

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

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| UNITED STATES OF AMERICA |) | |
| |) | |
| |) | Case No. 1:04CR00009 |
| |) | |
| v. |) | OPINION |
| |) | |
| TRADON MARQUEZ DRAYTON, |) | By: James P. Jones |
| |) | United States District Judge |
| Defendant. |) | |

Anthony P. Giorno, Assistant United States Attorney, Roanoke, Virginia, for United States; Tradon Marquez Drayton, Pro Se Defendant.

The defendant, a federal inmate, brings this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C.A. § 2255 (West Supp. 2010), alleging claims of ineffective assistance of counsel, insufficiency of the evidence, and illegal sentencing. Upon review of the record, I find that the motion must be denied.

I

Tradon Marquez Drayton was sentenced to his current imprisonment by this court after a jury convicted him of drug trafficking and firearms offenses. The facts surrounding these charges are as follows.¹

¹ In this summary, the evidence from Drayton’s trial is presented in the light most favorable to the government, as required in habeas review on claims of sufficiency of the evidence. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (finding that on collateral review, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”).

On the evening of July 16, 1999, Galax, Virginia, police responded to a report of shots being fired in what is known in the area as “the four-way stop,” or simply “the four-way.” Officers arriving on the scene discovered James Thornton, shot dead. Investigation into this apparent homicide led to the discovery of information about two separate groups of individuals who were selling crack cocaine in the area. One group included Drayton, John Reeves, and Sherrard Gathers, and the other group included Daniel Lineberry and an individual known only as “Big D.” Big D, a major drug distributor, was responsible for most of the crack cocaine entering the area. Lineberry was Big D’s local contact and occasionally held drugs for Big D. The investigation revealed that both groups were distributing crack cocaine from the same apartment complex on Poplar Knob Road in Galax.

Investigators learned that Drayton, Gathers, Reeves, and his brother, Hans Reeves, came to the Poplar Knob complex on July 16, 1999, to see Monica Beamer, a resident, about Drayton’s pet snake. When Drayton confronted Monica Beamer about his pet snake, she told him that her boyfriend, Billy King, had killed it. An argument followed between Drayton and King. After Beamer threatened to call the police, Big D entered Beamer’s apartment, waving a large gun, and bellowed, “Y’all messed up my money.” Thornton, who was an associate of Big D’s, calmed everyone down. Big D then told Drayton and his associates to leave, which they did.

They drove away only a short distance, however, before Drayton told Gathers, who was driving, to stop. Drayton got out of the car and waited in the bushes near the four-way and waited for Big D to drive past. A few minutes later, a blue Ford Taurus approached the four-way, with Thornton driving and Big D and Lineberry as passengers. Drayton fired three or four shots with a .22 caliber pistol at the car, striking the passenger side of the vehicle three times. Big D fired back. While returning Drayton's fire, Big D accidentally killed Thornton, his driver, with a single shot to the head. The Taurus, then out of control, ran under the porch of a house, where it caught fire. Big D and Lineberry ran. Drayton also fled, caught a ride, and was spotted by a police officer as he tried to duck out of sight. Lineberry was apprehended, but Big D escaped and has never been apprehended.

A resident in the area near the scene of the killing discovered a .22 caliber firearm and turned it in to authorities. Experts matched shell casings from the scene to the firearm and later traced the purchase history of the weapon to determine that Drayton had bought the firearm in July 1999.² Authorities also discovered that Drayton had been previously convicted in South Carolina of the felony possession

² I granted Drayton's pretrial motion to suppress evidence obtained through a gunshot residue test performed on his hands in the hours after the shooting, on the ground that the test had been taken in violation of Drayton's constitutional rights. *United States v. Drayton*, No. 1:04CR00009, 2006 WL 758746 (W.D. Va. Mar. 23, 2006).

of crack cocaine. Agents also verified that the .22 caliber pistol had traveled in interstate commerce and that it functioned as designed.

Shortly after the shooting, Drayton was charged in state court with shooting into an occupied vehicle. On July 31, 2000, Drayton was acquitted of this state charge, and a state charge for possession of a firearm by a convicted felon was dismissed. Sometime later, police disposed of the automobile in which Thornton's body had been found.

A grand jury of this court returned a multi-count indictment on February 3, 2004, charging Drayton and others with drug and firearm offenses related to the Thornton shooting and the subsequent investigation. Because Drayton faced a potentially capital charge for the drug-related shooting, two attorneys were appointed to represent him. After extensive pretrial proceedings, a Third Superseding Indictment was returned in October 2005.

