IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

12-cv-269-bbc
08-cr-87-bbc

v.

COREY THOMAS,

Defendant.

- -

Defendant Corey Thomas was sentenced on May 15, 2009 for bank robbery and use of a firearm. Since then, he has filed an unsuccessful appeal and a number of other motions attacking his conviction and sentence, including two motions for a new trial under Fed. R. Crim. P. 33. Now before the court are his timely motion for post conviction relief under 28 U.S.C. § 2255, dkt. #1, and a motion for sentence adjustment, dkt. #9.

In the § 2255 motion, defendant contends that he is entitled to relief because his counsel was ineffective in four respects: (1) he failed to object to the government's introduction of suppressed evidence; (2) he failed to object to the admission of a tape recording of calls made to codefendant Simmons at the Dane County jail by another codefendant, Prince Beck, and failed to object to the government's emphasis on these calls in its closing argument; (3) he failed to move for a mistrial on the issue of prosecutorial misconduct (the government's alleged coercion of witness Michael Simmons); and (4) on

appeal, he did not raise the issues of defendant's illegal sentence and the government's coercion of a witness. In his motion for sentence adjustment, he contends that he was improperly sentenced as a career offender.

Defendant cannot succeed on any of his claims. His attorney could not object to any suppressed evidence because the government did not introduce any; to the extent that defendant is arguing that his counsel should have moved to suppress additional evidence, he has not shown that he had any privacy interest in that evidence that would have supported such a motion. Counsel had no ground on which to object to the recorded jail calls because they did not incriminate defendant and he had no reason to move for a mistrial on the basis of prosecutorial misconduct. The only possible basis for such a motion is defendant's allegation that the government coerced Michael Simmons into testifying in a specific manner and defendant has no evidence to support that allegation.

It is futile for defendant to argue that counsel was ineffective in failing to raise the issues of defendant's allegedly illegal sentence or the alleged coercion on appeal because the facts do not support either issue. His sentence is not illegal. He was classified correctly as a career offender because he had been convicted of two crimes of violence before he committed the bank robbery. The fact that he was given an initial sentences of probation for each of those crimes rather than terms of imprisonment does not mean that the crimes were not crimes of violence under U.S.S.G. § 4B1.2. Finally, just as he cannot prevail on his claim that his counsel was ineffective in failing to move for a mistrial on the basis of coercion of a witness, he cannot prevail on his claim that counsel was ineffective for not raising this

same issue on appeal.

RECORD FACTS

A. The Bank Robberies

Defendant Corey Thomas was charged with co-defendants Prince P. Beck, Jarrell Murray and Lamar Liggons with one count of conspiracy to rob Bank Mutual branches in Madison and Middleton, Wisconsin and a U.S. Bank branch in nearby Blooming Grove; one count of taking funds by force, violence and intimidation from U.S. Bank in Blooming Grove; and one count of carrying and using a firearm during and in relation to a crime of violence. Defendant, Beck and Murray, but not Liggons, were charged in a second count with taking funds from Bank Mutual in Madison by force, violence and intimidation.

At trial, the government presented the following evidence about the robberies. Early in the morning of May 9, 2008, a Bank Mutual branch in Madison received a telephone call, inquiring about the time the bank opened. Shortly afterward, three masked men entered the bank and robbed it. Later, the call was traced to Beck's cell phone; surveillance video showed that defendant Thomas had been in the bank the day before; and the getaway car contained the fingerprints of defendant and Murray.

Between May 9 and the second robbery on May 21, 2008 of U.S. Bank, the conspirators increased their number. In Chicago, Beck met up with Murray and Michael Simmons and with Liggons, a new acquaintance, who was a friend of Simmons and had become his caretaker after Simmons was shot and paralyzed from the waist down. Simmons

and Liggons had been traveling for some period of time; the point of their trip was to take possession in Texas of a van that Simmons's uncle was giving him, along with $3000. On their way back to Chicago, they stayed for a while in Memphis with other relatives of Simmons, where they purchased guns with some of the money from Simmons's uncle and had their pictures taken with the guns in the new van. They gambled away the rest of the money in Chicago and were in need of replacement funds. At some point while they were gambling in Chicago, they met Beck and Murray and discussed committing some robberies. Simmons agreed to Beck's suggestion that they use Simmons's van as a getaway car and he lent Beck a Tech 9 gun he had bought with his uncle's money.

On May 19, 2008, Liggons and Simmons drove to Madison with Liggons's girlfriend, and stayed at her mother's house. They met that morning with defendant, Beck, Murray and two other men and spent the rest of the day casing banks. The next day, Murray called Simmons to say they were going out the following day in the early morning to commit robberies. All five men spent the night at the home of Beck's girlfriend, Julia Bell. On May 21, 2008, they started out in Simmons's van, where they had stashed guns. Defendant remembered that they had forgotten gloves, so they stopped at a Dollar Store and bought a package of yellow kitchen gloves. The first robbery, of U.S. Bank, went off, but with a major hitch; Simmons insisted on being part of the scheme, so he rolled himself into the bank in his wheelchair under the guise of opening a checking account. The four other men entered a few minutes later, demanding money and brandishing at least one gun; they collected money from the safe and ran out of the bank, leaving Simmons behind. When the

police responded to the bank's calls, they found Simmons almost immediately, although he had wheeled himself some distance from the bank. He was jailed when his explanation for being in the neighborhood fell apart under questioning.

In the early afternoon of May 21, defendant took Liggons and his girlfriend to the Badger Bus Station in Madison, where he bought each of them a one-way ticket to Chicago. A Badger Bus video camera recorded the transaction. The same day, Beck gave Julia Bell cash to buy him a new car. She bought a Pontiac and put it in her name.

The next day, May 22, defendant drove to Fond du Lac, Wisconsin, to buy a car at an auction. He took along Eric Reed, an auto dealer who agreed to help defendant with the purchase. Defendant found a car and Reed bought it for him for $6,165, using money defendant gave him, mostly $100 bills.

On the drive back to Madison, the two men split up, with defendant driving his new car. They both stopped at a gas station in Fond du Lac, where they were arrested by law enforcement officers who had tracked them using a target telephone. The men were searched and gave statements.

Meanwhile, Simmons was calling Beck from jail, telling Beck to bail him out. On May 22, the day after his arrest, Simmons called Beck's cell phone, which had the same number as the phone used to call Bank Mutual just before it was robbed on May 9. That conversation and others that he had with Beck were recorded and easily deciphered, although Beck tried to speak in code. Beck's comments implicated him in the U.S. Bank robbery. He made one reference to defendant in an apparent effort to keep Simmons from

talking about the crime, saying that "they mic'd C-Mack [defendant] and them and took their ass to jail." Tr. exh. 22(c) at 2.

B. The Investigation and Trial

Shortly after the robbery, the police recovered Simmons's van, which had license plates stolen from a vehicle registered to an address across the street from Julia Bell's home. Inside the van was the packaging for the kitchen gloves, which bore the fingerprints of both defendant and Liggons.

Defendant moved to suppress evidence seized in the course of the stop at the gas station in Fond du Lac: his own post arrest statements, a cell phone, approximately $13,000 in cash that had been in his possession, the names and statements of the three other individuals arrested at the same time and all of their footwear. He did not ask for the suppression of the receipt for the new car, which had been in Reed's possession when the arrests occurred. Before the magistrate judge issued his report and recommendation, defendant advised the court that he was not claiming standing to suppress any statements made by the others or any other evidence that had been obtained from them. The magistrate judge recommended suppression of defendant's statements, his phone and the cash; the recommendation was adopted by the court.

Simmons entered a guilty plea to a charge of bank robbery and agreed to cooperate. Liggons was a fugitive until one week before the trial began. After his arrest, he entered a plea of guilty to the U.S. Bank robbery and agreed to testify at trial. Both he and Simmons

testified at trial against defendant and Beck. Murray had been arrested, but he was undergoing a competency examination at the time of defendant's trial, so his case was severed. (He was later found to be competent and entered a plea of guilty on June 23, 2009.)

The trial of the charges began on March 9, 2009 against defendant and Beck only. Before jury selection, Beck's counsel filed a motion to prevent the government from eliciting testimony from Liggons and Simmons that would implicate Beck. He argued that doing so would violate the holding in Bruton v. United States, 391 U.S. 123 (1968), that the government could not use the confession of a defendant at trial if the confession implicated a codefendant who was being tried with the defendant and could not be cross examined. This motion was denied because both Liggons and Simmons would be testifying at trial and would be subject to cross examination.

At trial, defendant's counsel cross examined Simmons vigorously, suggesting that he was testifying against his co-conspirators because Beck had failed to post money for his release from jail; eliciting admissions from Simmons that he had been selling drugs up to the time he was arrested for the robbery; and questioning him about his extensive felony record for drug dealing, auto theft and unlawful use of a weapon and his lies to the police when he was first confronted in the neighborhood of the bank. Counsel asked questions about Simmons's expectation for a lower sentence in light of his cooperation and suggested that Simmons was testifying against defendant and Beck not because he knew they were involved but because the government had told him they were. Simmons testified that when he first

came to court, the Assistant United States Attorney told him, "You know it was Prince [Beck], it was Lamont, it was Beanz [Lamar Liggons] [that were involved with you in the US Bank robbery."] ("Lamont" is not identified.) Defendant's counsel followed up that testimony with the question: "So before you told them who you say was involved, they told you who they think was involved?" Dkt. #330, 3-A-43. Simmons answered, "Yes, sir." Id.

Defendant's counsel cross examined Liggons thoroughly as well. He asked him whether he had read Simmons's statement before giving his own statement, about his drug use during the period at issue, his interest in receiving a reduction in his sentence for testifying and the short length of time he had known defendant and Beck before the U.S. Bank robbery.

The jury found defendant and Beck guilty of three of the four charges; it acquitted both men of taking funds from Bank Mutual.

At sentencing, I concluded that defendant was a career offender because he had at least two prior crimes of violence. His counsel objected to the finding, arguing that defendant had been sentenced for the two crimes on the same day and that there had been no intervening arrest. That objection was overruled because the state court records showed that defendant had been arraigned and was on bond in the first case (Dane County case no. 07CF00080) when he committed the second crime of violence.

Defendant appealed, arguing that the court erred in limiting his cross examination of Simmons. The court of appeals agreed with defendant that the limitation was error, but concluded that it was harmless because the remaining evidence made it clear beyond a

reasonable doubt that a rational jury would have found defendant guilty had the error not occurred. The court observed that this evidence included Liggons's testimony, which duplicated Simmons's, the calls between Beck and Simmons, the physical evidence of the fingerprints, the photographs found in the car that showed Liggons and Simmons holding guns in the same van used in the robbery and Julia Bell's testimony about the men staying at her house the night before the U.S. Bank robbery. United States v. Beck, 625 F.3d 410, 421 (7th Cir. 2010).

C. Defendant's Post-Trial Motions

On May 17, 2011, defendant filed a motion for a new trial under Fed. R. Crim. P. 33(b), arguing that he had newly discovered evidence in the form of an affidavit from codefendant Jarrell Murray to the effect that neither defendant nor Beck had been involved in the U.S. Bank robbery. This motion appeared to be a motion for post conviction relief under § 2255. I warned defendant that if I addressed it, he would probably not have another chance to file a § 2255 motion. Defendant told the court that he stood by his characterization of the motion. The motion was denied and although it remained my view that it should have been filed as a § 2255 motion, I ordered the motion withdrawn because defendant had said he did not want it considered as a § 2255. Dkt. #434.

Defendant filed another Rule 33 motion on August 22, 2011, which was denied as well. Dkt. #445. Defendant appealed the denial. On April 11, 2012, while his appeal was pending, he filed a motion for relief under § 2255. The motion was timely, because it was

filed within one year of the Supreme Court's denial of his petition for a writ of certiorari. I asked defendant to advise the court whether he wished to withdraw the appeal of the denial of his Rule 33 motion so as to avoid the conclusion that his Rule 33 motion was a § 2255 motion in fact that would bar him from proceeding with his new § 2255 motion; he replied that he did not. On June 27, 2012, defendant filed a motion for sentence adjustment. Rulings were stayed on both his § 2255 motion and his motion for sentence adjustment, pending a decision by the court of appeals on his Rule 33 motion. That court denied the motion, without saying whether it considered the motion one that should have been brought under § 2255. United States v. Thomas, No. 11-3316, 2012 WL 3894526 (7th Cir. Sept. 10, 2012).

On request from the court, both parties responded to the question whether defendant's pending § 2255 motion should be considered as a second motion that requires permission for filing from a panel of the Court of Appeals for the Seventh Circuit under § 2255(h) or whether it was a legitimate Rule 33 motion. Both agreed it should not be because the court of appeals had treated it as a Rule 33 motion, addressing only the allegedly newly acquired statement by Murray.

OPINION

A. Characterization of Motion

In light of the disposition of defendant's second Rule 33 motion by the court of appeals and the parties' statements, I will treat defendant's present § 2255 motion as his first

one. Accordingly, defendant does not require permission from the court of appeals in order to pursue it.

B. Alleged Ineffectiveness of Trial Counsel

Proving a claim of constitutional ineffectiveness of counsel requires two showings: that counsel's performance fell below an objective standard of reasonableness *and* that the defendant suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). It is not enough simply to allege ineffectiveness; a defendant must "establish the specific acts or omissions of counsel that he believes constituted ineffective assistance" and from which the court can "determine whether such acts or omissions fall outside the wide range of professionally competent assistance." Wyatt v. United States, 574 F.3d 455, 458 (7th Cir. 2009) (citing Coleman v. United States, 318 F.3d 754, 758 (7th Cir. 2003)). He must also prove the prejudice prong, which requires a showing that [counsel's] deficient performance prejudiced the defense . . . [which] requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687.

1. Failure to object to government's introduction of suppressed evidence

Defendant contends that the government introduced evidence in violation of a suppression order, but he is in error. The government did not introduce any evidence that had been ordered suppressed, that is, defendant's statements to law enforcement after he was

stopped in Fond du Lac, the cell phone defendant had been carrying and $13,000 in cash. The government introduced evidence of the title and the lien release for the vehicle Reed bought on defendant's behalf, but defendant had never moved to suppress either of these documents.

In his reply brief, dkt. #21, defendant argues that his attorney should have moved to suppress statements made and evidence recovered from Eric Reed, his brother and a third man who had traveled with defendant to the auction. Defendant relies on the exclusionary rule, saying that it prohibits the introduction of tangible materials seized during an illegal search. As a general rule, this is true, but there is more to the story. The exclusionary rule is a personal one, United States v. Carlisle, 614 F.3d 750, 756 (7th Cir. 2010) ("The Supreme Court has consistently held that 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'") (quoting Rakas v. Illinois, 439 U.S. 128, 134 (1978)). A defendant has no basis for moving to suppress evidence unless it came from his person or from premises, a vehicle or a container in which he had an expectation of privacy. Knowing this, defendant's counsel acted wisely in choosing not to pursue a motion to suppress any of the evidence obtained from defendant's companions or from the car that Eric Reed was driving.

Defendant objects to the fact that Reed testified at trial, but he had no Sixth Amendment ground on which he could object to that testimony. He says that it was inadmissible because it was the "fruit of the poisonous tree" (the wrongful arrest, the subsequent recovery of the purchase slip from Reed's vehicle and Reed's post-arrest

statements), but he had no standing to object to that evidence. Only Reed could have objected and he chose not to.

2. Failure to object to admission of jail calls between Prince Beck and Michael Simmons

Defendant contends that his counsel denied him effective representation when he failed to object to the prosecutor's introduction into evidence of a tape recording of Beck's and Simmons's calls to and from the jail and failed to ask for a severance of his trial from Beck's. He maintains that the telephone conversations were the equivalent of a confession by Beck and should have been excluded under Bruton v. United States, 391 U.S. 123 (1968), because defendant could not cross examine Beck at their joint trial. He argues that the statements might have led the jury to believe that he had been arrested for his role in the robbery and that Beck would not have been concerned about the arrest unless he feared that it would lead the police to find out that he, Simmons and defendant were all involved in the robbery.

The government argues, unpersuasively, that Beck's conversations with Simmons were admitted under the exception to the hearsay rule set out in Fed. R. Evid. 801(d)(2)(E) as statements of a coconspirator made during the course of and in furtherance of the conspiracy. In fact, the statements were made after the conspiracy had come to an end and were made only because Beck was trying to keep Simmons from talking and disclosing the existence of the past conspiracy. As a general rule, concealment is not considered part of a conspiracy's primary criminal objective and, for that reason, statements made to conceal

evidence or to avoid punishment are not admissible. Grunewald v. United States, 353 U.S. 391, 405 (1957). Exceptions exist for cases such as those involving arson-for-profit in which the goal of the conspiracy is not achieved until the insurance proceeds are paid, e.g., United States v. Gajo, 290 F.3d 922 (7th Cir. 2002); United States v. Hunt, 272 F.3d 488, 497 (7th Cir. 2001), but the government does not suggest that this case falls into that exception or any similar one.

The statement that "they mic'd [arrested] C-Mack [defendant] and them and took their ass to jail" meets two of the three requirements for a hearsay statement: it was an oral assertion by Beck and it was made out of court. However it fails the third requirement, that it be offered for the truth of the matter asserted. It was clear from the conversation that Beck made the statement in an effort to scare Simmons out of saying anything about the robbery on the jail telephone and not for its truth. A non-hearsay statement does not raise any Bruton problem. That case concerned the use of hearsay statements inculpating the defendant along with his codefendant; its holding does not apply to a statement that does not facially incriminate the defendant. United States v. Souffront, 338 F.3d 809, 829 (7th Cir. 2003). It does not raise any problem under Crawford v. Washington, 541 U.S. 36 (2004), which bars the use of testimonial statements in the absence of an opportunity for cross examination. It did not even incriminate defendant. Assuming, as defendant argues, that the jury would have thought from Beck's comment that defendant had been arrested for the bank robberies, instead of on a probation hold, that news would not have changed its view of defendant. The jurors knew that the government believed he was guilty of the

bank robberies; that was the reason they had been empaneled.

Moreover, even if it was error for the government to play the portion of the tape in which Beck referred to C-Mack's arrest, defendant would be unable to show that his attorney's failure to object to the tape prejudiced him. The tape was far from the only evidence against defendant and the other evidence against him was more than sufficient to allow the jury to find him guilty. In addition to the matters the court of appeals noted in defendant's appeal (Liggons's testimony, the presence of defendant's fingerprints on the bag of kitchen gloves in the getaway van, the testimony of Julia Bell about the men having stayed in her house the night before the U.S. Bank robbery and the photos of Liggons and Simmons in the van with guns, Beck, 643 F.3d at 421), the evidence against Thomas included the video showing him jumping over the bank counter with his mask far enough down on his face to reveal his forehead, Reed's evidence about defendant's purchase of a car for more than $6000 the day after the robbery, with most of the purchase money in $100 bills, defendant's fingerprints on the getaway vehicle used on May 9 (a beige Chrysler LeBaron), the license plate on the getaway van that was traced to Julia Bell's neighbor and the video of defendant at the bus station with Liggons and his girl friend on May 21, where he bought them one-way tickets to Chicago shortly after the U.S. Bank robbery.

Thus, even if defendant's failure to object to the jail tapes was an actual error, it was not "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. See also Delaware v. Van Arsdell, 475 U.S. 673, 681 (1986) (not all federal constitutional errors require reversal of judgment of conviction if reviewing

court can say confidently that constitutional error was harmless beyond a reasonable doubt) (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

3. Counsel's failure to object to the closing argument

This argument is intertwined with the preceding one. Defendant contends that even if the taped telephone conversations were admitted properly, the government overreached in its use of those conversations during its closing argument. For example, the Assistant United States Attorney played portions of the tapes and argued that Beck's statement to Simmons that "C-Mack [defendant] has been mic'd and they threw their asses in jail," tr. trans., dkt. #329, at 49-50, was a warning to Simmons not to talk on the phone. Id. at 50. The government's argument was not improper. The government was merely suggesting to the jury how the comment should be interpreted. To the extent that defendant is arguing that the government suggested that he had been arrested in connection with the robbery and not on a probation hold, his argument fails because the government never made this suggestion. The government's focus was on what Beck and Simmons thought was the reason for defendant's arrest.

Defendant also objects to his counsel's failure to object to the government's statement that "[defendant] jumped over the counter, his mask slipped down a little bit and you can see his distinctive forehead on the video," tr. trans., dkt. #329, at 22, and to his statements that the testimony of Simmons and Liggons corroborates the identification of the man jumping over the counter in the video. Id. at 39. This argument was not improper; the

Assistant United States Attorney was suggesting that the jury could draw the inference that the man in the video was defendant from their own review of the video and from the codefendants' testimony. It is true, as defendant points out, that the Assistant United States Attorney is not an expert in identification, but he did not suggest that he was. He merely argued that the jury could make its own identification (or not) from the evidence.

4. Counsel's failure to move for a mistrial on the issue of prosecutorial misconduct

Defendant contends that the government engaged in misconduct when it met privately with Simmons outside the presence of Simmons's attorney. He has offered nothing more than an allegation that this happened, although it is his burden to make the showing. In the absence of any actual evidence that such a meeting took place, defendant cannot show that his counsel was ineffective in this respect.

5. Illegal sentence

In a motion filed on June 27, 2012, defendant asked for an adjustment of his sentence to reflect what he says was an improper finding that he was a career offender. His argument is that neither of his two prior state convictions could serve as a predicate for an enhanced sentence because he did not receive a term of imprisonment on one conviction and in the other, he was not sentenced until after he had been sentenced in this court. This claim is one that should have been raised on direct appeal but was not. Ordinarily, a claim not raised on direct review cannot be raised in a collateral attack on a sentence unless the

defendant can show both good cause for the failure to raise it and actual prejudice from the failure or that a refusal to consider the issue would lead to fundamental miscarriage of justice. Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996) (citing Reed v. Farley, 512 U.S. 339, 354 (1994)); see also Galbraith v. United States, 313 F.3d 1001, 1006 (7th Cir. 2002). However, defendant has alleged that his counsel refused or failed to raise the issue. Counsel's refusal to raise a valid ground for reversal of his client's conviction could constitute "cause" for the failure to raise it on direct appeal, so I will take up the claim.

The presentence report shows that defendant's prior criminal history included two violent crimes, both involving substantial battery with intent to do bodily harm. One was alleged to have taken place on January 6, 2007; the other on April 8, 2007. In both cases, the initial disposition was a term of probation that was later revoked following the bank robbery. Both crimes met the criteria for a crime of violence set out in U.S.S.G. § 4B1.1 and § 4B1.2, that is, they were offenses under state law punishable by imprisonment for a term exceeding one year that had "as an element the use, attempted use, or threatened use of physical force against the person of another." Because defendant was at least 18 and the crime for which he was being sentenced was a felony controlled substance offense, the finding that two of his previous crimes had been crimes of violence qualified him as a criminal offender under the guidelines. It was immaterial whether defendant received a particular penalty for the crimes, probation or a term of imprisonment. Nothing in either § 4B1.1 or § 4B1.2 requires that the defendant have received a particular penalty for his previous violent crimes in order to qualify as a career criminal.

In summary, none of defendant's arguments have any merit. He was not denied the effective assistance of counsel, either at trial or on appeal, and his sentence is not subject to adjustment.

B. Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). I cannot say that no reasonable jurist could come to a different result about the resolution of the motion as it relates to defendant's claim of ineffective representation. Therefore, a certificate of appealability will issue as to that claim. It will not issue as to defendant's claim that he was given an improper sentence.

ORDER

IT IS ORDERED that defendant Corey Thomas's motion for post conviction relief under 28 U.S.C. § 2255, dkt. #1, is DENIED; his motion for adjustment of his sentence,

dkt. #9, is DENIED as well. Further, it is ordered that a certificate of appealability shall issue as to defendant's claim that he was denied constitutionally effective representation at his trial; it will not issue as to his claim that his sentence is illegal.

Entered this 14th day of February, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge