IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. GARY STEPHEN STOTTS, a/k/a JACKIE WAYNE SIMMONS, Defendant.	Cv. No. 01-1001 Cr. No. 96-10015

ORDER GRANTING MOTIONS TO SUPPLEMENT ISSUES 1A, 1C, 1E, AND 3
ORDER DENYING MOTIONS TO AMEND TO RAISE ADDITIONAL ISSUES
ORDER DENYING MOTION UNDER 28 U.S.C. § 2255
ORDER DENYING CERTIFICATE OF APPEALABILITY
AND
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH

Defendant, Gary Stephen Stotts, Bureau of Prisons (BOP) registration number 15483-076, an inmate at the United States Penitentiary (USP) in Pollock, Louisiana, has filed a pro se motion under 28 U.S.C. § 2255 seeking to set aside his convictions for violating 21 U.S.C. § 841(a)(1) and 18 U.S.C. §§ 924(c) and 922(g).

On March 11, 1996, a federal grand jury returned a four count indictment charging Stotts with: count one, knowingly and intentionally manufacturing and attempting to manufacture 100 grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1); count two, carrying and using a destructive device during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and count three, carrying and using an unassembled destructive device during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and count four, possessing firearms after conviction of a felony, in violation of 18 U.S.C. 922(g). Between May 19, 1997 and May 22, 1997, the Court presided at a trial that concluded with the jury returning a verdict finding Stotts guilty of all counts charged in the indictment.

On September 18, 1997, the Court presided at a sentencing hearing and imposed a sentence of 327 months imprisonment on count one and 120 months imprisonment on count four, to run concurrently with the sentence imposed in count one and concurrent 30 year sentences of imprisonment on count two and count three, to run consecutively to the sentence imposed in counts one and four. The Court also imposed a five-year period of supervised release. The Court entered the judgment on September 19, 1997. Stotts appealed. The Sixth Circuit Court of Appeals vacated Stotts conviction on count three and affirmed the remainder of the judgment. United States v. Stotts, 176 F.3d 880 (6th Cir. May 12, 1999) cert. denied, No. 99-7315, 528 U.S. 1127 (Jan. 18, 2000). On August 10, 1999, this Court entered an order vacating defendant's conviction on count three and entered the amended judgment on August 12, 1999.

On January 2, 2001, Stotts filed this § 2255 motion alleging that:

1. Counsel was ineffective:

   A. by failing to object to the introduction of his post-arrest silence at trial;

   B. by failing to object to the introduction of drug use by Stotts at trial;

   C. by failing to seek dismissal of count one of the indictment as duplicitous based upon the use of a general verdict form;

   D. by refusing to allow Stotts to testify at trial;

   E. by failing to object to the constructive amendment of the indictment by use of the word "or" in the jury instruction on the government's burden of proof in count one;

   F. by performing inadequately due to the conflict between Stotts and counsel; and

2. The trial court erred by failing to interview Stotts personally before ruling on Stotts motion for new counsel and counsel's motion to withdraw;

3. His drug trafficking conviction should be reversed under the holding of Apprendi v. New Jersey, 530 U.S. 466 (2000).

On January 29, 2001, Stotts filed a motion to amend and supplement his pending motion by adding an additional claim that counsel was ineffective by failing to investigate and present an expert witness to testify for the defense at trial. On March 9, 2001, Stotts filed a second motion to supplement his § 2255 motion. Stotts seeks to supplement issues 1A of his original motion by attaching portions of the trial transcript. He seeks to supplement issue 3 of the original motion by presenting additional law and argument. Stotts also seeks to supplement the additional claim of ineffective assistance presented in his first motion to amend. Stotts also seeks to raise two new issues: that the search warrant was invalid because it was not signed and the cumulative effect of all the alleged errors merits reversal of his convictions. On July 19, 2001, Stotts filed his third motion to supplement his § 2255 motion seeking to include count two, the § 924(c) offense, in the analysis of previously raised issues 1C and 1E.

To the extent that the defendant seeks to supplement and clarify issues 1A, 1C, 1E, and 3, the motions are GRANTED. However, the remainder of the issues presented in the motions filed on January 29, 2001, March 9, 2001, and July 19, 2001, are new claims. Stotts' conviction was final on January 18, 2000. His deadline for filing a § 2255 motion was, thus, January 18, 2001. The mandate of Fed. R. Civ. P. 15(a), that a court freely grant leave to amend when justice so requires, has been interpreted to allow supplementation and clarification of claims initially raised in a timely § 2255 motion. See Anderson v. United States, No. 01-2476, 2002 WL 857742 at *3(6th Cir. May 3, 2002); Oleson v. United States, No. 00-1938, 2001 WL 1631828 (6th Cir. Dec. 14, 2001). However, once the statute of limitations has expired, allowing amendment of a petition with additional grounds for relief would defeat the purpose of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996)(codified, inter alia, at 28 U.S.C. § 2244 et seq.)(AEDPA). Oleson, 2001 WL 1631828 at *3 (citing United States v. Thomas, 221 F.3d 430, 436 (3d Cir. 2000)("[A] party cannot amend a § 2255 petition to add a completely new

claim after the statute of limitations has expired.")). See also United States v. Pittman, 209 F.3d 314, 317-18 (4th Cir. 2000)("The fact that amended claims arise from the same trial and sentencing proceeding as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c). . . Such a broad view of 'relation back' would undermine the limitations period set by Congress in the AEDPA" (citing United States v. Duffus, 174 F.3d 333, 337 (3d Cir. 1999)). Thus, the motions to add additional claims are DENIED.

