the Ninth Circuit recognizes and applies the *McQuiggin* procedure to untimely amendments, the Sixth Circuit declines to do so. In the case at bar, Petitioner filed an untimely motion to amend his timely § 2255 petition, in order to add an innocence/IAC claim. The District Court denied the motion to

amend on solely procedural grounds, without ever considering or evaluating the substantive merits of Petitioner's innocence/IAC claim. And the Sixth Circuit affirmed the District Court's holding and reasoning.

This Petition presents a straightforward question: may a district court refuse, on purely procedural grounds, and without ever addressing the merits of the claim, to allow a prisoner to amend a timely first § 2255 motion in order to make a claim of ineffective assistance of counsel through the "actual innocence gateway"?

The answer is no: district courts may not do so. In *McQuiggin*, this Court held squarely that district courts *may not refuse* to entertain such innocence/IAC claims on purely procedural grounds, whether those grounds are timeliness or other procedural bars. Rather, this Court held, district courts *must* consider the substantive merits of innocence/IAC claims, and must incorporate those substantive merits into its analysis of whether a petitioner falls within the "miscarriage of justice exception to AEDPA's statute of limitations." *McQuiggin*, 133 S. Ct. at 1935.

This Court was very clear: district courts must "focus[ ] on the merits of a petitioner's actual-innocence claims and tak[e] account of delay in that context, rather than treating timeliness as a threshold inquiry." *Id*. at 1936. The *mandatory* procedure under *McQuiggin* is as follows: when a district court receives an untimely innocence/IAC claim (whether

as an untimely first petition, or, as here, an untimely amendment to a timely first petition), it must evaluate the substantive merits of the innocence/IAC claim as part of its determination of whether to hear the motion despite the time bar.

McQuiggin does not hold that all untimely innocence/IAC petitioners are entitled to a full hearing on the merits; rather, they are entitled to an initial procedural ruling on timeliness that incorporates an analysis of the merits. The court must determine, as part of the timeliness analysis, whether the prisoner's innocence claim is credible. If it is, then the court must disregard all procedural bars: "a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits *notwithstanding the existence of a procedural bar to relief*." *Id*. at 1931 (emphasis added).

In this case, Petitioner timely filed a § 2255 petition. Then, after the one-year period had run, he sought to amend his petition to add an innocence/IAC claim. Specifically, he claimed that he was actually innocent of the Section 36 charge, and that but for the ineffective assistance of counsel, he would not have been convicted of that offense. (Amended 2255 Motion at 10-13.)

Under *McQuiggin*, the District Court was *obligated* to evaluate the merits of Petitioner's innocence/IAC claim as part of its statute of limitations analysis. It did not do so. Under *McQuiggin*, the District

Court was prohibited from "treating timeliness as a threshold inquiry." *Id.* at 1936. Yet that is precisely what the District Court did, and what the Sixth Circuit affirmed. Neither court even *cited McQuiggin*.

B. The Correct Approach: the Ninth Circuit

The Ninth Circuit, by contrast, straightforwardly applies *McQuiggin* to untimely amendments. In *Jones v. Taylor*, the Ninth Circuit ruled that an actual-innocence claim was properly heard on its merits, despite an untimely amendment to a writ of habeas corpus. *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014). In *Jones*, the petitioner filed a habeas petition on December 2, 2010, and then filed an amended petition almost two years later, well after the one-year AEDPA period had run. *Id.* at 1244-45.

As is the situation in the instant case, the prisoner's actual-innocence claim was not included in the original petition and was raised only in the amended petition. Nonetheless, the district court evaluated the merits of the petition and found that the petitioner "had made a sufficient showing of actual innocence on the unlawful sexual penetration charge to merit habeas relief." *Id.* at 1245.

On appeal, the Ninth Circuit endorsed the application of the *McQuiggin* procedure to the amended complaint. The court followed the holding of *McQuiggin* and evaluated the district court's finding of actual innocence on the merits. *Id.* at 1246-47.

Ultimately, the Ninth Circuit found that the petitioner did not meet the high bar for establishing an actual innocence claim, as he had not "demonstrated that he is probably innocent." *Id.* at 1248. In conflict with the Sixth Circuit, the Ninth Circuit properly followed this Court's holding in *McQuiggin* and evaluated the untimely innocence/IAC claim on its merits, in conjunction with the analysis of the procedural defect in the petition.

C. The Erroneous Approach: the Sixth Circuit

The Ninth Circuit's approach is the correct approach to *McQuiggin*, allowing amendment of timely first petitions to allow actual-innocence/IAC claims.[3] The Sixth Circuit, by contrast, ignored *McQuiggin* altogether.

In fact, Petitioner presents a *stronger* claim than did Perkins himself, because unlike in *McQuiggin*, Petitioner timely filed his first petition. At issue was the *amendment* to the petition. Petitioner filed his amendment after the expiration of the one-year AEDPA period, and the District Court refused to consider it.

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[3] At least one district court (in the Seventh Circuit) has also adopted this approach. *See also United States v. Orozco*, No. 10-7652, 2014 WL 2781838 (N.D. Ill. 2014) (evaluating the merits of the proposed innocence/IAC claim as part of the analysis of the motion to amend a § 2255 petition to add the innocence/IAC claim).

The District Court gave three reasons for refusing to consider Petitioner's amendments: first, that the amendment came after the one-year period had run; second, that the additional claims did not relate back; and third, that Petitioner could not submit any pro se filings because his prior counsel had not filed a notice of withdrawal. (App. 12-13.)

All three reasons are quintessential *procedural bars* to Petitioner's ability to present his actual-innocence claim. And the District Court relied solely on these procedural bars and never addressed the substance of Petitioner's actual innocence claim. That is error under *McQuiggin*.

The Sixth Circuit affirmed on all three grounds. (App. 9.) Despite having the benefit of *McQuiggin* – the Sixth Circuit's decision came more than a year after *McQuiggin* (which was itself a Sixth Circuit case) – the Sixth Circuit did not cite *McQuiggin*. The opinion devotes a single paragraph to Petitioner's attempted amendment, and cites only a single case, *Mayle v. Felix*, 545 U.S. 644 (2005). (App. 9.)

In *Mayle*, this Court held that "[a]n amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S. at 649. The decision was one of statutory interpretation, specifically, the interaction of the one-year limitation period in 28 U.S.C. § 2244(d)(1), and the terms "conduct, transaction, or

occurrence," in Rule 15(c)(2) of the Federal Rules of Civil Procedure. This Court explained that because Congress "enacted AEDPA to advance the finality of criminal convictions," amended habeas petitions should be read to relate back "only when the claims added by amendment arise from the same core facts as the timely filed claims." *Id*. at 657.

Mayle provides the rule for applying a particular procedural bar as applied to attempts to amend habeas petitions after the one-year filing period has expired. If *Mayle* had been this Court's last word on the AEDPA limitations period, there would be no need for this Petition. And if Petitioner's amended motion did not allege ineffective assistance of counsel through the gateway of actual innocence, there would be no need for this Petition.

But Petitioner *did* make an innocence/IAC claim: he claimed that he was actually innocent of the Section 36 charge, and that he was wrongfully convicted of that offense due to ineffective assistance of counsel. And *Mayle* is not this Court's last word on AEDPA procedural bars: *McQuiggin* is. *McQuiggin* expressly and emphatically held that no procedural bars may stand in the way of credible innocence/IAC claims, and that therefore district courts must assess the merits of innocence/IAC claims as part of the timeliness inquiry.

The District Court in this case was obligated to consider the merits of Petitioner's innocence/IAC claim as part of its timeliness inquiry. It did not do so. This

case boils down to the very simple proposition this Court articulated in *McQuiggin*: habeas petitioners claiming actual innocence have a right to be heard – even when their claims are untimely. Courts may not simply refuse to consider actual innocence claims on procedural grounds.

Here, Petitioner had a right to be heard. He does not claim in this Petition a right to *prevail*; he claims only the right to have a court consider the merits of his actual innocence claim when deciding whether to permit him to amend his petition. It is a limited claim – but it is an important claim, and it is an entitlement that this Court explicitly has given to Petitioner and all innocence/IAC petitioners. The District Court and the Sixth Circuit proceeded as if no such entitlement exists.

It is important to separate the facts of this case from the procedural issue that is the subject of this Petition. Petitioner was convicted of serious offenses, all but one of which are not at issue here. Even if he prevails in this Court and his case is remanded for resentencing, he will face a very long prison term.

But the Sixth Circuit's erroneous refusal to follow the procedure mandated in *McQuiggin* does not simply burden Petitioner. The Sixth Circuit's procedural hammer will fall equally on prisoners convicted on the strength of scientifically meritless hair analysis, subsequently-recanted witness testimony, or

exculpatory evidence suppressed by the government.[4] Whatever the claim, and however strong it may be, under the Sixth Circuit's approach, district courts in Tennessee, Kentucky, Ohio, and Michigan will simply refuse to consider it if it is made more than a year after final judgment. Those courts will treat timeliness as a threshold question and never examine the merits – precisely what this Court forbade in *McQuiggin*.

By contrast, petitioners in the western states filing identical untimely innocence/IAC motions will have the benefit of the procedural right this Court announced in *McQuiggin*. In all the states of the Ninth Circuit, district courts will follow the *McQuiggin* procedure and evaluate the merits of untimely innocence/IAC motions as part of the timeliness analysis. It is the mandate of this Court to eliminate such arbitrary regional disparities in this vital area of constitutional law.

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[4] *See*, *e.g.*, Fed. Bureau of Investigation, "FBI Testimony on Microscopic Hair Analysis Contained Errors in At Least 90 Percent of Cases in Ongoing Review," April, 20, 2015, *available at* http://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review; Dep't of Justice, Office of Professional Responsibility, "Investigation of allegations of prosecutorial misconduct in *United States v. Theodore F. Stevens*, Crim. No. 08-231 (D.D.C. 2009)," Aug. 15, 2011, available at http://www.leahy.senate.gov/imo/media/doc/052412-081511Report.pdf.

II. The Scope of This Court's Ruling in *McQuiggin* Should Be Resolved Now

A. The Question Is of Paramount National Importance

In recent decades, hundreds of wrongfully convicted prisoners have been released from custody. Almost without exception, these prisoners raised their claims of actual innocence through writs of habeas corpus or motions under § 2255.

Courts and legislatures have labored to balance society's twin interests in finality of judgments and in freeing the wrongfully convicted. This Court has been at the forefront of that effort. While Congress has enacted strict procedural limits on collateral attacks, this Court, in a series of cases culminating in *McQuiggin*, has interpreted the federal habeas statutes, 28 U.S.C. §§ 2254 and 2255, to allow for prisoners to raise innocence/IAC claims "notwithstanding the existence of a procedural bar to relief." *McQuiggin*, 133 S. Ct. at 1931; *accord Holland v. Florida*, 560 U.S. 631 (2010); *House v. Bell*, 547 U.S. 518 (2006); *Calderon v. Thompson*, 523 U.S. 538 (1998); *Schlup v. Delo*, 513 U.S. 298 (1995). This Court's solution – requiring district courts to consider the merits of innocence/IAC claims as part of their analysis of potential procedural defects – strikes a fair and reasonable balance between the interests of finality and accuracy.

This is an issue of profound national importance. It is vital that constitutional challenges to criminal

convictions be adjudicated under the same standards and procedures in all our federal courts.

B. This Case Is an Excellent Vehicle to Resolve This Issue

1. This Case Squarely Presents the Question Whether the *McQuiggin* Rule Applies to Amendments

This case is an excellent vehicle for this Court to resolve this issue. This case squarely presents a narrow procedural question on which two circuits have taken opposite positions: whether a district court must evaluate the merits of an innocence/IAC claim as part of the timeliness analysis when a § 2255 movant has filed a timely first motion and seeks to amend it after the expiration of the one-year filing period, or if procedural defects can bar substantive review of an innocence/IAC claim.

As set forth above, the Sixth Circuit, in the case at bar, held that Petitioner's motion to amend his § 2255 petition was properly denied on purely procedural grounds, without any court ever considering the merits of the innocence/IAC claim he sought to add.

By contrast, the Ninth Circuit, faced with the identical procedural posture in *Jones v. Taylor*, properly applied the *McQuiggin* procedure and evaluated the merits of the proposed innocence/IAC claim as part of its analysis of the motion to amend. 763 F.3d 1242, 1246 (9th Cir. 2014).

Accordingly, this case presents the Court with the opportunity to resolve a circuit split, clarify the law in this important area, and do justice for Petitioner.

2. Petitioner's Actual-Innocence Claim Clearly Meets the *Schlup* Threshold

This Court emphasized in *McQuiggin* that convincing actual-innocence claims – those that are strong enough to overcome AEDPA's time-bar – will be rare. *McQuiggin*, 133 S. Ct. at 1928. Such rare claims are those in which the court is convinced that no rational factfinder could have convicted the petitioner given the evidence at issue. *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 332 (1995)).

This is such a case. The officers' testimony establishes beyond cavil that Petitioner did not fire into a group of two or more persons. He fired two shots, each at a single individual. Neither Agent Gillette nor Detective Dunn was in a group of two or more persons when Petitioner discharged his weapon. Agent Gillette was by himself at a window toward the side of the house. (Trial Tr. 450:22-24.) Detective Dunn was inside the house, having entered by himself through the back door. (*Id.* at 500:9-24.)

These facts come straight from the officers' own testimony. Their testimony was clear, precise, and undisputed. *No jury could have found that Petitioner fired into a group*. Because of the ineffective assistance of his counsel, Petitioner was convicted of a crime that he absolutely, unambiguously did not

commit. This case is, in that respect, a quintessential innocence/IAC case.

And it is a quintessential innocence/IAC case despite the fact that Petitioner was also convicted of other serious crimes and is not challenging those convictions in this Petition. He is innocent of the charged Section 36 offense, and that is enough.

C. Additional Percolation Would Not Aid Development of the Issue

There are now two opposed approaches taken by the Courts of Appeals on the application of the *McQuiggin* rule to amended § 2255 petitions. Additional percolation would not aid the Court, because the question presented is black and white: May a district court *ever* deny a first-motion innocence/IAC claim on purely procedural grounds? The answer should be a straightforward "no" under *McQuiggin*.

Because the answer to the question presented should follow directly from the rationale of *McQuiggin*, further percolation would not provide any additional nuance or insight. And no additional nuance or insight is needed. If this Court meant what it said in *McQuiggin*, then it should act to correct the Sixth Circuit's misapprehension – or disregard – of its command.

III. The District Court Should Have Evaluated the Merits of Petitioner's Innocence/IAC Claim

As set forth above, the *McQuiggin* rule is clear: the District Court should have incorporated the substantive merits of Petitioner's innocence/IAC claim into its untimeliness analysis. That is what *McQuiggin* plainly requires.

The District Court's failure to follow the *McQuiggin* procedure was prejudicial to Petitioner, because his innocence/IAC claim met the *Schlup* threshold. As set forth above, the trial testimony establishes "that it is more likely than not that no reasonable juror would have convicted [him]" of the Section 36 offense but for the ineffective assistance of his counsel. *McQuiggin*, 133 S. Ct. at 1933.

The relief Petitioner seeks from this Court is very narrow. He made a simple, straightforward claim in his attempted amendment: I am innocent of the Section 36 charge, and but for the ineffective assistance of counsel, I would not have been convicted of that charge. This Court said loudly and forcefully in *McQuiggin* that he is entitled to have the district court look at that claim and evaluate it on the merits, as part of its procedural analysis.

The District Court here never evaluated the merits of his claim. It rejected it on solely procedural threshold tests – precisely what this Court forbade in *McQuiggin*. And the Sixth Circuit endorsed the District Court's defiance of *McQuiggin*'s command.

Petitioner's actual-innocence claim is not going to make the newspapers. But it is every bit as legitimate as those that do. It is true, of course, that Petitioner was convicted of other charges, and that his actual innocence claim as to Count 24 would not affect his convictions of those other charges. That is true, but irrelevant. As to Count 24, Petitioner claimed he was convicted of a crime he did not commit. He had a right, under *McQuiggin*, to have the merits of his claim evaluated as part of the District Court's timeliness analysis. But the District Court never looked at his claim, and rejected it purely on procedural grounds. That was error; Petitioner is as much entitled to the procedural protections announced by this Court in *McQuiggin* as is any other § 2255 movant.

IV. The Sixth Circuit's Approach Will Deny Petitioners Their Right to Have Their Claims of Actual Innocence Heard

The Sixth Circuit's erroneous approach threatens *all* litigants seeking to amend their § 2255 motions to add innocence/IAC claims. It is precisely the role of this Court to intervene and ensure that its decisions are respected by the Courts of Appeals and that the law is applied uniformly among the circuits.

Section 2255 motions are a critical tool for ensuring that wrongfully convicted prisoners have the opportunity to have their claims heard. In recent years, hundreds of wrongfully convicted prisoners have been released upon a court's re-examination of

their cases, often as a result of a successful § 2255 motion. And some of the most significant of these cases have come from states in the Sixth Circuit.

In Ohio, for example, Ricky Jackson was recently exonerated after serving 39 years in prison for a crime he did not commit. Mr. Jackson was convicted on the basis of false testimony by a child who was intimidated into testifying against Mr. Jackson by detectives.[5] Mr. Jackson's actual-innocence evidence was compelling – but under the Sixth Circuit's approach in the instant case, if he had presented that evidence in an untimely amendment to a § 2255 motion, no judge would ever have looked at it.

And in Michigan, Julie Baumer was exonerated after being convicted of first-degree child abuse, a crime she did not commit. Her defense attorney failed to present expert medical testimony showing that the child was suffering from an unrelated medical condition, not the effects of Shaken Baby Syndrome. *People v. Baumer*, No. 2004-002096-FH (Macomb Cir. Ct. Sept. 3, 2009). Ms. Baumer's actual-innocence evidence was compelling – but under the Sixth Circuit's approach in the instant case, if she had presented that evidence in an untimely amendment to a § 2255 motion, no judge would ever have looked at it.

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[5] University of Michigan Law School, National Registry of Exonerations, "Ricky Jackson," https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4553.

As these examples show, this Petition is about much more than Terry Penney. If the Sixth Circuit's refusal to apply *McQuiggin* to amendments to § 2255 motions is not corrected, there is a grave risk that the actual-innocence claims of many more wrongfully convicted individuals will remain unheard.

V. This Case Is Appropriate for a "Grant, Vacate and Remand" Order

The error of the Sixth Circuit's approach is clear: there is no colorable reason for excusing untimely first petitions raising innocence/IAC claims, but not untimely amendments raising the same claims, when made to timely first petitions. The *McQuiggin* rule is clear and emphatic and should plainly apply in both contexts. While Petitioner would welcome the opportunity to develop his arguments further in merits briefing, he encourages the Court also to consider the remedy of granting the Petition, vacating the orders below and remanding the case for further proceedings consistent with *McQuiggin*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 15, 2015

No. 13-6621

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRY EUGENE PENNEY, aka Terry Penny, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	)))))))	ORDER (Filed Aug. 4, 2014)

Terry Eugene Penney, a federal prisoner represented by counsel, seeks to appeal a district court judgment denying his motion to vacate sentence under 28 U.S.C. § 2255 and his motion to amend the § 2255 motion. Penney has filed an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b).

In 2005, a jury convicted Penney of conspiring to distribute five kilograms or more of cocaine hydrochloride, in violation of 21 U.S.C. §§ 846 and 841; conspiring to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 846 and 841; being a felon in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g); possessing marijuana with intent to distribute, in violation of 21 U.S.C. § 841; possessing firearms in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c); knowingly possessing a firearm with an obliterated

serial number, in violation of 18 U.S.C. § 922(k); possessing cocaine hydrochloride with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841; attempting to possess marijuana and cocaine hydrochloride with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841; attempting to kill an officer of the United States, in violation of 18 U.S.C. § 1114; discharging a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii); and firing a weapon in furtherance of a major drug offense, in violation of 18 U.S.C. § 36(b)(1). The district court sentenced Penney to a total of 895 months of imprisonment. This court affirmed Penny's convictions and sentence, concluding, via a split decision, that the district court properly denied Penny's pretrial motion to suppress evidence seized during searches of Penny's residence. *United States v. Penney,* 576 F.3d 297 (6th Cir. 2009).

In February 2011, Penny's counsel filed a § 2255 motion, arguing that trial counsel was ineffective in failing to: (1) submit a properly supported motion to suppress; (2) properly challenge whether his ex-girlfriend, Devota Bowman, actually consented to a search of his residence that was executed on August 19, 2003; (3) adequately develop the record and challenge the district court's denial of his motion to suppress on direct appeal; (4) properly challenge the § 922(g) charges against Penney; and (5) present mitigating evidence at sentencing or to argue for a below-guidelines sentence. In August 2013, Penney filed a

pro se motion to amend his § 2255 motion, seeking to assert nine additional grounds for relief.

The district court denied the § 2255 motion, concluding that Penney failed to establish that counsel's performance was deficient and that the performance prejudiced his defense because Bowman's grand jury testimony would not have altered the outcome of the suppression hearing, the decision not to challenge whether Bowman actually consented to the search was not improper in light of the evidence that she orally consented to the search and signed a consent form, and because the Sixth Circuit considered the relevant evidence concerning Penny's and Bowman's off-again/on-again relationship and whether she had signed a consent form authorizing the search of Penny's residence. The district court also concluded that counsel did not prejudice Penny's defense with respect to the § 922(g) offenses because Penny's prior Tennessee conviction was punishable by a term of imprisonment exceeding one year, even though he was sentenced to less than a year of imprisonment. Finally, the district court concluded that, while counsel's performance during sentencing was questionable, Penney did not establish that counsel's failure to argue mitigation or for a below-guidelines sentence did not prejudice Penney. The district court reasoned that Penney did not identify any evidence that would have warranted a lesser sentence in light of the seriousness of his offense, which included firing a weapon at government officials despite testimony that they properly identified themselves as government officials.