Drayton stood trial before a jury on March 27-30, 2006. He was convicted of conspiring to possess with intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C.A. §§ 841(a) & 846 (West 1999 & Supp. 2010) (Count Five); using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a drug trafficking crime, in violation of 18 U.S.C.A. § 924(c)(1)(A) (West Supp. 2010) (Count Seven); committing voluntary manslaughter in the course

of violating 18 U.S.C.A. § 924(c), in violation of 18 U.S.C.A. § 924(j) (West Supp. 2010) (Count Eight);³ possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C.A. § 922(g)(1) (West 2000) (Count Nine); and firing a weapon into a group of two or more persons in furtherance of a major drug offense, in violation of 18 U.S.C.A. § 36(b)(1) (West 2000) (Count Ten). Drayton was acquitted by the jury of Count Six, which charged him with possession of five grams of crack cocaine with intent to distribute on July 16, 1999, in violation of 18 U.S.C.A. §§ 2 and 841(a).

I sentenced Drayton to concurrent sentences of 188 months on Counts Five, Nine, and Ten. Additionally, I sentenced Drayton to a consecutive sentence of 60 months on Count Seven, pursuant to 18 U.S.C.A. § 924(c)(1)(A)(i), and to a consecutive sentence of 300 months on Count Eight, pursuant to 18 U.S.C.A. § 924(c)(1)(C)(i), for a total sentence of 548 months imprisonment.⁴

³ The jury was properly instructed that to convict the defendant of this crime, the government must prove beyond a reasonable doubt that the defendant intended to kill Big D or acted toward Big D recklessly with extreme disregard for human life, and that his actions caused the death of James Thornton.

⁴ Thereafter, pursuant to 18 U.S.C.A. § 3582(c) (West Supp. 2010) and the retroactive amendments to the federal sentencing guideline for crack cocaine cases, I reduced Drayton's sentence from 548 months to 511 months. *United States v. Drayton*, No. 1:04CR00009, 2008 WL 2405826 (W.D. Va. June 11, 2008).

Drayton appealed, arguing that the court erred in denying his Motion for Judgment of Acquittal on Count Eight; that the court erred in denying his Motion to Dismiss the Indictment; and that the court improperly sentenced him to a consecutive term of 300 months on Count Eight. The United States Court of Appeals for the Fourth Circuit affirmed. *United States v. Drayton*, 267 F. App'x 192 (4th Cir. 2008) (per curiam) (unpublished).

In his present motion, Drayton alleges the following grounds for relief:

1. Trial counsel provided ineffective assistance by
 - a. Failing to call Yvonne Reeves as a defense witness;
 - b. Failing to call Darryl Parum as a defense witness;
 - c. Failing to call John Reeves as a defense witness;
 - d. Failing to object to Count Seven as being duplicative; and
 - e. Withdrawing post trial motions as to Count Five;
2. The evidence was insufficient to establish that the defendant conspired with another person;
3. The evidence was insufficient to establish that the defendant used or carried a firearm during and in relation to a drug trafficking crime, or that he possessed a firearm in furtherance of such a crime;
4. The evidence was insufficient as to Count Eight, in that the government failed to prove that the defendant shot at the car in which the victim was killed;

5. The evidence was insufficient as to Count Ten, alleging that the defendant committed a drive-by shooting;
6. The sentence as to Count Five was illegal because the defendant was sentenced based on a drug amount not found by the jury beyond a reasonable doubt;
7. The sentence as to Count Eight was illegal because the defendant was convicted for involuntary manslaughter, but was sentenced for an unindicted subsequent violation of 18 U.S.C.A. § 924(c);
8. The sentence as to Count Nine was illegal because the defendant was convicted of possessing a firearm as a convicted felon, but was sentenced beyond the statutory maximum for that offense; and
9. Appellate counsel was ineffective for failing to file a petition for rehearing, a petition for rehearing en banc, and a petition for a writ of certiorari after the defendant asked her to do so.⁵

The government has filed a Motion to Dismiss, supported with affidavits from defense counsel. Drayton has responded to the government's motion, making the matter ripe for disposition. After review of the record, I am of the opinion that the government's motion must be granted and the 2255 motion denied.

⁵ Drayton added Claim 9 to his § 2255 motion through an amendment that he signed and dated on June 17, 2009. Drayton also submitted an Amended § 2255 Motion on July 20, 2009, which incorporated the June 17 amendment and the claims from the original § 2255 submission.

II

To state a claim for relief under § 2255, a defendant must prove that one of the following occurred: (1) his sentence was “imposed in violation of the Constitution or laws of the United States”; (2) the “court was without jurisdiction to impose such sentence”; or (3) the “sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C.A. § 2255(a). In a § 2255 motion, the defendant bears the burden of proving grounds for a collateral attack by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir.1958).

A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

To prove that counsel’s representation was so defective as to require reversal of the conviction or sentence, a defendant must meet a two-prong standard, showing that counsel’s defective performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness,” considering circumstances as they existed at the time of the representation. *Id.* at 687-88. The defendant must overcome a strong presumption that “under the circumstances, [counsel’s] challenged action might be considered sound trial strategy,” within the range of competence demanded from attorneys defending criminal cases. *Id.* at 689

(quotation marks and citation omitted). The court must be highly deferential to counsel's strategic decisions, avoiding the distorted effect of hindsight. *Id.* at 688-89.

Second, to show prejudice, the defendant must demonstrate a "reasonable probability" that but for counsel's errors, the outcome would have been different. *Id.* at 694-95. If it is clear that the defendant has not satisfied one prong of the *Strickland* test, the court need not inquire whether he has satisfied the other prong. *Id.* at 697.

Yvonne Reeves

Drayton asserts that Yvonne Reeves, who was subpoenaed and present for trial, would have testified that Drayton had only arrived in Galax for a family birthday party seven days before the shooting; that before that time, Drayton did not know her son, John Reeves; that Drayton ate and slept at her house; and that she never saw him possess or sell drugs. Drayton believes this evidence would have resulted in the jury's finding that he could not have conspired to sell drugs with John Reeves.⁶

⁶ Drayton also alleges that he and one of his two court-appointed attorneys had several disagreements and that counsel called Drayton "stupid" during a pretrial conference, but that counsel's motions to withdraw from the representation were denied. Although Drayton complains that it was unfair for the court to force him to continue working with an attorney whom he considered his "adversary," he does not present this issue as a separate claim in his § 2255 motion. Moreover, he also fails to present facts stating the necessary elements of a claim that this attorney had any actual conflict of interest which adversely impacted his representation of Drayton. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (finding that counsel has actual conflict when he actively represents conflicting legal interests).

John E. Jesse and Daniel Knowlton Read, Drayton's trial attorneys, have submitted a joint affidavit in support of the government's Motion to Dismiss. They state that although Yvonne was helpful to counsel and their investigator before and after trial and possessed information relevant to the case, they chose not call Yvonne to the stand for several reasons.

First, because of her strong-willed, outspoken nature and her belief that Drayton and her son, John, were being unfairly prosecuted in federal court as a result of racial prejudice, counsel worried about how Yvonne might present her testimony. They feared that her "attributing this [racist] motivation to the prosecution would [not] create a favorable impression with the jury." (Jesse & Read Aff. ¶ 4.) Counsel also knew Yvonne had threatened an investigator and worried that as a witness, she would come across as "unstable and volatile." (*Id.*)

Second, counsel believed that the factual information to which Yvonne would have testified was either uncorroborated or contradicted by other witnesses or circumstances. Several witnesses testified about John Reeves and Drayton as being associates in drug trafficking.⁷ Thus, Yvonne's testimony that she never saw him with drugs would not have been decisive. Javon Barroga, John's sister, who

⁷ According to counsel's affidavit, Yvonne never informed counsel that Drayton did not know John before coming to Galax. Moreover, Drayton himself indicates that during a state court proceeding, John had testified that he was with Drayton on the night of the shooting.

celebrated her birthday in the week before the shooting, testified that Drayton arrived on the day of the party, July 11, 1999. Gathers testified that he picked Drayton up in South Carolina and brought him to Galax two weeks before that date. Thus, the exact date of Drayton's arrival in the area would have remained uncertain, despite Yvonne's expected testimony on the subject, and counsel believed the potential disadvantages of calling such an unpredictable witness outweighed any beneficial information she could have offered.

Based on the foregoing, I cannot find that counsel acted unreasonably in deciding not to call Yvonne Reeves as a witness. For the reasons counsel cites, I find no reasonable probability that Yvonne's testimony about never having seen Drayton possessing or selling drugs, about the dates on which he was present in the area, or about his relationship with her son John would have resulted in a different outcome.⁸ Counsel reasonably believed that, in light of other testimony in the record, the evidence Yvonne would have presented would not have helped the defense case as much as her unpredictability and volatility could potentially have harmed it.⁹

⁸ In his response to the Motion to Dismiss, Drayton also asserts that Yvonne could have affirmed medical records that he had been in a hospital from June 23-29, 1999, in South Carolina. The jury was clearly informed of this hospital stay, however, through the parties' stipulation at trial. (Tr. 3-111 to 3-112, Mar. 29, 2006.) Therefore, any additional testimony from Yvonne about this issue would have been merely cumulative.

⁹ As an exhibit to his own counter-affidavit in response to the Motion to Dismiss, Drayton submits a typed letter purportedly from Yvonne Reeves, describing what she

Strickland, 466 U.S. at 688-89 (noting that court cannot second guess reasonable trial strategy). Accordingly, I will grant the Motion to Dismiss as to Claim 1(a).

Darryl D. Parum

Drayton asserts that counsel should have called Darryl D. Parum as an eye witness to the July 16, 1999 shooting. Parum gave a statement to police, indicating that his living room window faced the four-way. That night, Parum said he heard a man talking and then saw a very large black man (six feet, seven inches, tall, 300 pounds) curse at someone in the car, fire six times at Thornton's car from the right side, then four times from the left side, before the car sped away and crashed and burned. Parum also said that he did not see or hear Drayton shooting at the victim's car.

The government admits that Parum's version of events supported Drayton's claims — that Big D was not shooting at Drayton when he killed the victim and that Drayton did not fire any shots. Trial counsel states, however, that he and his co-counsel decided not to call Parum as a witness for two reasons: first, that he had a

remembers from "9 years ago" about what she personally witnessed on the day of the shooting, July 16, 1999. The letter is undated, unsworn, unsigned, and addressed to Drayton at the federal prison in Coleman, Florida. Because counsel clearly did not consider the contents of this letter in deciding whether or not to call Yvonne as a witness for the trial in 2006, I cannot consider it as evidence in connection with Drayton's ineffective assistance claims. I shall, however, consider it in addressing Drayton's argument that because the totality of the evidence proves his actual innocence, the court may address his procedurally barred and untimely filed claims.

recent conviction that could have been used to impeach his credibility; and, second, that his testimony would have been cumulative of the testimony offered by Stacy Mercer. Mercer lived with Parum at the time of the shooting and saw and reported exactly the same sequence of events from the same location as Parum did. Counsel believed that Mercer made a more credible witness than Parum, since she did not abuse drugs or alcohol, had no prior felony conviction, and was not part of the drug culture in which many other witnesses in the case were involved. They felt she would make a good impression on the jurors and effectively establish all the facts that they sought to offer on Drayton's behalf. Therefore, they did not call Parum.

Drayton does not deny that Mercer's testimony established all the facts that he now says counsel should have presented through Parum's testimony or that Parum had credibility problems that Mercer did not have. Thus, he fails to demonstrate that counsel's decision to call only one of the two witnesses was professionally unreasonable or that there is any reasonable probability that Parum's cumulative testimony to the same facts would have resulted in a different outcome.¹⁰ I will grant the government's motion as to Claim 1(b).

¹⁰ Drayton submits a copy of a note his attorney wrote to the prosecutor during the government's case, purportedly indicating that the defense had already decided not to call Parum as a witness. Since the decision was a reasonable trial strategy that did not prejudice the defense case, I cannot find that the submission of the note has any bearing on my analysis.

John Reeves

Drayton claims that counsel should have called his codefendant, John Reeves, to testify for the defense. At the state trial in which Drayton was acquitted of the shooting, Reeves testified that he was with Drayton on the day in question, that Drayton was not shooting at anyone, and that someone in another car was shooting at them.

In the federal case, however, Reeves initially reversed his position. In November 2005, he gave a statement to a federal agent, admitting that he had seen Drayton selling crack and that he thought Drayton might be willing to buy a gun. He then escorted Frederick Voss to Drayton's motel room with a small pistol. Voss later testified that he sold the pistol to Drayton. Reeves also stated that prior to the shooting on July 16, 1999, he saw Drayton with that same pistol. Shortly before Drayton's trial, Reeves pleaded guilty, pursuant to a written plea agreement, to Count Five of the indictment, conspiracy to possess with intent to distribute five grams or more of crack cocaine. Reeves' attorney advised Drayton's counsel at that time that Reeves' testimony would not be favorable to Drayton's case. Drayton's counsel later learned that Reeves had expressed a desire to withdraw his guilty plea and claimed that he had made the incriminating statements about Drayton under duress from counsel. Finding no assurance that Reeves' testimony at trial would be advantageous

to Drayton's defense, and fearing that it could be very damaging, counsel decided against calling Reeves as a witness.

Drayton does not submit any affidavit from Reeves, indicating that he would have been willing to testify at Drayton's criminal trial or stating the content of his potential testimony. In response to counsel's affidavit, Drayton points to Reeves' § 2255 motion, in which he alleged that the statement he made in support of his guilty plea was a written version of events that his attorney told him to memorize, in which he admitted he was guilty of selling drugs. Because this claim was in direct contradiction with statements Reeves made under oath during his guilty plea hearing, I found his § 2255 claim to be inherently incredible and denied relief. *Reeves v. United States*, Case No. 7:07CV00330, 2007 WL 3023965, at *4 (W.D. Va. Oct. 16, 2007).

Given Reeves' history of changing his story about his and Drayton's drug dealing activity, I cannot find that counsel's decision not to call him as a witness for Drayton's defense was deficient representation. Accordingly, this claim fails under both prongs of *Strickland*. Therefore, I will grant the government's motion as to Claim 1(c).

Failing to Object to Count Seven As Duplicative

Drayton argues that counsel should have objected to Count Seven on the ground that it charged him with two separate offenses, namely (1) using or carrying of a firearm during and in relation to a drug trafficking offense and (2) possession of a firearm in furtherance of a drug trafficking offense.

The government concedes that Count Seven charged two separate offenses. *See United States v. Woods*, 271 F. App'x 338, 343 (4th Cir. 2008) (unpublished). However, Drayton cannot show prejudice under *Strickland* here. If counsel had objected to Count Seven before trial on the ground that it charged two offenses, Drayton shows no reasonable probability that he would not have been convicted under an amended indictment separating the offenses. I will grant the government's motion as to Claim 1(d).

Withdrawal of Motion for Judgment of Acquittal

Count Five charged Drayton and John Reeves with conspiring between May 1999 and July 16, 1999, to possess with the intent to distribute and to distribute five grams or more of crack cocaine, while Count Six charged him with possession with intent to distribute five grams or more of crack cocaine on July 16, 1999. After the jury found Drayton guilty as to Count Five, counsel filed a Motion for New Trial or to Vacate the Judgment and Enter Judgment of Acquittal as to this count, among

others. On the day of sentencing, however, counsel moved to withdraw the motion as to Count Five, stating that it was without merit. In Claim 1(e) of his § 2255 motion, Drayton argues that withdrawal of this post-trial motion was ineffective assistance. I cannot agree.

To address a motion for judgment of acquittal, the court must determine whether there is substantial evidence which, taken in the light most favorable to the prosecution, would warrant a jury finding that the defendant was guilty beyond a reasonable doubt. *United States v. MacCloskey*, 682 F.2d 468, 473 (4th Cir. 1982). In so doing, the court must respect the jury's function "to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts." *United States v. Rojas*, 554 F.2d 938, 943 (9th Cir. 1977) (internal quotation marks and citation omitted). If the evidence would not warrant a finding of guilt under this standard, then the defendant is entitled to judgment of acquittal.

"To sustain [a] conspiracy conviction, there need only be a showing that the defendant knew of the conspiracy's purpose and some action indicating his participation." *United States v. Brooks*, 957 F.2d 1138, 1147 (4th Cir. 1992) (quoting *United States v. Collazo*, 732 F.2d 1200, 1205 (4th Cir. 1984)). The prosecution need not prove that a defendant knew each of his co-conspirators or all details about the conspiracy, and proof that he played only a minor role in the

conspiracy is sufficient to establish guilt. *United States v. Burgos*, 94 F.3d 849, 861 (4th Cir. 1996) (en banc). “The existence of a tacit or mutual understanding is sufficient to establish a conspiratorial agreement, and the proof of an agreement need not be direct — it may be inferred from circumstantial evidence.” *United States v. Kellam*, 568 F.3d 125, 139 (4th Cir. 2009) (internal quotation marks and citation).

The government presented evidence which, if believed by the jury, was sufficient to support a conviction on the conspiracy count beyond a reasonable doubt. Testimony from Elizabeth Lane and Monica Bryson established that around May 1999, Gathers and Reeves were selling crack cocaine at an apartment complex in Galax. Lane testified that she met Drayton in July 1999, when he came to her apartment with Gathers, and that she later purchased a small amount of crack from Drayton. She testified that Drayton was selling crack with, or on behalf of, Gathers and Reeves, and that when she needed crack, she could page Gathers, and he or Drayton would deliver it. Christopher Dattore also testified that he had purchased crack from Drayton prior to July 16, 1999, in amounts which totaled more than five grams, as charged in Count Five.

Bryson testified that Gathers, Reeves, and Drayton considered the apartment complex their “turf” and that “they ran that little place,” until Big D, a drug dealer from North Carolina, joined up with Daniel Lineberry and effectively took over the

drug trade at the complex. Dattore testified that on July 16, 1999, Drayton approached him, “perturbed and angry,” because Dattore was buying his crack from Big D and not Drayton. Dattore and others testified that Drayton had a small caliber handgun with him during this conversation. Witnesses testified that while Drayton argued with others about a snake, Big D became angry, shouted that Drayton and his compatriots were “messing” with his money, threatened them, and told them to leave. Gathers and Hans Reeves testified that as they, Drayton, and John Reeves were driving away, Drayton took out a handgun, got out of the vehicle, waited until Big D’s car approached the intersection, and fired shots at the car, hitting it at least three times. A jail mate of Drayton’s, Randy Rader, testified that around Christmas of 2004, Drayton told him that he was involved in selling crack cocaine and that the shooting in 1999 was about the business.

Although Drayton points to other evidence that contradicted these witnesses or that impeached their credibility, in considering a motion for judgment of acquittal, the court must assess the evidence in the light most favorable to the government. *MacCloskey*, 682 F.2d at 473. The jury here believed the government’s evidence, which was sufficient to prove that Reeves and Gathers conspired to sell crack from May through July 16, 1999; that Drayton willfully joined the conspiracy no later than

early July; and that Drayton's act of shooting at Big D's car was intended to protect the drug dealing activities of his own conspiratorial group.

Based on this evidence and the jury's verdict, counsel reasonably believed that the Motion for New Trial or Judgment of Acquittal on the conspiracy count would fail, and based on the same evidence, I find no reasonable probability that pursuing the motion would have resulted in a different outcome. This claim thus fails under both prongs of *Strickland*, and I will grant the government's motion accordingly as to Claim 1(e).

B. PROCEDURAL DEFAULT

Where a defendant attempts to raise claims under § 2255 which could have been raised on direct appeal, district court review of such issues is barred absent a showing of cause and prejudice or actual innocence. *Bousley v. United States*, 523 U.S. 614, 622 (1998). Inability to discover necessary facts necessary to the claim, despite due diligence, or constitutionally ineffective assistance of counsel, can serve as cause in the context of procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 451-53 (2000); *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

The actual innocence exception to procedural default is limited to "extraordinary case[s], where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 496. To make a showing of actual

innocence sufficient to excuse procedural default, a defendant must demonstrate that considering all the evidence, including evidence not presented at trial, “it is more likely than not that no reasonable juror would have convicted him” of the underlying crime. *Bousley*, 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)). In determining actual innocence in the procedural default context, the habeas court may “consider the probative force of relevant evidence that was either excluded or unavailable at trial.” *Schlup*, 513 U.S. at 327-28. The habeas court may also be required to assess the reliability of evidence not presented at trial and to weigh its impact on the credibility of trial witnesses. *Id.* at 328, 330. Specifically, “the Court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.” *Id.* at 332.

The government argues that Claims 2, 3, 4, 5, 6, 7, and 8 are procedurally barred from review under § 2255, because they could have been raised on direct appeal. I agree that these claims are procedurally defaulted, because Drayton could have presented them on direct appeal. He does not argue that counsel was ineffective in failing to raise these arguments on appeal or that he could not have discovered all necessary facts by the time of the appeal. Therefore, he fails to show cause for his default.

Drayton argues that he is actually innocent of Counts Five, Seven, Eight, and Ten. Although he does offer some evidence that was not presented at trial, his showings do not meet the *Schlup* standard as to any of the counts.

Count Five (Conspiracy)

I have already reviewed the government's evidence and deemed it sufficient to support Drayton's conviction on Count Five. A sufficiency determination does not preclude an actual innocence showing, however. *Id.* at 330. Drayton argues that taking all the evidence into account, no reasonable juror would have found him guilty of conspiring to traffic in five grams or more of crack cocaine. First, he points to the nature of the trial evidence: the government's case against him did not include evidence of any controlled buys or sales, wiretaps, monitored telephone calls, or confiscated drugs or money; some of the witnesses used by the government to establish the existence of a conspiracy denied seeing Drayton with drugs; and the jury acquitted Drayton of possessing drugs on July 16, 1999. These pieces of information, however, do not change the fact that reasonable jurors could find, beyond a reasonable doubt from all the evidence presented, that Drayton conspired with others to traffic in more than five grams of crack cocaine in July 1999.

Next, Drayton points to the following evidence not presented at trial: Yvonne Reeves' potential testimony that John and Drayton did not know each other before

Drayton's visit to her home in mid-July 1999 and that she never saw Drayton with drugs; John Reeves' purported testimony that Drayton was not involved in selling crack; medical records indicating that Drayton was in the hospital in South Carolina in June 1999, during the conspiracy period charged in Count Five; and prison housing records indicating that Drayton was incarcerated in a federal prison facility in Butner, North Carolina, from November 17, 2004, until January 12, 2005, and so was not incarcerated with Randy Radar on Christmas 2004, as Radar testified. Finally, Drayton offers his own account of the events of July 16, 1999, denying that he fired a gun at all on that day.

I cannot find that Yvonne Reeve's affidavit, prepared nine years after the events described, is reliable enough to persuade reasonable jurors to disbelieve the government's witness testimony about Drayton's drug sales. Drayton's own affidavit is undercut by others' testimony that he fired shots and by the excluded gun residue test, which I may consider in this actual innocence analysis. *Schlup*, 513 U.S. at 327-28. The reliability of Radar's testimony that he overheard his jail mate, Drayton, talking about his involvement in drug trafficking and a related shooting, is only slightly discredited by proof that Radar had one date slightly wrong. Finally, the medical records regarding Drayton's hospital stay add nothing to the parties' trial stipulation that he was a hospital patient in South Carolina from June 23 to June 29,

1999. Thus considering all the evidence, I cannot find that it is more likely than not that no reasonable jury would have convicted Drayton of conspiring to traffic in five or more grams of crack cocaine as charged in Count Five. Therefore, this actual innocence argument fails under *Schlup*.

Count Seven (The First Firearm Count)

Count Seven charged that Drayton knowingly used and carried a firearm during and in relation to, and possessed a firearm in furtherance of a drug trafficking crime, as set forth in Counts Five and Six . In support of this charge, the government relied on testimony from trial witnesses Dattore, Lane, and Beamer that they purchased crack cocaine from Drayton, or had seen him dealing crack, during the time period charged and on testimony from Beamer and other witnesses who said they saw Drayton carrying a firearm during drug transactions. Drayton points to other occasions when these witnesses, Yvonne and John Reeves, and Gathers testified (or purportedly would have testified) that they never saw Drayton dealing crack; to testimony that no drug transaction occurred on July 16, 1999; to his acquittal on Count Six; and to testimony indicating that Drayton did not purchase the firearm found near the scene of the shooting until July 16, 1999.

Taking all this evidence into account, however, reasonable jurors could have found that Drayton engaged in drug transactions at the Galax apartments while

carrying and displaying a different firearm before July 16, 1999. I find no actual innocence showing as to Count Seven.

Count Eight (The Second Firearm Count)

Count Eight charged that Drayton

knowingly used and carried a firearm during and in relation to a drug trafficking crime . . . and in the course of this violation caused the death of a person through the use of a firearm, which killing was murder as defined in [18 U.S.C.A. § 1111], in that the killing was perpetrated from a premeditated design unlawfully and maliciously to effect the death of another human being other than the victim.

In addressing Drayton's appeal claim that the court erred in denying his Motion for Judgment of Acquittal as to Count Eight, the Fourth Circuit reviewed the government's evidence in detail and affirmed the conviction. *Drayton*, 267 F. App'x at 194-95.

In arguing his actual innocence of Count Eight, Drayton again points to contradictory portions of witnesses' testimony, the lack of controlled buys or sales, the failure of the Third Superseding Indictment to incorporate Count Five as a predicate offense in Count Eight, and the lack of evidence that his actions harmed the victim. None of this is new evidence. Moreover, this court is bound by the Fourth Circuit's holding that the conviction on Count Eight was adequately supported by the evidence. *Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976) (finding that defendant ordinarily cannot relitigate issues under § 2255 that have

already been decided on direct appeal). Therefore, I find no actual innocence showing as to Count Eight.¹¹ *Schlup*, 513 U.S. at 327-28.

Count Nine (Sentencing Facts)

Drayton asserts that he was sentenced above the statutory maximum on Count Nine. He is correct. Count Nine charged Drayton with possession of a firearm as a convicted felon, which carries a statutory maximum sentence of ten years imprisonment. 18 U.S.C.A. § 922(g)(1). Drayton is currently serving the 151 months imprisonment concurrently imposed on Counts Five, Seven, and Nine.

Drayton does not, however, make an appropriate showing of actual innocence as necessary for me to consider the merits of this claim under § 2255, given Drayton's failure to raise it on direct appeal. Drayton does not demonstrate that he is actually innocent of the underlying conviction. Voss testified that Drayton purchased and possessed a firearm in July 1999 after being convicted of a felony earlier that year. (Tr. 2-167, Mar. 28, 2006.) Other witnesses testified that they had seen Drayton carrying and shooting a firearm in July 1999.

¹¹ Drayton also argues that he is actually innocent of the 300-month sentence imposed for Count Eight, because the jury found his act of shooting at the car to be voluntary manslaughter rather than first degree or second degree murder. Accordingly, he asserts, he should have been sentenced under 18 U.S.C.A. § 1112(b) (West 2000 & Supp. 2010), which carries a maximum sentence of fifteen years. The Fourth Circuit rejected this argument on appeal. *Drayton*, 267 F. App'x at 197. I am bound by that holding.

Moreover, Drayton’s argument of actual innocence of the sentencing facts is without merit. For purposes of sentence calculation, Count Nine was grouped with Counts Five and Ten, and the 42 grams of crack cocaine attributed to Drayton for Count Five gave him a Base Offense Level of 30 for each of the three grouped counts. As already discussed, Drayton fails to demonstrate that he is actually innocent of the conspiracy charged in Count Five. Since his sentence on Count Nine is based on the crack cocaine guideline, I cannot find that he is actually innocent of the conduct upon which that sentence was calculated. Moreover, because the 151-month sentence on Count Nine runs concurrently with the 151-month sentences imposed on Counts Five and Ten, I cannot find that Drayton will suffer a miscarriage of justice as contemplated under *Schlup* if this § 2255 claim is dismissed, based on his procedural default of the claim on direct appeal.

Count Ten (Drive-by Shooting)

This count charged that Drayton “knowingly and intentionally, in furtherance of a major drug offense . . . and with the intent to intimidate, harass, injure and maim, fired a weapon into a group of two or more persons, thereby causing grave risk to human life,” in violation of 18 U.S.C.A. § 36(b)(1). Drayton claims he is actually innocent of this count because he was not engaged in a major drug offense and did not shoot from a moving car.

Although the statute is entitled “Drive-by Shooting,” the elements of the offense as set forth in § 36(b)(1) do not require proof that the defendant fired his weapon from a moving car. Furthermore, the section defines “major drug offense” to include a drug conspiracy in violation of 21 U.S.C.A. § 846. *See* § 36(a)(2). For these reasons, I cannot find that Drayton has made the necessary showing of actual innocence as to Count Ten.

C. UNTIMELY CLAIM

The government argues that Claim 9, alleging that appellate counsel was ineffective for failing to file petitions for rehearing or a petition for a writ of certiorari, must be dismissed in its entirety as untimely filed, pursuant to § 2255(f). I agree.

A person convicted of a federal offense has one year to file a § 2255 motion, starting from the latest of the following dates:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been

newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2255(f). An amendment to a pending § 2255 motion is also subject to the one-year statute of limitations set forth in § 2255(f) unless the amendment relates back to a timely raised claim, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure. *Mayle v. Felix*, 545 U.S. 644, 664 (2005). However, “Rule 15(c)(2) relaxes, but does not obliterate, the statute of limitations; hence relation back depends on the existence of a common core of operative facts uniting the original and newly asserted claims.” *Id.* at 659 (quotation marks omitted). In the *Mayle* decision, the Supreme Court rejected prior appellate court rulings that allowed a habeas claim first asserted in a late amendment to relate back to timely filed claims merely because all the claims arose from the same trial proceedings. *Id.* at 662. Instead, the Court held that “[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order.” *Id.* at 664; *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000) (finding that late-filed claims did not relate back under Rule 15(c) to timely claims because they arose from “separate occurrences of both time and type”) (internal quotation marks and citation omitted).

A defendant's conviction becomes final for purposes of § 2255(f)(1) when the defendant's opportunity for direct review expires. *Clay v. United States*, 537 U.S. 522, 525 (2003). An inmate's § 2255 motion is considered filed when he delivers it to prison authorities for mailing. Rule 3(d), Rules Governing § 2255 Proceedings; *Houston v. Lack*, 487 U.S. 266, 276 (1988) (finding that prisoner's notice of appeal from denial of habeas relief was filed when he delivered it to prison authorities for mailing to the court).

The Fourth Circuit affirmed Drayton's conviction on March 4, 2008. Thus, Drayton's conviction became final on June 2, 2008, when the 90-day period to file a petition for a writ of certiorari expired. *Clay*, 537 U.S. at 525. Drayton signed and dated his original § 2255 motion on or about February 24, 2009, within one year of the date on which the conviction became final. Therefore, these initially filed claims are timely, pursuant to § 2255(f).

Drayton's Motion to Amend the § 2255 motion, however, was signed and dated on June 17, 2009, more than a year after the conviction became final on June 2, 2008. Therefore, even assuming that Drayton delivered the amendment to prison authorities for mailing on that date, Claim 9, first raised in the amendment, is untimely under § 2255(f)(1).

Moreover, the amended claim is also untimely filed under § 2255(f)(4), because it was not filed within one year of the date on which Drayton discovered the facts necessary for each part of the claim. According to Drayton and appellate counsel's affidavit, Drayton learned in late March 2008 that counsel had not filed a petition for rehearing or rehearing en banc. At that point, Drayton allegedly instructed counsel to file a petition for a writ of certiorari. When he was next able to contact counsel by telephone on June 5, 2008, he learned that she had not filed a petition for certiorari. Thus, Drayton knew the facts necessary to bring all subparts of Claim 9 by June 5, 2008, and had one year from that date in which to raise that claim.

Drayton does not allege facts indicating that § 2255(f)(2) or (3) applies to his claim or that equitable tolling is warranted. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (finding equitable tolling warranted only where inmate demonstrates diligent pursuit of rights and extraordinary circumstances that prevented timely filing).

Finally, the amendment does not "relate back" to previously filed claims. Drayton's initial § 2255 motion did not present any claim concerning the conduct of appellate counsel or Drayton's desire to pursue rehearing or certiorari proceedings. Therefore, Claim 9 does not relate back to any timely filed claim regarding a core of

common facts or occurrences of the same time and type, as required for an amendment to relate back under Rule 15(c). *Mayle*, 545 U.S. at 664; *Pittman*, 209 F.3d at 317-18. Therefore, I find that Claim 9 is untimely under § 2255(f)(1) and (4), and will deny relief as to this claim accordingly.¹²

III

For all of these reasons, I will deny the defendant's § 2255 motion. I find that the ineffective assistance claims alleged in Claim 1 are without merit, the trial errors asserted in Claims 2 through 8 are procedurally defaulted, and Claim 9 is untimely.

A separate Final Order will be entered herewith.

DATED: October 21, 2010

/s/ JAMES P. JONES
United States District Judge

¹² Drayton argues that the court may consider this procedurally defaulted claim on the merits, because he is actually innocent of several of the charges. *See Bousley*, 523 U.S. at 621. As already discussed, I do not find that Drayton has made the necessary showing of actual innocence so as to allow consideration of the merits of any of his procedurally defaulted claims, including the untimely Claim 9.