A § 2255 motion can never be utilized as a substitute for an appeal. Sunal v. Large, 332 U.S. 174, 178 (1947); United States v. Walsh, 733 F.2d 31, 35 (6th Cir. 1984). Failure to raise a claim on direct appeal constitutes a procedural default that bars presentation of the claim in a § 2255 motion.

> Given society's substantial interest in the finality of judgments, only the most serious defects in the trial process will merit relief outside of the normal appellate system. Hence, when a federal statute, but not the Constitution, is the basis for postconviction attack, collateral relief from a defaulted claim of error is appropriate only where there has been fundamental unfairness, or what amounts to a breakdown of the trial process.

Grant v. United States, 72 F.3d 503, 506 (6th Cir. 1996)(citing Reed v. Farley, 512 U.S. 339, 354 (1994)). Even claims of constitutional error that could have been raised on appeal are waived unless the defendant demonstrates cause and prejudice for that failure. United States v. Frady, 456 U.S. 152, 167-68 (1982). Defendant now attempts to contend that his conviction (and by implication the procedural default of issues 1A-F and 2), resulted from the ineffective assistance of trial and appellate counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984), establishes the standard for an ineffective assistance claim. A petitioner must show:

1. deficient performance by counsel; and
2. prejudice to the defendant from the deficient performance.

Id. at 687.

A prisoner attacking his conviction bears the burden of establishing that he suffered some prejudice from his attorney's ineffectiveness. Lewis v. Alexander, 11 F.3d 1349, 1352

(6th Cir. 1993); Isabel v. United States, 980 F.2d 60, 64 (1st Cir. 1992). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." Strickland, 466 U.S. at 697. If a reviewing court can determine lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. Id. at 697. See also United States v. Haddock, 12 F.3d 950, 955 (10th Cir. 1993).

To demonstrate prejudice, a movant under § 2255 must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Additionally, however, in analyzing prejudice,

> the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v. Fretwell, 506 U.S. 364, 368 (1993)(citing United States v. Cronic, 466 U.S. 648, 658 (1984)). "Thus an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart v. Fretwell, 506 U.S. at 369.

In evaluating an ineffective assistance claim, the Court should not second guess trial counsel's tactical decisions. Adams v. Jago, 703 F.2d 978, 981 (6th Cir. 1983). Rather, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. An ineffective assistance claim based on counsel's failure to raise a particular defense requires as a threshold matter a showing that the defense is meritorious. Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). Thus, counsel is not ineffective for failing to raise all possible defenses, and particularly for avoiding frivolous motions. Bowen v. Foltz, 763 F.2d 191 (6th Cir. 1985); Meeks v. Bergen, 749 F.2d 322 (6th Cir. 1984).

Issue 1A and Supplemented 1A

Stotts contends that counsel was ineffective for failing to object to the testimony by two prosecution witnesses that he remained silent when asked if other people or destructive devices were in the house. Stotts was under arrest at the time that the questions were asked. Stotts presented a defense in this case that another person made the rental arrangements for the home and resided there to create the inference that the drug manufacturing operation, explosives, and guns belonged to an unindicted party. Under Stotts' theory of the case, he was merely an innocent visitor at the house when the agents arrived and the explosion occurred.

Defense counsel, not the prosecutor, first elicited testimony regarding Stotts' silence when asked about the explosion or the presence of anyone else in the house during the cross examination of Special Agent Charles Parris. (R. At 158; transcript at 115-16). Counsel attempted to establish the agents' expectation or belief that someone else was in the house to bolster Stotts' defense that the illicit items found at the house did not belong to Stotts. On recross by the government, Parris responded that the defendant was non-cooperative when asked if other people or destructive devices were in the house. (R. At 158; transcript at 118). Drug Enforcement Agent (DEA) Billy Joe Mundy testified later in the trial that Stotts was questioned about "anybody else in the house." (Record at 159; Transcript at 18). During the cross examination of Mundy, defense counsel elicited the testimony that Stotts also remained silent when questioned about other explosive devices when cross-examining Mundy about a conflicting previous statement. (Record at 159; Transcript at 72-77). During closing argument, defense counsel referred to the agents' expectation that more than one person was in the house. The government referred to Stotts silence in response to agents' questioning on the presence of other persons or explosives during closing argument.

The Supreme Court has held that "it does not comport with due process to permit the prosecution during the trial to call attention to [a defendant's] silence at the time of arrest and

to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. Doyle v. Ohio, 426 U.S. 610, 619 (1976)(quoting United States v. Hale, 422 U.S. 171, 182-83 (1975).

Here, however, the defendant opened the door with defense counsel's questions to Agent Parris and by the very defense presented. The government then permissibly used Stotts' silence in response to questioning about the presence of other persons and explosives in the house to impeach and shed doubt on Stotts' defense. The Sixth Circuit has held that when it was a defendant's own counsel--not, as in Doyle, the prosecutor--who elicits testimony concerning post-arrest, post-Miranda silence, Doyle principles do not apply.

Defense counsel also emphasized inconsistencies between the physical evidence and testimony of prosecution witnesses. Defense counsel pointed out inconsistencies in Mundy's trial testimony and a previous statement to support the defense theory that when Mundy or other agents did not find the expected person at the house, they fabricated evidence of an explosion to implicate and gain indictment of Stotts. To the extent that Stotts argues implicitly that counsel was ineffective for asking questions about his silence, he questions counsel's tactical decisions on the defense presented. The choice of a defense strategy was inherently tactical and not subject to review. Jago, 703 F.2d at 981. Furthermore, the evidence against Stotts was overwhelming. Counsel's decision to construct the most persuasive possible argument in the face of such incriminating proof can hardly be described as ineffective. Neither was trial counsel ineffective by failing to raise a frivolous objection. Likewise, appellate counsel was not ineffective for failing to raise a frivolous issue on appeal.

Issue 1B

Stotts next contends that trial counsel was ineffective for failing to object to testimony by Mundy that Stotts had sores or pustules on his arms characteristic of one who injects

methamphetamine. Stotts alleges that the testimony was inadmissible under Fed. R. Evidence 404(b) and 403. Stotts further contends the evidence was introduced merely to raise the inference of Stotts' bad character and guilt by association.

Fed. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . .

The Sixth Circuit has interpreted Rule 404(b) as "a rule of inclusion rather than exclusion, since only one use is forbidden and several permissible uses of such evidence are identified." United States v. Blankenship. 775 F.2d 735, 739 (6th Cir. 1985). Rule 404(b) prohibits only the introduction of acts that are offered to show criminal propensity or a conformity with past criminal activity. United States v. Ushery,968 F.2d 575, 580 (6th Cir. 1992). If the evidence has an independent purpose, Rule 404(b) does not prohibit its admission. Id.

As a general rule, all relevant evidence is admissible under Federal Rule of Evidence 402. To be relevant, evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evidence 401. However, even if relevant, evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evidence 403.

The government did not rely on any Rule 404(b) evidence during the direct examination of Agent Mundy. Defense counsel then cross-examined Mundy with questions which created an arguable inference that Mundy or other agents expected another person to be at the house and fabricated evidence of an explosion to implicate and gain indictment of Stotts, rather than allegedly truly guilty party. The government responded on redirect examination by asking Mundy about his observations of Stotts' physical condition. (R. at

159; trial transcript at 86). Mundy responded that Stotts had sores or pustules on his arms characteristic one who injects methamphetamine.

Stotts was charged with knowingly and intentionally manufacturing and attempting to manufacture methamphetamine. The physical condition of Stotts' arms was circumstantial evidence of his familiarity with and use of the drug he was charged with manufacturing. That evidence was obviously probative for demonstrating not only Stotts' intent to manufacture methamphetamine, but also his knowledge of the substance he was manufacturing. To the extent that evidence was prejudicial, it was not unfairly prejudicial, as any damage to Stotts' case resulted not from improper considerations, but from the legitimate probative force of the evidence. United States v. Bilderbeck, 163 F. 2d 971, 978 (6th Cir. 1999)(citing Sutkiewicz v. Monroe County Sheriff, 110 F.3d 352, 360 (6th Cir. 1997). Thus, trial counsel was not ineffective by failing to object to the testimony by Mundy and appellate counsel was not ineffective for failing to raise this issue on appeal.

Issue 1C and Supplemented 1C

Stotts next contends that counsel was ineffective by failing to seek dismissal of counts one and two of the indictment as duplicitous based upon the use of a general verdict form. Stotts contends that two separate offenses were charged in each count.

> An indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence [sic] intended to be punished."

Hamling v. U.S., 418 U.S. 87, 117 (1974) (citations omitted); United States v. Holmes, 975 F.2d 275, 285 (6th Cir. 1992)(applying same standard to section 924(b) firearm prosecution); Allen v. U.S., 867 F.2d 969, 971 (6th Cir. 1989).

The relevant language of count one of the indictment charged Stotts with unlawfully, knowingly, and intentionally manufactur[ing] and attempt to manufacture in excess of 100

grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and § 846. The indictment plainly charged a violation of section 841(a)(1). The relevant language of count two of the indictment in this case states that the defendant "did knowingly and intentionally carry and use a firearm, to wit, a destructive device." Thus, the indictment also plainly charged a violation of section 18 U.S.C. § 924(c).

> A duplicitous indictment is one that charges separate offenses in a single count. The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or both. Adverse effects on a defendant may include . . . the danger that a conviction will result from a less than unanimous verdict as to each separate offense.

United States v. Duncan, 850 F.2d 1104, 1108 n. 4 (6th Cir. 1988).

When a defendant manufactures or attempts to manufacture at the same place and at the same time, it is a single transaction containing "multiple criminal steps leading to the same criminal undertaking." United States v. Palafox, 764 F.2d 558, 563 (9th Cir. 1985). Actual manufacture under § 841(a)(1) and attempted manufacture under § 846 do not each require proof of an additional element which the other does not. Attempted manufacture requires: (1) an intent to engage in criminal conduct and (2) an overt act constituting a substantial motion towards commission of the substantive offense. United States v. Williams, 704 F.2d 315, 321 (6th Cir. 1983).

The crime of attempt is a lesser included offense of the substantive crime. United States v. Pino, 608 F.2d 1001, 1003-04 (4th Cir. 1979); United States v. Marin, 513 F.2d 974, 976 (2d Cir. 1975). An act of completed manufacture necessarily subsumes all the elements of attempted manufacture. "As is invariably true of a greater and lesser included offense, the lesser offense . . . requires no proof beyond that which is required for conviction of the greater. . ." Brown v. Ohio, 432 U.S. 161, 168 (1977). Moreover, the "substantial step" element of an attempt may be as much as, or less than, the actual commission of the crime. See United States v. Manley, 632 F.2d 978, 987-88 (2d Cir. 1980).

Had Stotts been charged separately with one count of manufacturing and one count of attempt to manufacture for this same conduct, he would have been subjected to multiple convictions and punishments for the same offense violating the double jeopardy clause of the Fifth Amendment. Rutledge v. United States, 517 U.S. 292, 302 (1996). Count one of Stotts' indictment does not violate the prohibition against duplicitous indictments. Neither trial nor appellate counsel were ineffective for failing to raise this issue.

Stotts also alleges that count two was duplicitous for charging him with "carry and use" of a firearm, to wit, a distructive device during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Although the indictment was written in the conjunctive, the statute itself is written in the disjunctive, "uses or carries." It is settled law that an offense may be charged conjunctively in an indictment where a statute denounces the offense disjunctively. United States v.Murph, 707 F.2d 895, 896 (6th Cir. 1983)(citing United States v. Niederberger, 580 F.2d 63 (3d Cir. 1978). As the indictment was not duplicitous, it follows a fortiori that defendant was not prejudiced by trial counsel's failure to file a motion on that ground to dismiss the indictment or appellate counsel's failure to raise the issue on direct appeal.

Issue 1D

Stotts alleges that the counsel was ineffective by refusing to allow Stotts to testify at trial. Stotts admits that he discussed whether he should testify with his attorney prior to trial. Stotts alleges that counsel advised him that he would be impeached with his prior convictions if he testified. Stotts further alleges that he told counsel that he would wait until the government presented its case before making his decision. Stotts contends that the government introduced evidence of his "extensive criminal record" over the objections of counsel and despite his stipulation prior to trial that he was a convicted felon.

The trial transcript reflects that Agent Mundy testified that he express-mailed Stotts' photograph to the area where he previously resided because of his suspicion that Stotts had

a criminal history. Mundy further testified that Sparta police identified Stotts as an individual "who has an extensive criminal record." (Trial transcript at 42.) Defense counsel immediately moved for a mistrial. The Court denied the motion for mistrial but gave a curative instruction to the jury to disregard any reference to the defendant's criminal history except to the extent that it was necessary to prove that Stotts was in fact a convicted felon on the date of these alleged incidents. (Trial transcript at p. 45.)

Stotts alleges that based upon Mundy's statement in the presence of the jury, he reasoned that any impeachment with his criminal history would not matter. Stotts alleges that he informed his attorney that he wanted to testify but counsel would not allow him to testify. Stotts alleges that he would have testified that he was not involved in the manufacturing of a destructive device, was not taking drugs, and that another individual also resided at the house where Stotts was arrested.

The constitutional right of a defendant to testify at trial is well established and subject only to a knowing and voluntary waiver by the defendant. Rock v. Arkansas, 483 U.S. 44, 49 (1987); United States v. Teague, 953 F.2d 1525, 1532-33 (11th Cir. 1992). With regard to whether a defendant will take the stand, defense counsel's role is to advise; "it is ultimately for the defendant himself to decide." Teague, 953 F.2d at 1533.

Stotts alleges that he expressed his desire to testify after the government presented its case. At trial, however, the defense rested after calling eight witnesses but not Stotts. During the proceedings Stotts never objected to nor expressed dissatisfaction with not having testified. Stotts merely offers the thoroughly self-serving statement here that he was prevented from taking the stand. See Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991). The record is devoid of any evidence of a disagreement during trial between counsel and Stotts over any desire by Stotts to testify. See United States v. Systems Architects, Inc., 757 F.2d 373, 374-76 (1st Cir. 1985).

Prior to trial, Stotts made his displeasure with counsel known by filing three motions seeking new appointed counsel. The first motion was granted and new counsel was appointed. Stotts next two motions were denied. At sentencing, Stotts stated merely that counsel would not allow him to "participate in the preparation of [his] own defense," when relating counsel's alleged deficiencies. (Transcript of sentencing at p. 25.) Stotts expounded with great verbosity on the many alleged errors in the court's rulings prior to and during trial. (Transcript of sentencing at 25-27.)

Stotts also received new counsel for his direct appeal. Stotts then also filed a motion for appointment of counsel after the conclusion of the direct appeal in which he expressed his dissatisfaction that appellate counsel would not file a petition for writ of certiorari. Stotts did not allege that appellate counsel had failed to raise any requested issues regarding his trial counsel's performance on direct appeal, rather Stotts' contended that an issue that was raised by wrongly decided by the appellate court and should be presented for review by the Supreme Court.

Thus, the trial and post-trial record does not reflect any request by Stotts to testify, any expression of Stotts' dissatisfaction for not having testified, nor does the record reflect that he ever requested that appellate counsel raise the issue. Stotts desire to testify is first expressed in this § 2255 motion.

Stotts has failed to show that counsel's conduct with regard to his decision to testify was constitutionally deficient. Furthermore, he has failed to demonstrated prejudice. The name and nature of Stotts' prior convictions were not revealed to the jury by Mundy's testimony. The remark was isolated and a curative instruction was given immediately. Had Stotts taken the stand his entire record would have been revealed. Counsel presented testimony by other witnesses that another person rented and resided in the home and that agents expected more than one person in the home without any damaging impeachment or

cross-examination of Stotts on his criminal record or other issues relevant to the underlying charges.

Although the ultimate decision whether to testify rests with the defendant, when a tactical decision is made not to have the defendant testify, the defendant's assent is presumed. United States v. Webber, 208 F.3d 545, 551 (6th Cir. 2000) (citing United States v. Joelson, 7 F.3d 174, 177 (9th Cir. 1993). Defense counsel is presumed to follow the professional rule of conduct and "strongly presumed to have rendered adequate assistance" in carrying out the general duty "to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland, 466 U.S. at 688-90.

A defendant who wants to testify can reject defense counsel's advice to the contrary by insisting on testifying, communicating with the trial court, or discharging counsel. Joelson, 7 F.3d at 177. At base, a defendant must "alert the trial court" that he desired to testify or that there is a disagreement with defense counsel regarding whether he should take the stand. When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred from the defendant's conduct. Webber 208 F.3d at 551. Waiver is presumed from the defendant's failure to testify or notify the trial court of the desire to do so. Joelson, 7 F.3d at 177.

The Seventh Circuit recognized the "grave practical difficulty in establishing a mechanism that will protect a criminal defendant's personal right" to testify in his own behalf "without rendering the criminal process unworkable." Underwood, 939 F.2d at 475. As the court pointed out, "[i]t is extremely common for criminal defendants not to testify, and it is simple enough after being convicted for the defendant to say 'My lawyer wouldn't let me testify. Therefore I'm entitled to a new trial.'" Id.

The Seventh Circuit's solution was to place the burden on the movant to allege specific supporting facts.

> [A] barebones assertion by a defendant, albeit made under oath, is insufficient to require a hearing or other action on his claim that his right to testify in his own defense was denied him. It is just too facile a tactic to be allowed to succeed. Some greater particularity is necessary--and also we think some substantiation is necessary, such as an affidavit from the lawyer who allegedly forbade his client to testify--to give the claim sufficient credibility to warrant a further investment of judicial resources ind determining the truth of the claim. . . . In a subsequent collateral attack on the conviction the defendant must produce something more than a bare, unsubstantiated, thoroughly self-serving, and none too plausible statement that his lawyer (in violation of professional standards) forbade him to take the stand.

Underwood, 939 F.2d at 475-76. See also United States v. Ortiz, 82 F.3d 1066, 1070-71 (D.C. Cir. 1996)(declining, on direct appeal, to institute either a rule assuming error in absence of trial court inquiry of defendant or a rule assuming waiver in absence of on-the-record demand by defendant, and holding that trial court did not err in accepting counsel's representation that client had made informed decision not to testify); U.S. v. Pennycooke, 65 F.3d 9, 14 (3d Cir. 1995)(holding on direct appeal that absent indication of interference by trial counsel with defendant's decision whether to testify, trial court not obliged to inquire of or obtain waiver from defendant, and requiring attack on attorney's performance to be raised under § 2255).

The record does not support Stotts' assertion that his attorney refused to allow him to testify. Neither do the allegations of the petition demonstrate that Stotts' testimony would probably have resulted in an acquittal, or that his failure to testify caused his trial to be fundamentally unfair or unreliable. Stotts has totally failed to establish either that trial counsel's trial strategy was deficient or that appellate counsel was ineffective for failing to raise this issue on appeal.

Issue 1E

Stotts contends that counsel was ineffective by failing to object to the constructive amendment to the indictment when the judge instructed the jury that in order to prove count one, the government must establish that the defendant "intentionally manufactured or attempted to manufacture methamphetamine" rather than "manufactur[ed] and attempted [to] manufactur[e]" as charged in the indictment. Stotts supplemented his motion with the additional argument that counsel was also ineffective by failing to object when the judge instructed the jury that in order to prove count two the government must prove that the defendant knowingly "used or carried a firearm," rather than "carr[ied] and use[d] a firearm" as charged in the indictment.

As discussed in issue 1C, where a statute denounces an offense disjunctively, the offense may be charged conjunctively in the indictment. Moreover, guilt may be established by proof of any one act named disjunctively in the statute. Murph, 707 F.2d at 896(citing Niederberger, 580 F.2d 63). Stotts has no claim arising from the use of the disjunctive in the jury instructions.

A constructive amendment occurs when "'the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of an offense charged that there is a substantial liklihood that the defendant may have been convicted of an offense other than that charged in the indictment.'" United States v. Manning, 142 F.3d 336, 339 (6th Cir. 1998)(quoting United States v. Hathaway, 798 F.2d 902, 910(6th Cir. 1986)).

In this case, there is absolutely no evidence that the indictment was amended in any manner. Stotts' contentions that the jury instructions expanded the offenses charged in counts one and two are without factual or legal foundation. Stotts was not required to defend against an uncharged crime. Accordingly, there was no possibility that Stotts was convicted of an offense other than the offenses charged in the indictment. United States v. Flowal, 163

F.2d 956, 962 (6th Cir. 1998). As Stotts' arguments lack merit, counsel was not ineffective for failing to raise these frivolous issues at trial or on appeal.

Issue 1F

Stotts alleges that trial counsel performed inadequately due to the conflict of interest between Stotts and counsel. As support for this issue, Stotts refers to his letters to the trial judge and a complaint filed with the Tennessee Board of Professional Responsibility. Defendant's first attorney was appointed on January 16, 1996. On May 15, 1996, defendant requested a new attorney. The Court ruled in open court that appointed counsel would remain on the case unless defendant could retain counsel. On June 26, 1996, Stotts requested that he be appointed another attorney. Again his request was denied with appointed counsel instructed to proceed unless the defendant retained counsel. Stotts' trial was set for July 16, 1996.

On July 5, 1996, the Court granted defense counsel's motion for additional time to prepare for trial, and the trial was rescheduled for August 19, 1996. On July 31, 1996, the Court granted the government's motion for a continuance. Defendant's trial was reset for December 19, 1996. On September 20, 1996, appointed counsel filed a motion to withdraw based upon a letter from Stotts indicating that he contemplated filing a lawsuit against counsel. The motion was referred to the United States Magistrate Judge for a hearing. The motion was granted, and Stotts was appointed new counsel.

Defendant's trial was rescheduled for January 6, 1997. In order that new counsel have sufficient time to prepare, the trial was then rescheduled for February 18, 1997. The trial was again rescheduled for March 24, 1997, at the request of the defense due to late delivery of discovery materials. Upon motion of the government, the trial was postponed until April 14, 1997, due to conflicts in the schedules of two essential witnesses. On April 7, 1997, the defense requested additional time to prepare which resulted in the rescheduling of the trial to May 19, 1997.

On April 2, 1997, Stotts filed a motion for substitution of counsel alleging that counsel failed to confer with him and respond to his letters concerning facts of the case and questions of law although his trial was two weeks away. Stotts alleged that he was entitled to copies of documentary and photographic evidence which counsel failed to provide. On April 4, 1997, the Clerk filed an ex parte undated letter which the defendant had mailed to the Court. The letter expresses defendant's belief that he was entitled to discovery documents, to participate in preparing his defense, answers to questions, and copies of pictures of evidence. Stotts wrote that he wanted copies of "everything pertaining to [his] case, so that [he] can in turn give copies to [his] family because [his] family has a friend who is an attorney who told [his] family that he would be able to give them an overview of [his] case which could possibly help [him] in [his] defense."

On April 4, the Court denied the pro se motion for substitution of counsel, noting that as defendant was represented by an attorney, he was not entitled to file motions on his own behalf. The Court also noted that defendant failed to serve a copy of the motion on the attorney for the government. The Court further ruled that defense counsel was under no obligation to provide copies of documents to the defendant so that another attorney could review his work, noting that if defendant had retained another attorney, he should so advise the court and appointed counsel would be relieved. The Court also determined that trial strategy was the province of the defense attorney, not every motion that a defendant wants filed should be filed, and as defendant was also unhappy with his first appointed lawyer, he was apparently embarking upon a quest to find an attorney who would let him direct every aspect of the case.

Not satisfied, Stotts then filed an amended motion for substitution of counsel alleging that counsel failed to give defendant copies of expert witnesses' opinions and inform and update the defendant, refused to allow the defendant to participate in orchestrating his defense strategy, and refused to interview all government witnesses. Stotts characterized this

behavior as a "conflict of interest" and "a serious conflict." The Court reaffirmed its previous order and directed Stotts to file no further motions to be relieved of present counsel.

Stotts then notified counsel that he had filed a formal complaint with the Board of Professional responsibility, an action orchestrated to require his attorney to file a motion to be relieved as counsel. Stotts' action was almost identical to that taken with his first appointed attorney after the Court denied two pro se motions, a threat of lawsuit against counsel which resulted in almost a year's delay in his trial.

In denying counsel's motion to be relieved, the Court noted that defendant had lodged similar complaints against the first attorney, alleging that counsel did not consult with him often enough and did not conduct the investigation in a manner satisfactory to the defendant. The Court determined that present counsel was diligently attempting to prepare a defense and must be granted the discretion to decide how that defense should be prepared and not be subject to every demand of a defendant.

The Court further determined that defendant had been unhappy with both lawyers appointed to represent him, thus, the Court had no indication that he would ever be happy with any lawyer appointed for him. The Court determined that Stotts had competent, experienced counsel representing him who was conducting an investigation in preparation for a defense and denied counsel's motion to be denied.

The Sixth Amendment right to effective assistance of counsel is violated when an actual conflict of interest adversely affects counsel's representation. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). To establish an actual conflict of interest, the defendant must show that (1) the attorney could have pursued a plausible alternative defense strategy, and (2) the alternative strategy was inherently in conflict with or not undertaken due to the attorney's other interest or loyalties. United States v. Soldevila-Lopez, 17 F.3d 480, 486 (1st Cir. 1994). When an alleged conflict of interest is at issue, actual prejudice need not be established. Id.; Cuyler, 446 U.S. at 349-50.

Stotts contends that an actual conflict existed because counsel filed a motion to be relieved as counsel in which he denied Stotts' allegations. Stotts opines that counsel was then representing his own interests, rather than Stotts' interests. Stotts cites Mathis v. Hood, 937 F.2d 790, 795-96 (2d Cir. 1991), for the proposition that the filing of disciplinary proceedings against an attorney and possiblity of liability for the delay caused by the attorney created an obvious conflict of interest sufficient to undermine its confidence in the outcome of the appeal, a conflict that established a per se violation of the right to effective assistance of counsel. However, Stotts overlooks the fact that Mathis's disciplinary complaint against his appellate attorney was well-founded, was based on egregious delay, and resulted in the attorney's being formally admonished by the disciplinary committee. Mathis, 937 F.2d at 796.

This Court determined Stotts' complaints against his attorney were unfounded, frivolous, and for the purpose of delay. The Mathis court also issued the proviso that a "frivolous complaint against an attorney, or one filed for purposes of delay, or even one filed for the purpose of obtaining new counsel, would not create a conflict of interest warranting habeas relief of the type approved here." Id. No unconstitutional conflict of interest existed in this case despite the defendant's attempt to manufacture one.

Furthermore, Stotts' motion is devoid of any plausible defense strategy, with the exception of his desire to testify in his own behalf. Stotts ignores the inconsistencies in his own motion wherein he faults counsel for the minute amount of damaging evidence which was admitted into evidence on the one hand, and his purported alternative defense strategy of testifying which would have allowed the floodgate of damaging impeachment evidence and cross examination to open. Stotts fails to demonstrate any plausible alternative defense strategy.

Stotts has failed to establish prejudice or deficient performance by his trial attorney. Furthermore, despite the appointment of new counsel for Stotts' direct appeal, the motion is

devoid of any allegations that Stotts requested appellate counsel to raise this issue on direct appeal.

Issue 2

Stotts contends that the Court erred by failing to hold a hearing on his second round of motions for substitution of counsel. This Court heard from Stotts personally with regard to his dissatisfaction with his first appointed counsel. Stotts also received a hearing before the Magistrate Judge. Stotts began his attempt to obtain a third attorney two weeks before trial. That the trial was subsequently postponed for a month to allow defense counsel to continue preparing his defense is irrelevant. Stotts began the campaign before the Court granted the continuance. At that stage of the proceedings, defendant was not seeking to assert his right to counsel. He was seeking counsel of choice, a right which is not absolute and requires a showing of good cause to warrant substitution. United States v. Iles, 906 F.2d 1122, 1130 (6th Cir. 1990).

Stotts received the appointment of the second attorney as a result of similar complaints and dissatisfaction with the first attorney. Stotts' attempt to obtain a third attorney was an attempt to delay his trial. Furthermore, his demands were unreasonable and untimely. Counsel's motion, contrary to Stotts' assertion of establishing any actual conflict, documented counsel's continuing efforts to diligently prepare a defense. Due to the absence of evidence of any actual conflict, the Court determined that no hearing was necessary on Stotts' motions.

Furthermore, the Court notes that Stotts did not renew his motion or otherwise express dissatisfaction with counsel during trial. Thus, Stotts fails to demonstrate that his trial was fundamentally unfair and this Sixth Amendment claim fails also.

Stotts has failed to demonstrate any way that his trial attorney's actions caused his trial to be fundamentally unfair or unreliable. Regardless of whether his trial or appellate attorneys did everything Stotts expected, he cannot establish any prejudice under Strickland

or Fretwell. The issues raised by this motion are factually baseless complaints regarding counsel's failure to raise meritless claims and objections. Neither trial or appellate counsel were ineffective for failing to raise frivolous and baseless defenses and objections. All the foregoing Sixth Amendment claims are without merit.

Issue 3

Defendant contends that his conviction and sentence under count one of the indictment violate the principles enunciated in Apprendi v. New Jersey, 530 U.S. 466 (June 26, 2000). Stotts was sentenced on September 18, 1997 and his judgment of conviction was entered on September 19, 1997. After the Sixth Circuit Court of Appeals vacated Stotts conviction on count three and affirmed the remainder of the judgment, this Court entered its amended judgment on August 12, 1999. The United States Supreme Court denied his petition for writ of certiorari on January 18, 2000.

Stotts maintains that Apprendi is a "new rule of constitutional law" which entitles him to relief. Apprendi was clearly not available to Stotts at trial, sentencing, or on appeal and presents a new constitutional rule of criminal procedure. However, new rules of constitutional criminal procedure are generally not applied to cases on collateral review. Teague v. Lane, 489 U.S. 288 (1989). Here, Stotts cannot demonstrate that Apprendi has been "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255 ¶ 8(2).

The United States Supreme Court must explicitly hold that its decision is retroactive to cases on collateral review and has not done so in the case of Apprendi. Applying that standard, the Sixth Circuit held, in an unpublished decision, that the Supreme Court's decision in Apprendi does not meet either Teague exception to the general rule of non-retroactive application and is not retroactively applicable to initial § 2255 motions. Goode v. United States, No. 01-1340, 2002 WL 987905 (6th Cir. May 10, 2002); see also Oleson v. United States, No. 00-1938, 2001 WL 1631828, at *3-*4 (6th Cir. Dec. 14, 2001) (district

court did not abuse its discretion in denying a motion to amend a § 2255 motion to assert an Apprendi claim because amendment would have been futile); Snyder v. United States, No. 01-1258, 2001 WL 1298954, at *2 (6th Cir. Aug. 7, 2001) (upholding dismissal of § 2255 motion because, inter alia, "Apprendi may not be applied retroactively"); Jones v. United States, No. 00-5280, 2001 WL 92114, at *2 (6th Cir. Jan. 25, 2001) (directing the district court to "determine whether Apprendi may be retroactively applied to this case under Teague v. Lane"); United States v. Murray, No. 98-1537, 2001 WL 118605, at *2-*3 (6th Cir. Jan. 25, 2001) (recalling mandate to permit application of Apprendi to case in which certiorari had recently been denied; noting that, with respect to those "defendants whose convictions became final before Apprendi was handed down, the new rule would not be retroactively applicable" and that this action "involves a tiny subset of situations in which this court's decision has been entered, but has not yet become final due to a pending petition for rehearing en banc or for certiorari"); see also In re Clemmons, 259 F.3d 489 (6th Cir. 2001) (holding, on the basis of Tyler v. Cain, 533 U.S. 656 (2001), that Apprendi has not been "made retroactive to cases on collateral review by the Supreme Court", 28 U.S.C. § 2255, and, therefore, it may not form the basis for a second or successive § 2255 motion); White v. Lamanna, No. 01-4051, 2002 WL 857739, at *2 (6th Cir. May 3, 2002) (applying Tyler and Clemmons to deny consideration of an Apprendi issue raised in a petition pursuant to 28 U.S.C. § 2241); Perkins v. Thomas, No. 01-5432, 2001 WL 1178279 (6th Cir. Sept. 24, 2001) (same).[1] Thus, Apprendi fails to provide Stotts with any basis for relief.

[1] These unpublished decisions are consistent with the decisions in other circuits refusing to give retroactive application to Apprendi. See Hamm v. United States, 269 F.3d 1247 (11th Cir. 2001); Dukes v. United States, 255 F.3d 912 (8th Cir. 2001); United States v. Moss, 252 F.3d 993, 996-1001 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001); Jones v. Smith, 231 F.3d 1227, 1236-38 (9th Cir. 2000); cf. United States v. Smith, 241 F.3d 546 (7th Cir. 2001) (declining to decide whether Apprendi is retroactively applicable on collateral attack because defendant could not establish cause and prejudice sufficient to excuse his failure to raise the issue at trial and on direct review).

The motion, together with the files and record in this case "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. See also Rule 4(b), Rules Governing Section 2255 Proceedings in the United States District Courts. Therefore, the court finds that a response is not required from the United States Attorney, and that the motion may be resolved without an evidentiary hearing. United States v. Johnson, 327 U.S. 106, 111 (1946); Baker v. United States, 781 F.2d 85, 92 (6th Cir. 1986). Defendant's conviction and sentence are valid, and his motion is denied.

Consideration must also be given to issues that may occur if the defendant files a notice of appeal. Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2255 motion. Section 2255 now incorporates the old habeas procedure of issuing or denying a certificate of probable cause, now renamed a certificate of appealability. No § 2255 movant may appeal without this certificate.

Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063 (6th Cir. 1997), held that district judges may issue certificates of appealability under the AEDPA. Id. at 1073. The court also held that AEDPA codifies in amended § 2253 the standard for issuing a certificate of probable cause found in prior § 2253, which was essentially a codification of Barefoot v. Estelle, 463 U.S. 880, 893 (1983). See Lyons, 105 F.3d at 1073.

> [P]robable cause requires something more than the absence of frivolity . . . and the standard for issuance of a certificate of probable cause is a higher one than the 'good faith' requirement of § 1915. . . . [A] certificate of probable cause requires petitioner to make a substantial showing of the denial of [a] federal right. [A] question of some substance, or a substantial showing of the denial of [a] federal right, obviously [does not require] the petitioner [to] show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot, 463 U.S. at 893 (internal quotations and citations omitted). In this case, the movant's claims are clearly without merit, and he cannot present a question of some

substance about which reasonable jurists could differ. The Court therefore denies a certificate of appealability.

The Prison Litigation Reform Act of 1995 (PLRA), Title VIII of Pub. L. 104-134, 110 Stat. 1321 (Apr. 24, 1996), does not apply to appeals of orders denying § 2255 motions. Hereford v. United States, 117 F.3d 949, 951 (6th Cir. 1997). Cf. McGore v. Wrigglesworth, 114 F.3d 601, 610 (6th Cir. 1997)(instructing courts regarding proper PLRA procedures in prisoner civil-rights cases). Rather, to seek leave to appeal in forma pauperis in a § 2255 case, and thereby avoid the $105 filing fee required by 28 U.S.C. §§ 1913 and 1917, the prisoner must seek permission from the district court under Rule 24(a) of the Federal Rules of Appellate Procedure (F.R.A.P.). Hereford, 117 F.3d at 952. If the motion is denied, the prisoner may renew the motion in the appellate court.

F.R.A.P. 24(a) states, in pertinent part that:

> A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave to so proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal.

The Rule further requires the district court to certify in writing whether the appeal is taken in good faith. For the same reasons the court denies a certificate of appealability, the court determines that any appeal in this case would not be taken in good faith. It is therefore certified, pursuant to F.R.A.P. 24(a), that any appeal in this matter by this defendant is not taken in good faith.

IT IS SO ORDERED this _____ day of July, 2002.

_____
JAMES D. TODD
UNITED STATES DISTRICT JUDGE