The district court also denied Penney's pro se motion to amend the § 2255 motion, concluding that the motion to amend was untimely and that he was prohibited from filing a pro se motion because he was represented by counsel.

Thereafter, Penney filed a pro se motion for declaratory judgment and to alter or amend the order denying his motion to amend the § 2255 motion. Counsel filed a motion seeking to adopt Penny's pro se motion. The district court denied Penney's pro se motion to alter or amend as moot, granted counsel's request to adopt Penny's pro se motion in part and denied it in part. The district court declined to consider the newly proposed claims set forth in Penney's motion to amend his § 2255 motion, but amended its previous judgment denying the § 2255 motion to note that Penny's motion to amend was denied as untimely *and* because he was represented by counsel.

Penney seeks a COA with respect to the claims that counsel was ineffective during the proceedings on his motion to suppress, for failing to argue on appeal that Bowman did not actually consent to the search of his residence, and failing to raise the proper argument to challenge his § 922(g) offenses. Penney also argues that the district court erred when it denied his motion to amend his § 2255 motion.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003). When based on the merits,

"[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). When the district court's denial is based on a procedural ruling, the petitioner must demonstrate that jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.* Penney has not met this burden.

Penney has failed to make a substantial showing that counsel was ineffective or that his performance prejudiced his defense. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). Penney first argues that counsel was ineffective in failing to present Bowman's grand jury testimony to the district court in support of his motion to suppress and that counsel should have challenged whether Bowman actually consented to the search, as opposed to merely challenging the legality of her consent. He maintains that Bowman's grand jury testimony was relevant to the issue of whether she had actual or apparent authority to consent to the search. He notes that Bowman testified before the grand jury that she only periodically lived with Penney, that she did not remember consenting to the search, and that she believed the document she signed provided only that the police had not "kicked in" Penney's door. The district court concluded that Bowman's grand jury testimony would not have altered the outcome of the suppression proceedings.

The district court noted that Bowman had provided similar evidence via an affidavit presented during the suppression hearings, but the magistrate judge had properly determined that Bowman was not credible. The district court concluded that Bowman's failure to remember consenting to the search did not establish that she had *not* given such consent, especially in light of the testimony from police officers that she had orally consented to the search and actually signed a consent form that was submitted into evidence. Under these circumstances, the district court concluded that counsel was not ineffective in failing to present Bowman's grand jury testimony to the district court or by failing to challenge whether Bowman actually consented to the search. Reasonable jurists would not debate the district court's ruling on these issues.

The district court concluded that counsel was not ineffective on direct appeal in failing to present this court with an adequate record to review the suppression issue despite Penny's assertion that counsel failed to emphasize: (a) that Bowman's affidavit denied providing consent for the search; (b) the nature of Penney's and Bowman's relationship; and (c) that the officers were aware that Penney had asked that Bowman be removed from his residence prior to the search. Penney also argued that counsel should have submitted a police report in which Bowman sought to press charges against Penney. The district court concluded that counsel was not ineffective during the appellate proceedings because counsel filed an appeal

brief that identified the pertinent facts relating to the suppression issue, and because the record before this court established the off-again/on-again nature of Penny's and Bowman's relationship, including evidence that Bowman had moved back into Penney's residence a day or two before the August 19, 2003, search. Reasonable jurists would not debate the district court's ruling on this issue.

The district court next concluded that counsel was not ineffective in failing to present the "strongest" argument when challenging Penny's § 922(g) charges. He maintains that counsel should have argued that Penny's conviction for attempting to commit a felony under Tennessee Code Annotated § 39-603 did not constitute a predicate conviction for purposes of § 922(g) because § 39-603 provides for alternative maximum sentences, and Penney was sentenced pursuant to the provision providing for imprisonment in the county workhouse or jail for not more than one year. The district court concluded that Penney's claim lacked merit because his conviction for violating § 39-603 is also punishable by a term of imprisonment not to exceed five years, *see United States v. Burchard,* No. 94-6153, 1995 WL 385109, at *3 (6th Cir. June 27, 1995) (table), and the fact that Penney was sentenced to 11 months and 29 days of imprisonment does not mean that his state conviction does not qualify under § 922(g). Reasonable jurists would not debate the district court's ruling on this issue.

Finally, the district court concluded that counsel's performance during the sentencing proceedings did

not prejudice him. Penney argues that, in light of the lengthy sentence that he faced, counsel was ineffective in presenting only two objections to the presentence report and failing to make a statement on his behalf during the sentencing hearing. He argues that counsel should have: (a) presented mitigating evidence to support a lower sentence; (b) argued that the § 924(c) charges violated the Double Jeopardy Clause and/or that the charges should have been merged, because the bulk of Penny's sentence was predicated on the § 924(c) charges; and (c) pointed out factual inaccuracies in the presentence report. The district court observed that, in light of the sentence Penney faced, counsel arguably should have made a statement on Penny's behalf and argued that the applicable guidelines range was greater than necessary to achieve the statutory sentencing purposes. However, the district court rejected Penny's arguments, concluding that counsel's failure to act as desired did not prejudice Penney in light of the extent of his criminal activity and the fact that he fired a weapon during the offense, seriously injuring three law enforcement officers. The district court noted that it was aware of the various issues that Penney argues counsel should have emphasized during the sentencing hearing, and determined that the issues did not warrant a lower sentence. The district court also noted that, although counsel did not present character letters on Penny's behalf, the letters that Penney submitted contained no information that would have warranted a lower sentence. Finally, the district court noted that this court rejected Penny's claim that the § 924(c) counts

should have been merged. Under these circumstances, reasonable jurists would not debate the district court's ruling that counsel's performance during the sentencing proceedings did not prejudice Penney.

Finally, the district court denied Penny's motion to amend his § 2255 motion, concluding that the claims were filed approximately two years beyond the applicable one-year statute of limitations, and that the newly proposed claims did not relate back to his original § 2255 motion because the claims were supported by facts different from the claims presented in the original motion. *See Mayle v. Felix,* 545 U.S. 644, 650 (2005). The district court also concluded that Penney was prohibited from filing a pro se motion to amend because he was represented by counsel. Reasonable jurists would not debate the district court's ruling.

Accordingly, Penny's application for a COA is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

TERRY PENNEY	)	
	)	
v.	)	1:11-cv-35\1:04-cr-36
	)	*Edgar*
UNITED STATES OF AMERICA	)	
	)	

JUDGMENT ORDER

(Filed Nov. 20, 2013)

For the reasons expressed in the memorandum opinion filed herewith, it is hereby **ORDERED** that Terry Penny's ("Penney") motion filed pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence is **DENIED** (Criminal Court File No. 407). In addition, because Penney is still represented by counsel and an order of substitution has not been made, the motion to amend will be **DENIED** (Criminal Court File No. 421).

Additionally, the Court has reviewed this case pursuant to Rule 24 of the Federal rules of Appellate Procedure and hereby **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, any application by Penney for leave to proceed *in forma pauperis* on appeal is **DENIED**. Fed. R. App. P. 24.

Should Penney give timely notice of an appeal from this order, such notice will be treated as an application for a certificate of appealability, which is

hereby **DENIED** since he has failed to make a substantial showing of the denial of a constitutional right or that jurists of reason could debate the Court's resolution of his § 2255 motion. *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000) ("To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*[*v. Estelle,* 463 U.S. 880, 894 (1983)] includes showing 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.'" (citation omitted)); 28 U.S.C. § 2253(c)(2); Rule 22(b) of the Federal Rules of Appellate Procedure.

The Clerk of Court **SHALL** close the record in this case.

SO ORDERED.

ENTER this the 20th November, 2013.

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES
DISTRICT JUDGE

ENTERED AS A JUDGMENT
s/ Debbie Poplin
CLERK OF COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

TERRY PENNEY	)	
	)	
v.	)	1:11-cv-35\1:04-cr-36
	)	*Edgar*
UNITED STATES OF AMERICA	)	
	)	

MEMORANDUM

(Filed Nov. 20, 2013)

Terry Penney ("Penney"), by and through counsel, Attorneys Gerald H. Summers and Marya L. Schalk, filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Criminal Court File No 407).[1] Penney contends he was denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution.

Plaintiff subsequently filed an untimely *pro se* motion to amend his § 2255 motion more than two years after the expiration of the applicable one year statute of limitation for filing such a motion (Criminal Court File No. 421). Local Rule 83.4 (c) provides that "[w]henever a party has appeared by attorney, that party may not thereafter appear or act in his or her own behalf in the action or proceeding, unless an order of substitution shall first have been made by

[1] Each document will be identified by the Court File Number assigned to it in the underlying criminal case.

the Court, after notice by the party to the attorney and to the opposing party." Because Penney is still represented by counsel and an order of substitution has not been made, the motion to amend will be **DENIED** (Criminal Court File No. 421).

The § 2255 motion, together with the files and record in this case, conclusively show Penney is entitled to no relief under 28 U.S.C. § 2255. For the reasons which follow, the Court has determined an evidentiary hearing is not necessary and concludes Penney's § 2255 motion lacks merit and will be **DENIED** (Criminal Court File No. 407).

I. STANDARD OF REVIEW

A sentence in a criminal case must be vacated if the Court makes a finding "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, . . . " 28 U.S.C. § 2255(a). Thus, "[a] motion brought under § 2255 must allege one of three bases as a threshold standard: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." *Weinberger v. United States,* 268 F.3d 346, 351 (6th Cir. 2001), *cert. denied,* 535 U.S. 967 (2002).

A motion filed pursuant to 28 U.S.C. § 2255 must consist of something more than legal conclusions unsupported by factual allegations. *United States v. Johnson,* 940 F.Supp. 167, 170 (W.D. Tenn. 1996). To warrant relief under 28 U.S.C. § 2255 because of constitutional error, the error must be one of constitutional magnitude which had a substantial and injurious effect or influence on the proceedings. *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) (citation omitted); *Clemmons v. Sowders,* 34 F.3d 352 (6th Cir. 1994). In order to prevail on a § 2255 motion alleging non-constitutional error, "a defendant must establish either a fundamental defect in the criminal proceedings which inherently resulted in a complete miscarriage of justice, or an error so egregious that it amounts to a violation of due process." *United States v. Goddard, Slip Copy,* 2013 WL 5410939, *5 (6th Cir. Sept. 26, 2013).

Under Rule 8 of the Rules Governing Section 2255 Proceedings in the United States District Courts, the Court is to determine after a review of the answer and the record whether an evidentiary hearing is required. If no hearing is required, the district judge is to dispose of the case as justice dictates. The Court finds it is not necessary to hold an evidentiary hearing.

II. PROCEDURAL BACKGROUND

A second superseding thirty-seven count indictment was filed on December 15, 2004, charging

Penney in sixteen counts (Criminal Court File No. 64). Count One charges a conspiracy beginning in January of 1998 and continuing until approximately April 2004, between Penney and his co-defendants, to distribute five (5) kilograms or more of a mixture and substance containing a detectable amount of cocaine hydrochloride in violation of Title 21 U.S.C. §§ 846 and 841(b)(1)(A). Count Two charges, beginning approximately January of 1998 and continuing to about January 2004, Penney and some of his co-defendants conspired to distribute 100 kilograms or more of a mixture and substance containing a detectable amount of marijuana in violation of Title 21 U.S.C. §§ 846 and 841(b)(1)(B).

Count Four charges Penney with having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, possessing various firearms and ammunition, in violation of 18 U.S.C. § 922(g)(1). Count Five charges Penney with possessing with the intent to distribute marijuana on August 19, 2003, in violation of 21 U.S.C. §841(a)(1) and (b)(1)(D). Count Six charges Penney with possessing firearms in furtherance of a drug trafficking in violation of 18 U.S.C. § 924(c) offense on that same date. Count Seven charges that on the same date Penney knowingly possessed a stolen firearm, which previously had been shipped in interstate commerce, knowing and having reasonable cause to believe the firearm was stolen, in violation of 18 U.S.C. § 922(j). Count Eight charges Penney with knowingly possessing a firearm with the manufacturer's serial

number removed, obliterated, and altered, that previously had been shipped in interstate commerce, in violation of 18 U.S.C. § 922(k).

Count Ten charges that from on or about October 7, 2003, until October 8, 2003, Penney and two of his co-defendants attempted to violate 21 U.S.C. § 841(a)(1), that is, possessing with the intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine hydrochloride, in violation of 21 U.S.C. § 846 and 841(b)(1)(A). Cou[n]t Eleven charges Penney and two of his co-defendants with attempting to violate 21 U.S.C. § 841(a)(1) when they possessed, with intent to distribute, marijuana in violation of 21 U.S.C. § 846 and 841(b)(1)(D). Count Twelve charges that on or about October 14, 2003, until on or about October 15, 2003, Penney and two of his co-defendants attempted to violate 21 U.S.C. § 841(a)(1) when they possessed, with the intent to distribute, 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine hydrochloride in violation of 21 U.S.C. §§ 846 and 841 (b)(1)(A).

Count Twenty charges Penney with attempt to kill Special Agent Paris Gillette of the Bureau of Alcohol, Tobacco, Firearms, and Explosives on January 13, 2004, in violation of 18 U.S.C. § 1114. Count Twenty-One charges Penney with knowingly using and discharging a firearm during in relation to the crime of violence in Count Twenty in violation of 18 U.S.C. § 924(c)(1)(A)(iii). Count Twenty-Two charges that on January 13, 2004, Penney and a co-defendant

attempted to violate 21 U.S.C. § 841(a)(1), that is possessing with intent to distribute marijuana in violation of 21 U.S.C. §§ 846 and 841(b)(1)(D). Count Twenty-Three charges that on January 13, 2004, Penney possessed a firearm in furtherance of the drug trafficking offense charged in Count[ ] Twenty-Two in violation of 18 U.S.C. § 924(c). Count Twenty-Four charges that on January 13, 2004, Penney fired a weapon in furtherance of a major drug offense in violation of 18 U.S.C. § 36(b)(1). Count Twenty-Five charges that on January 13, 2004, Penney previously having been convicted of a crime punishable by imprisonment for a term exceeding one year, possessed an assortment of firearms and ammunition in violation of 18 U.S.C. § 922(g)(1) (Criminal Court File No. 64).

Following a jury trial, the jury returned a verdict of guilt on all Counts except Court Seven of the Indictment (Criminal Court File No. 201). The Court sentenced Penney to 895 months (i.e., 235 months on each of Counts One, Two, Ten and Twelve; 120 months on each of Counts Four and Twenty-Five; 60 months on each of Counts Five, Eight, Eleven, and Twenty-Two; and 235 months on each of Counts Twenty and Twenty-four, all to run concurrently. And, 60 months on Count Six and 300 months on each of Counts Twenty-One and Twenty-Three, to run consecutively to each other and all other counts) in prison. The Court also sentenced Penney to 5 years supervised release and imposed a $25,000.00 fine and

$1,500.00 special assessment (Criminal Court File No. 298).

On August 7, 2009, the Court of Appeals for the Sixth Circuit affirmed Penney's convictions and sentences (Criminal Court File No. 389). The Supreme Court of the United States denied certiorari on February 22, 2010 (Criminal Court File No. 400). Penney, through counsel, timely filed the instant § 2255 motion (Criminal Court File No. 407).

III. FACTUAL BACKGROUND

The facts underlying Penney's offense conduct are taken from the Court of Appeals for the Sixth Circuit opinion affirming his conviction and sentences (Criminal Court File No. 389):

> Terry Eugene Penney lived at 10609 Dayton Pike, in Soddy-Daisy, Tennessee, less than three miles away from the Soddy-Daisy Police Department. Penney raised roosters and ran a bar called Penney's Place, both familial activities that Penney has carried on. For about six years, Penney was in a tempestuous relationship with Devota Bowman, during which Bowman lived with Penney "off and on." Soddy-Daisy police officers were no strangers to Penney's residence, where they were called on the "numerous occasions" when the relationship between Penney and Bowman turned violent. The last of such visits took place on August 2, 2003, when, according to the police report, Penney had

"pushed [Bowman] out," and she had left the residence. By August 18, 2003, Bowman had again moved back in with Penney.

On the morning of August 19, 2003, following another quarrel with Penney, a barefoot Bowman hitch-hiked to the Soddy-Daisy police station to file a complaint for assault against Penney. While Bowman was at the station, Penney arrived and demanded that police remove Bowman from his residence. The police arrested Penney for assault and transported him to the Hamilton County Jail. As the police officers worked on Bowman's report, she offered information about narcotics in Penney's house. Detective Mike Sneed requested her consent to search the residence; Bowman agreed and signed a consent form.

Soddy-Daisy officers then accompanied Bowman to the Dayton Pike residence. Bowman led the officers, including Sneed, to the front door, which was locked. Because she did not have a key, Bowman went around to the back door, which she opened without a key. Sneed later learned that only a special "trick" opened the back door. Bowman led the officers around the house, pointing to various items of contraband and picking up her own clothing and personal items as they walked. Officers uncovered numerous guns, cash, scales, and narcotics, removing some of these items from unlabeled, unlocked containers. Police officers then took their search outside the house, discovering a .22-caliber rifle in a

pick-up truck and a shotgun in the chicken house.

The next day, Penney, having been released, went to the Soddy-Daisy police station to inquire about his guns. Sneed explained that the guns were confiscated as a result of a search, to which Bowman consented. Penney informed the police that Bowman did not live with him and had no authority to consent to the search.

Following the search on August 19, 2003, the Soddy-Daisy Police and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") opened an investigation of Penney. During the course of the investigation, police recorded several conversations between Penney and Leonard (a.k.a. Sonny) Stewart, a confidential informant ("CI"). A conversation recorded four months later, on January 3, 2004, revealed that the CI would travel to California to pick up approximately 200 pounds of marijuana, for which Penney would provide two buyers, "Midget" and "Cotton" (a.k.a. William North). On January 12, 2004, in a recorded phone conversation, the CI told Penney that he had returned from his trip and instructed Penney to arrange a meeting with Cotton at Penney's Dayton Pike residence the next day at noon.

Prompted by this conversation, Detective Sneed obtained an anticipatory search warrant for Penney's residence, business, vehicles, and person. The warrant was

executable only after Penney met with the CI "to examine and attempt to purchase the narcotics by obtaining funds or promising to obtain funds in the near future in order to complete the transaction." On January 13, 2004, at approximately 12:20 pm, the CI went to Penney's residence, where he found Penney alone without Cotton. In the course of a recorded conversation between the CI and Penney, Cotton telephoned Penney, indicating that he was on his way. The CI left, and made at least three recorded phone calls to Penney to determine whether Cotton had arrived. When Penney finally told the CI to return to the residence, the CI arrived, wired, at approximately 6:15 pm. The CI went inside the residence, met Cotton and Penney, and told Cotton he wanted to see the money. Cotton agreed, stating that he had $35,000 for fifty pounds of marijuana, at $700 per pound; Penney was to receive $100 per pound as the middle-man. Penney remained inside, as the CI and Cotton stepped outside. Cotton showed the CI the money inside Cotton's vehicle. The CI stated that he could see the money, a predetermined statement to indicate to the police that they should execute the warrant.

Soddy-Daisy police, Hamilton County Sheriff's Department, and ATF officers moved to execute the search warrant. All of the officers were wearing dark bulletproof vests with appropriate official insignia on front and back, identifying them as law enforcement. Some of the officers (the "entry team") knocked on

the front door, yelling "Sheriff's Department! Search warrant! Get on the ground!" Other officers, including Sneed, Hamilton County Detective Marty Dunn, and ATF Special Agent Paris Gillette, circled around to the back of the residence, where the vehicle with the money was parked. Sneed testified that as he approached, he saw Cotton and the CI being taken into custody by other officers, and heard activity inside the residence. As Sneed went toward the residence, he heard gunshots. When Sneed approached the back porch, Detective Dunn, who was standing at the back door, told Sneed that Penney had shot him. Penney yelled that he wanted to see a badge, and Dunn threw his badge through the open back door. Sneed also called out to Penney identifying himself, and Penney recognized his voice. Sneed entered the residence with his gun drawn and saw Penney holding a shotgun. Sneed ordered Penney to put down the gun several times, and Penney eventually complied and surrendered the weapon. Detective Dunn and another Hamilton County officer, Mark King, then placed Penney in handcuffs. As a result of the operation, Agent Gillette sustained a serious head wound; Dunn and King were also injured.

The subsequent search turned up $35,000 in Cotton's truck and five weapons inside Penney's residence. No narcotics were found inside Penney's residence.

United States v. Penney, 576 F.3d 297, 301-303 (6th Cir. 2009), *cert. denied,* 559 U.S. 940 (2010).

IV. ANALYSIS – INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Penney asserts his trial counsel rendered ineffective assistance at trial and on appeal in four different instances (with several subclaims) each of which the Court will analyze separately after discussing the law applicable to ineffective assistance of counsel claims.

A. Applicable Law

The Supreme Court established the criteria for determining whether a Sixth Amendment claim of ineffective assistance of counsel is meritorious in *Strickland v. Washington,* 466 U.S. 668 (1984). The *Strickland* test requires that a defendant demonstrate two essential elements: (1) counsel's performance was deficient, i.e., counsel was not functioning as counsel guaranteed the defendant by the Sixth Amendment; and (2) counsel's deficient performance prejudiced the defense, i.e., deprived the defendant of a fair trial rendering the outcome of the trial unreliable. *Id.* at 687-88; *McQueen v. Scroggy*, 99 F.3d 1302, 1310-11 (6th Cir. 1996); *Sims v. Livesay*, 970 F.2d 1575, 1579-81 (6th Cir. 1992).

In order to demonstrate deficient performance, it must be shown that counsel's representation fell "below an objective standard of reasonableness" in

light of the "prevailing professional norms." *Strickland,* 466 U.S. at 686-88. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *See also West v. Seabold,* 73 F.3d 81, 84 (6th Cir.), *cert. denied,* 518 U.S. 1027 (1996) (internal punctuation and citations omitted). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the [ultimate] judgment." *West v. Seabold,* 73 F.3d at 84.

A reviewing court cannot indulge in hindsight but must instead evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors. *Strickland,* 466 U.S. at 690; *McQueen,* 99 F.3d at 1311. Trial counsel's tactical decisions are particularly difficult to attack. *McQueen,* 99 F.3d at 1311; *O'Hara v. Wigginton,* 24 F.3d 823, 828 (6th Cir. 1994). A defendant's challenge to such decisions must overcome a presumption that the challenged actions might be considered sound trial strategy. *McQueen,* 99 F.3d at 1311; *O'Hara,* 24 F.3d at 828. "[R]eviewing court[s] must remember that 'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Wong v. Money,* 142 F.3d 313, 319 (6th Cir. 1998) (quoting *Strickland,* 466 U.S. at 690). A court must make an independent judicial evaluation of counsel's performance and

determine whether counsel acted reasonably under all the circumstances. *McQueen,* 99 F.3d at 1311; *O'Hara,* 24 F.3d at 828; *Ward v. United States,* 995 F.2d 1317, 1321-22 (6th Cir. 1993); *Sims v. Livesay,* 970 F.2d 1575, 1580-81 (6th Cir. 1992).

To establish the prejudice prong, a petitioner must show that "counsel's conduct so undermined [t]he proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686. The Supreme Court has reiterated the standard of prejudice in *Wiggins v. Smith,* 539 U.S. 510 (2003):

> [T]o establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Id. at 534 (quoting *Strickland v. Washington*, 466 U.S. at 694).

When applying these standards, the Court is cognizant of the fact that there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. "Reviewing courts focus on whether counsel's errors have undermined the reliability of and confidence that the trial was fair and just." *Austin v. Bell,* 126 F.3d 843, 847 (6th Cir. 1997) (citing *Strickland,* 466 U.S. at 687; *United States v.*

Cronic, 466 U.S. 648, 658, (1984), *cert. denied,* 523 U.S. 1088 (1998); *McQueen* [*v. Scroggy*], 99 F.3d [1302,] 1310-11 [6th Cir. 1996]). In addition, the Court is mindful that "the Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance . . . " *Burt v. Titlow,* ___ S. Ct. ___, 2013 WL 5904117 (U.S. Nov. 5, 2013).

B. Ineffective Assistance of Counsel Claims

Penney challenges counsel's assistance in three major respects: (1) in relation to the motion to suppress – (a) counsel's alleged failure to present relevant grand jury testimony of his girlfriend to district court; (b) counsel's alleged failure to raise the factual issue of whether his girlfriend gave consent for the search of his house; (c) during appeal counsel's alleged failure to provide sufficient facts, arguments, and citation to the record regarding the August 29, 2003, search of his residence to permit meaningful appellate review; (2) in relation to challenging the § 922 Counts – alleges trial counsel made the wrong argument challenging the 18 U.S.C. § 922(g) charges; and (3) during sentencing – alleges counsel ineffectively failed to speak on Penney's behalf, present any mitigating evidence, and argue his sentence was greater than necessary to achieve the purposes of sentencing (Criminal Court File Nos. 1 & 2).

1. *Motion to Suppress*

Penney claims trial counsel made three significant errors, in relation to the suppression issue, rendering their assistance ineffective and prejudicial. First, Penney contends counsel failed to introduce relevant grand jury testimony of his girlfriend, Devota Bowman ("Ms. Bowman"), which he claims contains exculpatory and favorable evidence. Second, Penney challenges trial counsel's failure to raise the issue of whether she actually even gave consent. In his third and final claim regarding the motion to suppress, Penney claims that due to counsel's ineffectiveness on appeal, the Sixth Circuit was prevented from meaningfully reviewing the search and consent issues involved in the case (Criminal Court File No. 407).

a. Grand Jury Testimony

Penney argues trial counsel was ineffective for failing to present the grand jury testimony of Ms. Bowman to the district court. Penney maintains this testimony was directly relevant to the issues of apparent and actual authority that were raised by trial counsel and to the issue of consent, which trial counsel failed to raise. Penney contends the grand jury testimony bolstered his argument and corroborated his and Attorney Roddy's testimony that Ms. Bowman did not have apparent or actual authority to consent (Criminal Court File No. 408).

The government maintains the Jencks Act[2] specifically prohibited trial counsel from requesting or obtaining the transcript of Ms. Bowman's grand jury testimony as the Jencks Act only applies to government witnesses and only during the trial phase. According to the government, because Ms. Bowman was not a government witness and was not testifying at trial, counsel had no legal basis to request, much less obtain and present her grand jury transcript during the suppression hearing (Criminal Court File No. 413).

Penney counters that the government's reasoning is flawed. Penney argues the Jencks Act is not applicable in this situation and therefore, pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963), the grand jury transcript should have been turned over to trial counsel upon their request (Criminal Court File No. 414).

The Supreme Court has consistently "recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings[,]" *Douglas*[ ] *Oil Co. Of Ca*[ ]*lifornia v. Petrol Stops Northwest,* 441 U.S. 211, 218 (1979). Nevertheless, Rule 6(E) of the Federal Rules of Criminal Procedure provides a court may authorize disclosure of a grand-jury matter under certain limited circumstances, only

[2] The Jencks Act does not require disclosure of government witness statements until the witness has testified on direct examination during trial.

two of which are arguably applicable here: "(i) preliminarily . . . in connection with a judicial proceeding[,]" or (ii) "at the request of a defendant who shows a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury[.]" Rule 6 (E) (i) and (ii). A disclosure of testimony before the Grand Jury may properly be obtained only upon a showing that "a particularized need for disclosure outweigh[s] the interest in continued grand jury secrecy." *Douglas Oil Co. Of California v. Petrol Stops Northwest,* 441 U.S. at 223.

Here, although trial counsel did not have the transcript during the second day of the suppression hearing (Criminal Court File No. 364, pp. 12-13 (suppression hearing transcript), Penney states counsel received a copy of the grand jury testimony prior to trial. Penney explains he located a copy of Ms. Bowman's grand jury testimony in the files of trial counsel (Criminal Court File No. 408, p. 6 (Memorandum Supporting § 2255 motion). Penney argues if counsel had this grand jury testimony prior to the Report and Recommendation being filed in this case, he should have submitted it to the court.

The issue before the Court is whether Penney has overcome the strong presumption that trial counsel's decision not to present the grand jury testimony was sound strategy. *Strickland,* 466 U.S. at 690-91. The burden is on Penney to demonstrate counsel's performance was constitutionally deficient, and that the deficient performance prejudiced the defense by depriving him of a fair trial with a reliable

result. *Strickland v. Washington,* 466 U.S. 687. Penney has not demonstrated trial counsel's strategic decision not to present the grand jury testimony was unreasonable. *Goldsby v. United States,* 152 Fed.Appx. 431, 435 (6th Cir. Oct. 12, 2005) (unpublished table decision), *available in* 2005 WL 2572362.

Notably, Penney only submitted a few select pages of Ms. Bowman's February 11, 2004, grand jury testimony, none of which convince the Court that trial counsel did not act reasonably under all the circumstances or that there is a reasonable probability that, but for trial counsel's decision not to introduce the grand jury testimony, the result of the proceeding would have been different (Criminal Court File No. 407-1). For the reasons explained below, the grand jury testimony does not undermine the Court's confidence in the outcome of the suppression hearing.

Ms. Bowman testified she had a relationship with Penney for the previous six and a half years. At times she resided with him and then she would return to her home. Ms. Bowman testified she stayed with Penney from time to time the previous summer, stayed there "a while in September and October[,]" and from New Year's Eve until January 11th or 12th, 2004. Ms. Bowman was not at Penney's residence on January 13, 2004, when the anticipatory search warrant was executed (Criminal Court File No. 407-1, pp. 3-5).

Ms. Bowman testified she did not remember Officer Sneed asking her for consent to search the

house (Criminal Court File No. 407-1, p. 6). When asked what her relationship with Penney was at the time of her testimony, she responded:

> I have a lot of feelings for him, especially when he did change as far as personally toward me. But then again it was very short lived. I don't know that it would have continued. I do talk to him, try to keep his spirits up because he knows what he has done. And I guess I give them more attention and more thought than really I should.

(Criminal Court File No. 407-1, p. 7). Ms. Bowman further testified she was not his girlfriend anymore because "[i]t's kind of hard to be." (Criminal Court File No. 407-1, p. 7).

When Ms. Bowman was asked whether she objected to or ask the officers not to come inside the house after she signed "that piece of paper," she explained:

> No, actually because I had no – I don't know. I was just really upset, and he told me that I was just signing a statement that they did not kick the door in because they watched me just – I mean you just barely had to kick it and push on it to get it to come open. And, you know, I just felt like they were just saying, well, we did not do it.

(Criminal Court File No. 407-1, p. 8). Ms. Bowman further testified that she only had clothes in a little bag because she did not stay there "constantly." The officers, however, "kept searching the house for mail

that had [her] name on it. There wasn't any. They kept looking in his closets for my clothes. And all I had was a change of clothes." (Criminal Court File No. 407-1, p. 8).

Ms. Bowman's testimony in front of the Grand Jury is vague and considering her relationship with Penney, the evidence in the record, and the testimony of several law enforcement officers involved in the search, it does not undermine the Court's confidence in the outcome of Penney's criminal proceedings. Undoubtedly, the Magistrate Judge would have given little weight, if any, to her grand jury testimony considering he gave no credence to Ms. Bowman's August 28, 2003, affidavit wherein she averred that "she was not 'living' or 'staying' at Penney's house on August 19, 2003, and that she has only one residence – HC 71, Box 104, Graysville, TN. She did not give the Soddy Daisy Police or any one else permission to search Penney's residence on August 19, 2003, and she went to Penney's residence with police on that date to obtain her personal items which were in a bag sitting next to the entrance kitchen door." (Criminal Court File No. 51, p. 13).

First, Penney has not overcome the strong presumption that trial counsel's decision not to present the grand jury testimony was sound strategy. *Strickland,* 466 U.S. at 690-91. The grand jury testimony does not show that Ms. Bowman lacked "actual and/or apparent authority to consent to the search of defendant's residence, the unlocked containers therein and the outbuilding (chicken house) on August 19,

2003[,]" as previously determined by the Magistrate Judge and Accepted and Adopted by the undersigned (Criminal Court File Nos. 51, 61). As explained above, the Magistrate Judge gave no credence to Ms. Bowman's affidavit, thus her credibility was virtually destroyed. Considering Ms. Bowman's credibility issues, there is nothing before the Court to support an inference that Penney's trial counsel were deficient in failing to present her grand jury testimony.

Even assuming for the sake of discussion that trial counsel were deficient for failing to present Ms. Bowman's grand jury testimony, Penney is unable to demonstrate prejudice as he has not demonstrated a reasonable probability, that had the grand jury testimony been presented during the suppression proceedings, the result of the proceeding would have been different. In addition to giving no credence to Ms. Bowman's affidavit, the Magistrate Judge "placed no credence in Penney's testimony[,]" and found his testimony attempting "to minimize his relationship with Devota Bowman and the number of occasions on which she stayed/was present at Penney's residence, as 'grossly inconsistent' and 'not reliable.' " (Criminal Court File No. 61, p. 4 (quoting Criminal Court File No. 43, p. 17)). Based on the portion of Ms. Bowman's grand jury testimony that was provided to the Court, she admitted that during the six and a half years that she dated Penney, she would stay at his residence anywhere from "a few days, sometimes a week, sometimes two weeks, a month, . . . " It appears it may have been more than a month at a time but

testimony responding to that question ended mid-sentence on page six and page seven was not submitted to the Court (Criminal Court File No. 407-1, p. 6). Further, she admitted staying at Penney's residence from time to time during the summer of 2003, and after the August 2003 search of his residence. Considering Ms. Bowman's grand jury testimony along with the other evidence in this case, the Court's confidence in the outcome of Penney's suppression hearing is not undermined.

Accordingly, there is no need for an evidentiary hearing to resolve Penney's arguments regarding the grand jury testimony because the record and the parties pleadings conclusively show that no relief is warranted on this claim.

b. Consent

Penney also challenges trial counsel's failure to raise the issue of whether Ms. Bowman actually gave consent to law enforcement to search Penney's residence (Criminal Court File No. 407). Penney relies on Ms. Bowman's affidavit and grand jury testimony and seemingly ignores the fact that prior to law enforcement transporting her to Penney's residence she orally consented to the search of the residence according to Officer Sneed and subsequently signed a consent to search form which was witnessed by Officer Kevin Luck of the Soddy-Daisy Police Department (Criminal Court File No. 363, pp. 11-12).

As previously discussed, the Magistrate Judge gave "no credence" to Bowman's affidavit, finding it contradicted by the credible testimony of law enforcement officers and "by the written consent form which Bowman herself signed." (Criminal Court File No. 40, p. 16). Ms. Bowman's testimony that she did not remember whether Officer Sneed asked her for consent to search the house does not demonstrate[ ] that she did not consent nor does it weaken the evidence demonstrating she did in fact consent to the search (Criminal Court File No. 407-1, p, 6). In other words, Ms. Bowman's lack of memory does not defeat the evidence of her written consent and the testimony of law enforcement officers that she gave consent.

Counsels' decision to litigate the legality of Ms. Bowman's consent rather than whether she actually gave consent for the search, considering there is a signed and witnessed consent form, reflects a strategic decision and not unreasonable performance. "Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." *Harrington v. Richter*, ___ U.S ___, 131 S.Ct. 770, 791 (2011). Even assuming for the sake of this discussion that counsels' decision not to challenge the fact of consent was unreasonable and thus, deficient, Penney has not demonstrated he suffered any prejudice since he has presented no evidence which allows the Court to even infer the written consent is unreliable.

In sum, Penney has the burden in this proceeding to prove his claims, and he has not carried his burden. Penney has not submitted any credible evidence indicating Ms. Bowman did not consent to the search of his residence. Accordingly, Penney's claim that counsel was ineffective for failing to contest the fact of Ms. Bowman's consent is meritless and § 2255 relief will be **DENIED**.

c. Appeal

Next, Penney argues trial counsel was ineffective on appeal for failing to provide adequate argument, factual background, or citation to the record to allow the Sixth Circuit to give a meaningful review to the search and consent issues involved in the case. Penney asserts appellate counsel performed deficiently in several instances. First, Penney contends should have emphasized Ms. Bowman's affidavit and made it a part of the appellate record. Next Penney contends appellate counsel should have emphasized that apparent authority to consent had to be based on what the officers knew prior to entering the house. Penney's third complaint is that appellate counsel should have gone into greater detail explaining the testimony regarding how often Ms. Bowman stayed at Penney's residence citing the transcripts, the grand jury testimony, and the affidavit. Fourth, according to Penney, appellate counsel should have made Officer Luck's August 19, 2003, report of domestic assault part of the appellate record and argued that Officer Luck's statement demonstrates "Ms. Bowman advised

that on 08/18/2003 in the evening hours she was called by her ex-boyfriend Terry Penney asking her to come to his house."

Although Detective Sneed conceded Ms. Bowman told the officer she had arrived at Penney's residence the day before she swore out the warrant, he explained, that both Ms. Bowman and Penney subsequently indicated she actually arrived at Penney's residence on Sunday, August 17, 2003, the day she sent her daughter off to college (Criminal Court File No. 363, p. 43). Nevertheless, when the Sixth Circuit reviewed the search issue, they considered the on and off relationship of this couple, the fact Ms. Bowman was no longer staying at Penney's house at the conclusion of an August 2, 2003, incident, and relied on the fact that Ms. Bowman told the Detective Sneed that although they had "broken up six months ago, they had now reconciled and that she had moved back in the day before." (Criminal Court File No. 389, p. 12). Therefore, providing the actual August 19, 2003, report would have been of no consequence since the Sixth Circuit considered the facts surrounding their relationship on August 19, 2003, when reaching their decision to affirm this Court's denial of the motion to suppress. Accordingly, Penney can not demonstrate he suffered any prejudice.

Assuming for the sake of discussion that appellate counsel performed deficiently for failing to provide adequate argument, factual background, or citation to the record to allow the Sixth Circuit to give a meaningful review to the search and consent issues

involved in the case, Penney has failed to carry his burden of establishing a reasonable probability that the result would have been different, as "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter,* 131 S. Ct. at 792.

Penney claims appellate counsel should have emphasized Ms. Bowman's affidavit and made it a part of the appellate record. The Magistrate Judge concluded it deserved no credence, and Penny has submitted nothing from which the Court can infer the Sixth Circuit would have reached a different conclusion. Second he claims counsel should have emphasized that apparent authority to consent had to be based on what the officers knew prior to entering the house and reviewed those facts. Notably lacking, are the specific facts Penney claims appellate counsel should have discussed. Moreover, the appellate brief reflects counsel identified the pertinent facts and devoted a section to arguing Ms. Bowman lacked actual or apparent authority to authorize the search (Criminal Court File No. 407-4, pp. 3-8; 9-14).

Penney also claims appellate counsel failed to provide the details of the search and supporting facts, and cite to the record. Again, Penney has failed to provide the details of the search and supporting facts omitted by appellate counsel and the appellate brief includes the pertinent details of the search and supporting facts, and cites to the transcript of the motion to suppress (Criminal Court File No. 407-4, pp. 3-8). Penney challenges appellate counsel's failure to make Officer Luck's report part of the record, but

as previously noted, Detective Sneed explained that both Ms. Bowman and Penney, subsequently recollected that she arrived at his house on Sunday and the Sixth Circuit considered that the parties had reconciled and Ms. Bowman had moved back in the day before (Criminal Court File No. 389, p. 12).

Finally, Penney complains that appellate counsel spent very little time discussing Petitioner's demand that Ms. Bowman not be allowed into his residence; a fact he contends requires a finding of lack of good faith for conducting the search and apparent authority. Appellate counsel explained, in the appellate brief, that law enforcement had actual notice that the true owner of his residence had terminated any "mutual use" of the residence that Ms. Bowman had enjoyed prior to being evicted earlier that morning and Penney emphatically told the officers Ms. Bowman was no longer a welcome guest when he told them he wanted her "immediately removed (Criminal Court File No. 407-4, pp. 9-14). The majority of the Court of Appeals for the Sixth Circuit apparently did not find the argument persuasive. After considering these claims individually and cumulatively, the Court is unable to conclude that had appellate counsel presented and emphasized this evidence in some other manner – a manner which Penney has failed to identify – there is a reasonable probability the Sixth Circuit would have granted him relief.

There simply is no evidence in the record from which the Court can infer Penney is able to demonstrate a reasonable probability of a different result on

appeal. Accordingly, Penney will be **DENIED** relief on his claim that appellate counsel was ineffective.

2. *Prior Felony Conviction*

Penney concedes that trial counsel went to great lengths to challenge the underlying felony conviction, but maintains counsel failed to make the correct argument. According to Penney, 18 U.S.C. § 922(g)(1) requires the maximum penalty for the underlying offense be more than one year and it does not matter whether the offense was a misdemeanor or felony. What matters is the maximum penalty for the offense. Penney argues the maximum penalty for his prior conviction was one year, not "more than one year."

The government counters that Penney's prior Tennessee conviction for attempt to commit a felony has been properly classified as a felony under 18 U.S.C. § 922(g)(1) by four different courts despite trial counsel's extraordinary tenacious attempts to have it disqualified: the Criminal Court for Hamilton County, Tennessee (Nos. 130199, 248876), the Tennessee Court of Criminal Appeals (*Penney v. State*, 2005 WL 3262929 (Tenn. Crim. App.), *app. for permission to appeal denied* (Mar. 27, 2006), this Court (Criminal Court File No. 24), and the Sixth Circuit, *United States v. Penney*, 576 F.3d 297, 305 (6th Cir. 2009). (Criminal Court File No. 413). Specifically, the Sixth Circuit has already found Penney's prior conviction to be a qualifying felony under § 922(g)(1), noting the

Tennessee Court of Criminal Appeals likewise had deemed the conviction to be a felony. *See United States v. Penney,* 576 F.3d at 305. In addition, both this Court and the Sixth Circuit have already rejected the suggestion that Penney's prior conviction did not carry a statutory maximum in excess of one year (Criminal Court File No. 413).

"There are . . . countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Harrington v. Richter*, 131 S. Ct. 770, 788-89 (2011). "Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach." *Id.* at 789. When evaluating counsel's performance, the Court is cognizant of the strong presumption that counsel's attention to certain issues to the exclusion of others reflects a tactic rather than sheer neglect. *Id.* at 790.

"According to the judgment, the petitioner was charged with 'FEL. SELLING A CONT. SUBSTANCE" and pled guilty on May 19, 1976, to "ATTEMPT TO COMMIT A FELONY.'" *Penney v. State,* 2005 WL 3262929, at *2 (Tenn. Crim. App. 2005). The Court minutes reflect Penney pleaded guilty to Selling a Controlled Substance, Schedule IV, and his 11 month and 29 day sentence was suspended for 5 years. *Id.* at *3.

According to Penney, the applicable Tennessee statute is Tennessee Code Annotated section 39-603 (1975) and it provides:

> if any person assaults another, with intent to commit, or otherwise attempts to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction be punished by imprisonment not exceeding five (5) years, or in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500).

Penney argues the statute provides two alternative maximum sentences. Tennessee courts have determined that just because the attempt statutes allow for discretionary sentencing in either the penitentiary or by fine and imprisonment in the county jail, does not make it any less an offense punishable by imprisonment in the penitentiary or disqualify it as a felony. *State v. Seltzer,* 1987 WL 4867, at *3 (Tenn. Crim. App. 1987). Penney's state crime was "punishable by imprisonment for a term exceeding one year[,]" thus qualifying as a prior conviction under 18 U.S.C. § 922(g)(1). The fact that his sentence was 11 months and 29 days and suspended for 5 years is of no consequence, since the crime was punishable under Tennessee law by a term of up to five (5) years. Section 922(g)(1) does not look to the actual sentence imposed but to the potential maximum punishment under the statute. Because the crime of

attempt to commit a felony is punishable under Tennessee law by a term of up to five years, it qualifies as a prior conviction under § 922(g)(1). *See United States v. Burchard,* 50 F.3d 829 (6th Cir. 1995), *available at* 1995 WL 385109, *3 (concluding the crime of attempt to commit a felony – Tenn. Code Ann. § 39-603 (1975) – is punishable under Tennessee law by a term of imprisonment not exceeding five years); *United States v. Beazley,* 780 F.2d 1023 (6th Cir. 1985), *available at* 1985 WL 13961, *3 (attempt to commit a felony under Tennessee law is a felony and carries a maximum sentence of five years imprisonment). Moreover, both this Court and the Sixth Circuit have already rejected the argument that Penney's prior conviction did not carry a statutory maximum sentence in excess of one year (Criminal Court File No. 40, p. p. 6; *Penney,* 576 F.3d at 305).

In conclusion, counsel was not deficient for failing to make such an argument, and Penney is unable to demonstrate he suffered any prejudice since the argument lacks merit. Accordingly, Penney's claim that counsel was ineffective in failing to challenge his prior state conviction on the ground that his sentence was less than a year lacks merit and will be **DENIED**.

3. *Sentencing*

Penney claims counsel provided ineffective assistance during his sentencing proceeding. Penney suggests various grounds upon which trial counsel

should have attacked the PSR and claims counsels' failure to present any favorable evidence on Penney's behalf, in light of the fact that the PSR reflected his guidelines were calculated as 1020 months to life, "must be ineffective assistance of counsel." (Criminal Court File No. 2). At first glance the sentencing transcript appears to support Penney's claim that counsel performed deficiently during sentencing as counsel did nothing more than state the two objections for the record and presented no mitigating evidence or try to rehabilitate Penney. A thorough examination of the record reveals, however, Penney has presented no substantial credible evidence with which trial counsel could have rehabilitated Penney or mitigated his conduct of which the Court was not aware and that would have resulted in a lower sentence. Likewise, there is no suggestion of any additional meritorious objections that trial counsel should have lodged against the PSR. However, given Penney was facing a substantial sentence, i.e., 1020 months to life, seemingly the better practice would have been for counsel at least to have said something on Penney's behalf and present an argument that the sentence was greater than necessary to achieve the statutory sentencing purposes.

Nevertheless, given that Penney has presented no evidence of any redeeming qualities or any mitigating or rehabilitating evidence unknown to the Court or any viable argument that the sentence was greater than necessary to serve the purposes of sentencing, he has failed to demonstrate counsel was

ineffective in that regard because, for the reasons explained below, he cannot demonstrate he suffered any prejudice. The Court will address each alleged incident of ineffectiveness below.

a. Filing Only Two Objections

First, Penney specifically argues counsel should have filed more than two objections, should have vigorously argued the objections, and complains counsel failed to argue to reduce his 895 months sentence. The presentence report (PSR) reflected Penney's guideline range was 1020 months to life. Counsel filed an objection as to the drug amount and an objection for not crediting Penney for acceptance of responsibility. Penney faults counsel for telling the Court the objections were filed only for the purpose of documenting the issues so as not to waive them, rather than vigorously arguing these objections during his sentencing hearing (Criminal Court File No. 349 – Sentencing Transcript).

The government responds that Petitioner's arguments along with the attached affidavit of Attorney Leslie Cory, does not demonstrate he suffered any prejudice. Attorney Cory analyzed the PSR, thoroughly discussed and analyzed the proper way to prepare and represent a defendant in the United States District Court at sentencing, generally discussed the various objections that could have been made, and avers counsel should have made additional arguments (Criminal Court File No. 422-1). Although

Ms. Cory's affidavit included some excellent advice on how to prepare for a sentencing hearing, Penney has failed to submit any factual details of what he claims trial counsel failed to submit during his sentencing hearing.

Although trial counsel did not vigorously object to the drug amount during sentencing, the Court addressed the drug quantities and discussed the objection with the prosecution. Moreover, Penney received the benefit of the drug quantity objection because the Court concluded it would use six kilos of cocaine hydrochloride as the drug quantity rather than the 120 kilograms identified in the PSR. Therefore, Penney's offense level was reduced to 32, and after the enhancements, his total offense level was 38 with guideline of 235 to 293 months on the drug charges (Criminal Court File No. 349, p. 7-8). Therefore, to the extent Penney faults counsel with his performance addressing the drug quantity objection, he is unable to demonstrate prejudice, and therefore, unable to establish ineffective assistance of counsel requiring § 2255 relief.

As to the objection regarding Penney's acceptance of responsibility, during sentencing counsel argued Penney should receive an adjustment for acceptance of responsibility because he went to trial, "for among other reasons, to preserve his right to contest his status of a felon versus that misdemeanor conviction in 1975." (Criminal Court File No. 349, p. 3). The Court rejected that argument. Although Penney admitted being involved in the drug transaction that

took place when the shooting occurred, there is no evidence supporting a reduction for acceptance of responsibility based on the whole scheme of his criminal activity as he has never accepted responsibility for all the crimes of conviction. For example, there was testimony by several witnesses that law enforcement were yelling their identity as they were surrounding Penney's residence and attempting to gain entry before the three officers were wounded by Penney; yet, Penney claimed he never heard anything.

United States Sentencing Guidelines § 3E1.1(a) provides: "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels." Penney did not meet his burden of proving that a two level reduction was appropriate as he has never accepted responsibility for the total criminal activity for which he has been convicted or voiced any remorse for it. *Application Note 2* explains "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilty, is convicted, and only then admits guilty and expresses remorse." As previously noted, Penney has never admitted his guilt to all of the crimes for which he stands convicted, and he has not expressed remorse.

As to the additional one level reduction for acceptance of responsibility, the Government is afforded discretion as to whether to request an additional reduction. United States Sentencing Guidelines

§ 3E1.1(b) provides, in pertinent part, that if a defendant qualifies for a decrease under section (a), the offense level may be decreased by one addition level "upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently . . . " Aside from the fact that Penney did not qualify for a decrease under section (a), he did not meet the requirements to allow the government to exercise its discretion and request an additional one level reduction for acceptance of responsibility.

Penney has not provided any evidence that he accepts responsibility and the sentencing transcript reflects he did not indicate acceptance of responsibility, as he declined to make any statement when given the opportunity (Criminal Court File No. 349, p. 9). Thus, even if counsel performed deficiently in failing to vigorously argue this objection, Penney is unable to demonstrate he suffered any prejudice as there is no credible evidence of his acceptance of responsibility in the record or his submissions in this § 2255 proceedings. Accordingly, Penney is unable to demonstrate he was denied ineffective assistance in this regard.

b. Mitigating Evidence

Penney identifies seven alleged categories of potentially mitigating evidence he contends counsel should have presented at sentencing. Although the Court was aware of most of the evidence Penney references, it did not deem it sufficient to warrant a lesser sentence.

(1) *Petitioner Believed He Could Legally Possess Weapons*

Penney contends counsel should have reminded the Court at sentencing that he thought he could legally posses firearms, as evidenced by the fact that after his guns were seized he asked law enforcement officers if they could be returned. The Court heard Detective Sneed's testimony that following the August search of Penney's residence, Penney went to the police department and asked the detective how he could get his guns back (Criminal Court File No. 344, p. 37 – Trial Transcript). Even assuming counsel was deficient for not making an argument that Penney did not realize he was not able to own weapons, Penney is unable to demonstrate he suffered any prejudice because the Court does not consider Penney's alleged lack of knowledge mitigating under the circumstances of this case. Accordingly, Penney will be **DENIED** relief on his claim that counsel was ineffective for failing to argue he was not aware he was not allowed to possess weapons.

(2) *Failure to Proffer Mitigating Evidence of the Nature and Circumstances of the Offense*

Petitioner claims counsel failed to ask the Court to consider the nature and circumstances of the offense under 18 U.S.C. § 3553(a)(1) which included mitigating evidence. Specifically, Penney faults counsel with failing to argue Penney had previously been robbed, tied up, and held at gun point and believed he was being robbed when he shot Agent Gillette. In addition, Penney contends trial counsel should have submitted an affidavit by Agent Lee reiterating his trial testimony of the risks involved in law enforcement executing an anticipatory search warrant in the manner that it was done at Penney's residence and the options law enforcement had that likely would have prevented the shooting of Agent Gillette. Penney also contends counsel should have emphasized that Penney did not hear law enforcement identify themselves until after he fired shots and that he told an officer at the scene that he thought he was being robbed.

The Court was aware of this alleged mitigating evidence. When the Court sentenced Penney it considered all the evidence that was presented at trial, and the Court would not have been inclined to reduce Penney's sentence had counsel summarized the evidence. Thus, even if counsel were deficient in failing to make these argument, Penney is unable to demonstrate he suffered any prejudice. Accordingly, relief will be **DENIED** on his claim counsel failed to

proffer mitigating evidence of the nature and circumstances of the offense.

(3) *Confidential Informant*

Penney claims counsel performed deficiently in failing to make any argument regarding the confidential informant's role initiating drug sales with him which pushed him to deal in greater amounts. The government counters that counsel was not ineffective for failing to make an argument that the Sixth Circuit has repeatedly held that "at no time . . . has this Court recognized the use of sentencing manipulation or its cousin, sentencing entrapment, as a mitigating factor in sentencing." *United States v. Greer,* 415 Fed. Appx. 673 (6th Cir.) *available at* 2011 WL 693231, *2 *cert. denied,* 131 S. Ct. 2476 (2011); *accord United States v. Guest,* 564 F.3d 777, 781 (6th Cir. 2009); *United States v. Gardner,* 488 F.3d 700, 716-17 (6th Cir. 2007).

Aside from the fact that neither the Sixth Circuit nor the United States Supreme Court has recognized this legal theory as a mitigating factor, even if the Court could consider it as a mitigating factor, it would not do so under the circumstances of this case. Accordingly, Penney will be **DENIED** relief on his claim that counsel were ineffective for failing to argue sentencing manipulation or sentencing entrapment.

(4) *Counsel's Lack of Preparation for Sentencing*

Penney claims counsel failed to make an argument on his behalf at sentencing and failed to prepare Penney to make a statement on his behalf. Although it is concerning that counsel failed to make any type of argument on Penney's behalf and allegedly failed to prepare Penney to make a statement, Penney has presented no new evidence which would have persuaded the Court to sentence him to a lesser amount of time in prison. Moreover, counsel did not need to "prepare" Penney to make a statement, all Penney needed to do was present his statement, expression of remorse, or whatever he wanted to say. Notably, Penney has not submitted his affidavit or any evidence of what he would have stated had counsel "prepare[d]" him. Accordingly, because Penney has failed to demonstrate he suffered any prejudice, relief on his claim that counsel were ineffective for failing to prepare for sentencing will be **DENIED**.

(5) *Counsel's Failure to Argue Penney's History and Character as Mitigating Evidence*

Penney claims counsel failed to investigate or present evidence that he "may have had a drug problem that contributed to his actions[ ]" or obtain a psychological assessment "that may have provided mitigating circumstances[.]" (Criminal Court File No. 2). In addition, Penney faults trial counsel with failing to show his remorse for the offense or his

willingness to get treatment for drug or mental health issues. Penney also claims trial counsel should have stressed his age and lack of criminal history as mitigating factors and present other unidentified § 3553(a) factors.

Penney has presented no evidence of "a drug problem" or a psychological problem or submitted an affidavit detailing his remorse, his willingness to attend drug treatment or mental health treatment sessions. The PSR reflects Penney experimented with drugs in the past, and at the time of the offense was taking prescribed hydrocodone for his knee pain, but would buy it off the street if he ran out. The Court was aware of this information when it pronounced sentence on Penney. Notably, the Presentence also report reflects Penney stated he did not need substance abuse treatment, and he and his mother reported he had no history of mental health treatment or counseling. Consequently, this claim is frivolous. Penney has failed to submit any credible proof to demonstrate he had any remorse, a drug problem, or a psychological problem that trial counsel could have introduced at sentencing. Accordingly, because Penney has not demonstrated counsel performed deficiently in failing to argue his unidentified history or character evidence, relief will be **DENIED** on this claim.

(6) *Lack of Character Letters*

Penney faults counsel with failing to present any character letters on his behalf. Penney has attached several character letters but claims he would have had more at sentencing and they would have provided insight into his character and personal history. There is nothing in the letters submitted by Penney, which would have influenced the Court to vary downward on Penney's sentence. Accordingly, relief will be **DENIED** on Penney's claim that counsel was ineffective for failing to submit character letters.

(7) *Inadequate Appellate Brief*

Penney claims trial counsels' appellate brief regarding sentencing was extremely inadequate, partially as a result of their deficient performance during sentencing and for their failure to provide any reason to doubt the reasonableness of his sentence. Assuming for the sake of this discussion that counsel performed deficiently in this regard, Penney is not entitled to any relief because he has not suggested, much less demonstrated he suffered any prejudice. Penney has not submitted any evidence or argument from which the Court can even infer that the sentence was not reasonable based on the facts of this case.

Accordingly, relief on Penney's claim that counsels' appellate brief was inadequate will be **DENIED**.

(8) *Counsel Failed to Argue Any of the Three § 924(c) Counts Should Run Concurrently*

Penney claims all three of this 18 U.S.C. § 924(c) offense arose out of the events that occurred on January 13, 2004, and counsel failed to argue any of these sentences should run currently with other offenses or that running each of these offenses consecutively to all the other offenses was a double jeopardy violation. Penney also faults counsel with failing to preserve these issues for appellate review.

The government responds that only two of the § 924(c) counts arose out of the January 13, 2004, event, as the third count arose from the August 19, 2003, search of Penney's trailer. Further, the government maintains the Sixth Circuit addressed and rejected this claim, finding Penney's § 924(c) convictions stemmed from two "distinct predicate offenses: attempted murder of a federal agent, and an attempt to possess marijuana with intent to distribute it." *Penney,* 576 F.3d at 316.

The government correctly responds that only two of the § 924(c) counts arose out of the January 13, 2004, event (Counts Twenty-One and Twenty-Three), the other Count arose from the August 19, 2003, search of Penney's trailer (Count Six), and the Sixth Circuit addressed and rejected this claim. On appeal Penney argued Count Twenty-One (discharging firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)) and Count

Twenty-Three (possessing a firearm in fu[r]therance of drug trafficking in violation of 18 U.S.C. § 924(c)) should have merged. The Sixth Circuit addressed the claim as follows:

> Third, Penney challenges his convictions under Counts Twenty-One, discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii), and Twenty-Three, possessing a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c). Penney does not elaborate why either conviction lacks sufficient evidence, and we deem these claims waived.
>
> In the alternative, Penney claims that these two counts should have been merged, along with Count Twenty (attempted murder), for the purposes of sentencing. He argues that sentences for Counts Twenty-One and Twenty-Three should be merged because both are "924(c) violations stemming from the exact same incident, the exact same set of facts." Appellant's Br. at 56.
>
> We have previously rejected an identical argument on substantially similar facts. *United States v. Nabors,* 901 F.2d 1351 (6th Cir.1990). In particular, we held that when "two separate predicate offenses for triggering § 924(c)(1) were charged and proven," a defendant may be convicted and sentenced for two separate crimes, even if both offenses were committed in the course of the same event. *Id.* at 1357-58. Here, as in *Nabors,* the

> two violations of § 924(c)(1) of which Penney is convicted are based on distinct predicate offenses: attempted murder of a federal agent, and an attempt to possess marijuana with the intent to distribute. Penney's unelaborated claim that Count Twenty should have been merged with Twenty-One and/or Twenty-Three for the purposes of sentencing is precluded by the text of the statute. 18 U.S.C. § 924(c)(1)(D)(ii) ("[N]o term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed."). Therefore, the district court did not commit an error by imposing consecutive sentences for these three crimes.

United States v. Penney, 576 F.3d at 316.

The issues decided by the Sixth Circuit on direct appeal are the law of the case. The law of the case doctrine mandates that issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitutes the law of the case. *United States v. Moored,* 38 F.3d 1419, 1421-22 (6th Cir. 1994); *United States v. Campbell,* No. 95-cr-81192, 01-cv-73211-DT, slip op. (E.D. Mich. Jan. 25, 2002), *available in* 2002 WL 3219979, at *2-3. Since the Sixth Circuit determined there was no error committed by imposing consecutive sentences on direct appeal, this Court is bound by that

determination. Hence, the law of the case doctrine applies to this claim.

Moreover, contrary to Penney's claim, counsel raised this claim on direct appeal and Sixth Circuit case law provides for consecutive sentences in this instance. Thus, Penney has not demonstrated trial counsel were ineffective in this regard. Accordingly, Penney will be **DENIED** relief on his claim that counsel should have argued his § 924(c) counts should have merged for sentencing purposes.

c. Greater than Necessary Sentence

In his last claim, Penney argues counsel was ineffective for failing to argue the total sentence of 835 months was "greater than necessary" to achieve the purposes of sentencing. Penney argues his 74 year and 7 month sentence is greater than necessary for effectuating the purposes of sentencing. Given the substantial sentence Penney faced, counsel should have at least put forth an argument that the total sentence was greater than necessary to serve the purposes of sentencing.

Nevertheless, Penney presents no factors to support his claim the sentence was greater than necessary to effectuate the purposes of the sentence, and therefore, he has not demonstrated he suffered any prejudice as the result of trial counsels' alleged shortcomings. Notably, during sentencing, the government asked the Court to impose a life sentence to "send a message to the community of bad guys out

there that conduct of the kind Mr. Penney engaged in endangering the life of a law enforcement officer, more than one law enforcement officer, nearly killing him, that is something that [sic] that's something that won't be tolerated, the Court won't tolerate it, the United States won't tolerate it, and people should know if they're going to engage in that kind of conduct they can expect the maximum sentence possible." (Criminal Court File No. 349, p. 10).

When imposing the sentence, the Court explained:

> I have carefully considered this case. Of course, I heard all of the evidence at trial. And I've had the presentence report now for a while to look over. And I do think that among the sentencing factors for this Court to consider is the need to provide deterrence. I do agree with Mr. Neff in that respect. I do also think that another fact with respect to Mr. Penney here is the need to provide protection of the public, as well as for law enforcement officers as made clear by the events in this tragic case. Of course, the Court has also considered the guidelines a[s] well. And the Court has not only considered the guidelines, but also the minimum sentences which are provided for in the federal gun statutes, firearms statutes.
>
> For all of those reasons, and pursuant to the Sentencing Reform Act of 1984, it's this Court's judgment that the defendant is hereby committed to the custody of the Bureau of

> Prisons to be imprisoned for a total term of, 895 months.
>
> As I calculate it, this term consists of 235 months on each of Counts 1, 2, 10 and 12, 120 months on each of Counts 4 and 25, 60 months on each of Counts 5, 8, 11 and 22, and 235 months on Count 20, and 235 months on Count 24, all to run concurrently. That's basically 235 months on all of the drug counts.
>
> Further, the defendant will serve a term to 60 months on Count 6, and 300 months on each of Counts 21 and 23, to be served consecutively to each other and to all other counts, for a term of 895 months.
>
> . . .
>
> I don't consider myself, of course, in light of *Booker* necessarily bound by those guidelines, but this sentence would have been imposed regardless of whether I felt like I was bound by the guidelines. So, we're all making a record here with respect to *Booker* so we don't have to do all of this all over again. . . .

(Criminal Court File No. 349, pp. 10-14).

Although the Court would have listened to any argument counsel presented to try to demonstrate the sentence exceeded what was necessary to satisfy the purposes of sentencing, for the reasons stated above the Court concluded a 895 month prison sentence was necessary to satisfy the purposes sentencing. Penney has presented nothing to change the Court's decision

of the necessity of that sentence, especially considering the extent of his criminal drug activity and the fact he shot three law enforcement officers, almost killing one. Accordingly, based on the record, the Court stands by its conclusion that the 895 month sentence is not greater than necessary to achieve statutory sentencing purposes and **DENIES** relief on this claim.

V. Conclusion

Penney has failed to present any facts which establish his conviction or sentence is subject to collateral attack under 28 U.S.C. § 2255. Penney is not entitled to any relief under § 2255 and a judgment will enter **DENYING** his motion.

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

No. 13-6621

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRY EUGENE PENNEY, ALSO KNOWN AS TERRY PENNY, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	))))))))))	ORDER (Filed Dec. 17, 2014)

Before: SILER, COOK, and WHITE, Circuit Judges.

Terry Eugene Penney petitions for rehearing en banc of this court's order entered on August 4, 2014, denying his 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

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk