IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	1:03cr296 (LMB)
	)	1:08cv533 (LMB)
MASOUD AHMAD KHAN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Before the Court is Masoud Ahmad Khan's ("Khan") Amended Motion Under 28 U.S.C. § 2255 ["Am. § 2255 Mot."] [Dkt. No. 694], in which he argues that his conviction and sentence should be vacated due to multiple errors in his trial and on appeal. Specifically, he alleges that: 1) the government failed to provide information that the telephones of his co-conspirators were monitored; 2) he received ineffective assistance of trial and appellate counsel; 3) the government may have violated its Brady obligations; 4) the government constructively amended the indictment; 5) Count 5 of the indictment failed to allege a crime and the indictment failed to allege any actions that would constitute an overt act for the crime of providing material support to a terrorist organization; 6) two criminal statutes under which he was convicted are unconstitutionally vague and overbroad; 7) certain findings of guilt and innocence were inconsistent; 8) certain counts should not have served as predicate offenses for the firearm counts; 9) the Court should resentence Khan on certain firearm charges that were duplicative;

and 10) the cooperation agreements and Fed. R. Crim. P. 35(b)'s provision for reducing sentences for defendants who cooperate with the government violate Khan's Due Process rights. The motion has been fully briefed by the parties. For the reasons stated below, Khan's motion will be dismissed as to all issues, except for one, which the government concedes has merit.[1]

I. Background

On June 25, 2003, a grand jury indicted Khan and ten others, for offenses arising out of their preparation for violent jihad against the United States and an ally. Specifically, the indictment focused on the co-conspirators' activities going back to 1998 when some of them began preparing for possible jihad against the enemies of Islam. Preparations for jihad included participating in para-military exercises in Northern Virginia, purchasing numerous assault-type weapons including AK 47's, and watching radical Islamist films. Co-conspirators traveled to Pakistan where several of them, including Khan, received combat training with Lashkar-e-Taiba ("LET"), a radical Islamist group, which in December 2001 was designated a terrorist organization

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[1] Khan argues that the conspiracy conviction under Count 1 should be vacated because it is a lesser included offense of the Count 2 conspiracy. Am. § 2255 Mot. at 61. The government agrees that the Count 1 conviction should be vacated because it is subsumed by Count 2. Answer at 69-70. The Court finds that the parties are correct. Accordingly, relief will be granted on this one claim and the conviction on Count 1 will be vacated by the Order issued with this Opinion, and an Amended Judgment will be entered.

pursuant to Section 219 of the Immigration and Nationality Act. In August and September of 2003, four of the co-conspirators, Yong Kwon ("Kwon"), Mohammed Aatique ("Aatique"), Donald Surratt ("Surratt"), and Mahmoud Hasan ("Hasan"), plead guilty to various counts in the indictment under plea agreements, in which they promised to cooperate with the United States. On September 25, 2003, a grand jury returned a 32-count superseding indictment charging Khan and the remaining co-conspirators with various conspiracy and substantive offenses. In January of 2004, two additional co-conspirators, Randall Todd Royer ("Royer") and Ibrahim Al-Hamdi ("Al-Hamdi"), plead guilty under agreements with the government. Khan, along with the remaining defendants, Hammad Abdur-Raheem, Seifullah Chapman ("Chapman"), Sabri Benkhala, and Caliph Basha Ibn Abdur-Raheem filed motions to sever or, in the alternative, for a waiver of a jury trial.[2] The motions to sever were denied, and the case was tried to the bench. Khan was represented throughout the pretrial and trial stages by retained counsel, Bernard Grimm and Jennifer Wicks, and on appeal by Jonathan Shapiro. On March 4, 2004, after a nine-day bench trial, the Court issued its findings of fact and conclusions of law,[3] see United States v. Khan, 309 F. Supp. 2d

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[2] The bench trial of Sabri Benkhala was severed and he was later acquitted of all charges.

[3] The Court adopts the Memorandum Opinion's findings of fact and conclusions of law for the purposes of this § 2255 Motion. The Court also adopts the factual background from its December

789 (E.D. Va. 2004) ("Khan I"), aff'd in part, remanded for sentencing, 461 F.3d 477 (4th Cir. 2006), in which Khan was found guilty of Count 1 (conspiracy in violation of 18 U.S.C. § 371), Count 2 (conspiracy to levy war against the United States in violation of 18 U.S.C. § 2384), Count 4 (conspiracy to contribute services to the Taliban in violation of 50 U.S.C. § 1705), Count 5 (conspiracy to contribute material support to Lashkar-e-Taiba in violation of 18 U.S.C. § 2339A), Count 11 (conspiracy to possess and use firearms in connection with a crime of violence in violation of 18 U.S.C. § 924(o)), and Counts 24, 25, and 27 (use and possession of firearms in connection with a crime of violence in violation of 18 U.S.C. § 924(c). On June 15, 2004, Khan was sentenced to life imprisonment. He appealed both his convictions and sentence. The convictions were affirmed, but the case was remanded for resentencing to comply with United States v. Booker, 543 U.S. 220 (2005). On July 29, 2005, Khan was resentenced to life imprisonment.[4] The Fourth Circuit affirmed Khan's convictions and sentence in United States v. Khan, 461 F.3d 477 (2006) ("Khan II"). The Supreme Court denied Khan's

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23, 2009 Memorandum Opinion for Chapman's § 2255 Motion.

[4] The sentence consisted of 60 months imprisonment on Count 1; 120 months imprisonment on each of Counts 2, 4, 5, and 11 to be served concurrently with each other and Count 1; 120 months imprisonment on Count 24, to be served consecutively to Counts 1, 2, 4, 5 and 11; 300 months imprisonment as to Count 25, to be served consecutively to Count 24; and life imprisonment as to Count 27, to be served consecutively to Count 25, among other penalties.

petition for a writ of certiorari on May 21, 2007. Khan v. United States, 550 U.S. 956 (2007) (No. 06-1116). Khan timely filed his pro se § 2255 Motion on May 23, 2008. On November 3, 2008, Khan's new counsel filed an amended § 2255 Motion. Although the new issues raised in the amended § 2255 motion could be stricken as time-barred, the Court has addressed them on the merits.

II. Standard of Review

Under 28 U.S.C. § 2255, a federal prisoner who collaterally attacks a conviction or sentence prevails only if he can show that the conviction or sentence was imposed in violation of the United States Constitution or laws, that the court lacked jurisdiction to impose the sentence, that the sentence was in excess of the maximum authorized by law, or that the sentence or conviction is otherwise subject to collateral attack. Relief under § 2255 is designed to correct for fundamental constitutional, jurisdictional, or other errors, and is therefore reserved for situations in which failing to grant relief would otherwise "inherently result [] in a complete miscarriage of justice. United States v. Addonizio, 442 U.S. 178 (1979). However, a motion pursuant to § 2255 "may not do service for an appeal." United States v. Frady, 456 U.S. 152, 165 (1982). Claims that were not raised on appeal are deemed waived and procedurally defaulted unless the movant can show cause for not

raising the issue on appeal and establish actual prejudice. Id. at 165-67. An exception to the procedural default applies when a movant establishes constitutionally ineffective assistance of appellate counsel. See United States v. DeFusco, 949 F.2d 114 (4th Cir. 1991).

III. Discussion

A. Failure to provide information about Terrorist Surveillance Program

Without any evidence that his co-conspirators were ever subject to monitoring under the National Security Agency's Terrorist Surveillance Program, Khan argues that the government failed to inform him that his co-conspirators' telephones were monitored, in violation of its obligations under Brady v. Maryland, 373 U.S. 83 (1963). Am. § 2255 Mot. at 8-9. Khan supports this claim by theorizing that intercepted conversations might have exculpated him; however he also concedes that he does not know whether he or any co-conspirator was actually the subject of an interception and he does not identify the content of any phone calls which would have been exculpatory. Khan requests full discovery, either in camera or in open court, to determine whether he was denied exculpatory information.

"Unsupported, conclusory allegations do not entitle a habeas petitioner to an evidentiary hearing." United States v. Golden, 2002 U.S. App. LEXIS 12125 (4th Cir. 2002) (citing Nickerson v. Lee, 971 F.2d 1125, 1136 (4th Cir. 1992)). The government

correctly argues that Khan offers only "mere speculation" that such exculpatory information exists. Government's Answer to Def.'s Mot. Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence ("Answer") at 5-6. Khan does not allege any facts to support his speculative claim that the government intercepted any of his co-conspirators' communications and fails to provide any basis upon which to conclude that those communications would have been exculpatory. The purely speculative nature of this claim does not entitle Kahn to an evidentiary hearing or other relief. Accordingly, this claim will be dismissed.

B. Ineffective assistance of trial counsel

Khan raises numerous claims of ineffective assistance of trial counsel, none of which has merit. To prevail on an ineffective assistance claim, a movant must satisfy the two-prong test established in Strickland v. Washington, 466 U.S. 668 (1984). First, he must show that counsel's performance was "deficient." Id. at 687. Deficient performance is present when "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance;" however, counsel is "strongly presumed to have rendered adequate assistance." Id. at 690. Second, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 694. The movant bears the burden of proving both prongs, and if the movant fails to demonstrate prejudice, the Court need not address the issue of counsel's performance. Fields v. Attorney Gen. of State of Md., 956 F.2d 1290, 1297-99 (4th Cir. 1992).

1. Waiver of jury trial

Khan first argues that his trial counsel's performance was deficient when he advised Khan to waive a trial by jury. In pretrial motions, Khan joined co-defendant Chapman's motion to sever. In the alternative, the defendants asked to waive the jury, and to be tried by the Court. In addressing the jury waiver, Chapman's memorandum supporting the motion stated that "[a] bench trial would likely result in a much shorter trial and, would afford the accused with the opportunity to receive a fair trial." After the motion to sever was denied, the government consented to the waiver. Because the jury waiver was included as alternative relief in the defendants' motion to sever, the defendants were not asked to sign a jury trial waiver. Although neither Khan nor any other defendant objected to a bench trial during either the motions hearing, the trial, or at the sentencing hearing, Khan now argues that he did not want to waive his right to a jury trial and that his trial counsel should have advised him not to waive the jury.

The government responds that the waiver was a reasonable

strategic move. Answer at 7. That assessment is valid. The issues in this prosecution focused on the defendants' adherence to a radical form of Islam, and included allegations that the co-conspirators were supportive of radical Islamic actions after the attacks of September 11. Trying such issues before a jury less than three years after the September 11 attacks presented a legitimate concern for defense counsel.

On this record, Khan has failed to demonstrate that his counsel's advice to waive jury was outside "the wide range of reasonable professional assistance." Strickland, 466 U.S. at 690. Moreover, the Fourth Circuit has explicitly recognized the strategic nature of the decision to waive a jury. On direct appeal, Khan argued that the jury trial waiver was invalid because the Court did not obtain a written waiver or conduct a colloquy. The Fourth Circuit rejected this argument, holding that defendants' waivers "were a knowing, voluntary, and intelligent part of their trial strategy, and we uphold them as valid." Khan II, 461 F.3d at 492. On this record it is clear that counsel's advice concerning the jury waiver was not deficient because it was within the range of reasonable professional assistance.

Even if the advice to waive the jury constituted deficient performance, Khan has not demonstrated that the decision was prejudicial. The Court acquitted Khan on three counts, and later

acquitted co-defendant Benkhala of all charges. A related jury trial of an unindicted co-conspirator, Ali Al-Timimi, resulted in convictions on all counts. Khan simply fails to demonstrate that "the result of the proceeding would have been different," Strickland, 466 U.S. at 694, if he had been tried by a jury, rather than the bench. Therefore, the Court does not find that trial counsel's advice as to the waiver of a jury constituted ineffective assistance of counsel.

2. Sufficiency of the evidence

Khan complains that trial counsel were ineffective because the evidence for each conviction was weak. Am. § 2255 Mot. at 16-28. The sufficiency of the evidence was fully addressed and rejected on direct appeal with the Fourth Circuit holding that "there was sufficient evidence to support his [Khan's] conviction on those counts[.]" Khan II, 461 F.3d at 487-88, 488 n.6.

"Absent a change in the law, a prisoner cannot relitigate in collateral proceedings an issue rejected on direct appeal." United States v. Walker, 299 Fed. Appx. 273, 276 (4th Cir. 2008), see also, United States v. Roane, 378 F.3d 382, 396 n.7 (4th Cir. 2004) ("Because the Defendants have not pointed to any change in the law that warrants our reconsideration of these claims, we agree with the district court that they cannot relitigate these issues."). The sufficiency of the evidence has been fully considered by the Fourth Circuit, accordingly, Khan cannot use

this § 2255 motion to get a second chance to raise the issue. For these reasons, this ineffective assistance of counsel claim will be dismissed.

3. Failure to prepare for and perform effective witness examination

Khan next argues that his trial counsel failed to prepare for and perform effective witness examination. Am. § 2255 Mot. at 28-38. This claim focuses on specific questions Khan believes trial counsel should have asked. For example, he complains that counsel failed to ask co-conspirator Kwon about a recorded telephone conversation between Kwon and Royer in which Kwon stated "nobody there told us to, you know, said go to Afghanistan." Am. § 2255 Mot. at 32. Khan fails to mention that in the same conversation Royer instructed Kwon not to mention Afghanistan to the government and that he must swear to "Sheik Ali" never to tell what occurred at the post-September 11 meeting with co-conspirator Al-Timimi. Answer at 28. Clearly, it was a reasonable strategic decision for trial counsel to avoid probing into the taped conversation. Therefore, this decision does not constitute ineffective assistance of counsel.

Khan also complains that trial counsel failed to ask Kwon about cold-weather jackets that Khan purchased for himself and Kwon. At trial, the government argued that Khan's purchase of these jackets shortly after the meeting with Al-Timimi was significant because these jackets were for extreme cold whether,

which would be consistent with the high mountain climate where the LET training camps were located. Khan I, 309 F. Supp. at 811, n.7. In a declaration made more than four years after Khan's trial, Kwon stated that Khan purchased his jacket because he liked "high quality" and the jacket "would be a good buy." App. at 37. Although Khan's trial counsel did not elicit that answer from Kwon, his counsel did point out during closing argument that Khan had legitimate reasons for purchasing the jackets.

> Mr. Khan is not recommending to him a coat for war. He is recommending a coat for cold weather, again, a coat that Mr. Khan orders because he knows he's going to Pakistan before the dinner.

Trial Tr. at 3414.

> 9/15, Masaud (sic) Khan purchases the Cabela jacket. He's going to Pakistan, so he gets the coat to go to Pakistan. He's not getting the coat to go to training at LET.

Id. at 3423. The government correctly argues that Khan's counsel made a sound strategic decision not to ask Kwon about the jacket because such questioning could easily have drawn attention to the fact that the jacket was particularly appropriate for the extremely cold climate in the high mountains where the LET camps were located.

Khan also cites several other statements that Kwon made after Khan's trial and argues that such statements would have helped Khan had his counsel elicited them at trial. Am. § 2255

Mot. at 32-33. He first points to evidence from the subsequent trial of Ali Al-Timimi, in which Kwon testified: "I don't think I ever asked [Khan] to go to an LET camp." App. at 163. This testimony would have been irrelevant to Khan's defense because the government never argued that Kwon urged Khan to go to an LET camp. Moreover, because Khan's trial occurred before Kwon's testimony in Al-Timimi's trial, it is unreasonable to expect Khan's counsel to have anticipated such a response. Counsel's failure to ask that question does not constitute deficient performance under Strickland. Moreover, even if Kwon had provided the same testimony as he did in the Al-Timimi trial, Khan does not state how this testimony would have helped his case because there was no dispute in the evidence that Khan did go to the LET camps.

Khan next cites statements that Kwon made to the Federal Bureau of Investigation in 2003 in which he said that 1) Royer told Kwon, or Kwon believed, that LET training was "fun;" 2) Royer and Kwon believed "there would be no trouble since LET was not considered a terrorist group by the U.S. Government;" 3) Khan convinced Kwon not to go back to LET for further training; 4) Kwon and Khan refused the request of LET to assist them after they left the LET camp; 5) Kwon erroneously believed Khan had fought in Afghanistan in the 1980's; and 6) Khan did not fight after the LET training because he was eager to return to his

family. Am. § 2255 Mot. at 33.

Khan's counsel had a good reason to avoid eliciting such statements because a major part of his strategy was to attack Kwon's credibility. For example, in his closing argument, counsel attacked Kwon's lack of knowledge of Khan's alleged activities in Afghanistan:

> Kwon also claims that his friend, Masaud (sic) Khan, tells him that he fought in the war in Afghanistan for three years. Mr. Kwon can't remember where he told him. It might have been at his house. And he can't even remember the year that he told him he fought there.

Trial Tr. at 3416. Khan's counsel's reasonable strategy was to discredit Kwon; therefore, it would have been counterproductive to rely on Kwon's statements to the FBI. Moreover, Khan has not shown how such omissions were prejudicial to his case.

Citing to the testimony in the Al-Timimi trial, Khan complains that his counsel also failed to question co-conspirator, Aatique, about Khan not influencing his decision to attend LET training. But Khan does not fully and accurately describe Aatique's testimony in the Al-Timimi trial:

> Q: Your actions, your telling them that you were going to camp influenced people like Khan to go to camp?
>
> A: If you ask my opinion about individuals, I'm not so sure about Masaud (sic) Khan, but probably influenced more Kwon and Hasan.

App. at 156. That testimony would not have helped Khan. Aatique did not state that his decision to attend LET training was

independent from Khan's; rather, he only stated that he did not influence Khan's decision to go to the LET camp.

Khan next cites co-conspirator Hasan's grand jury testimony that there was no plan to fight in Afghanistan and that "they would figure out what to do next" after completing their training in the LET camps. Am. § 2255 Mot. at 36. Khan argues that his lawyers' failure to elicit that testimony at trial constituted ineffective assistance. Yet, he fails to mention that when his trial counsel cross-examined Hasan, Hasan appeared to know little about the group's plans. In fact, Khan's trial counsel caused Hasan to admit not remembering anything Khan may have said about fighting in Afghanistan.

> Q: Sure. Mr. Khan never told you or Mr. Kwon, "I can't wait to get back to Afghanistan, because I know the terrain. I fought a war over there. I can tell you where to go, where to hide," things like that, correct?
>
> A: I don't recall anything like that.

Trial Tr. at 1430. Khan has not demonstrated that failure to ask Hasan about his grand jury testimony was either deficient performance by counsel or prejudicial.

As to all of Khan's complaints about counsel's failure to adequately question these witnesses, the government points out that "Khan's attorneys made a number of helpful points through cross-examination." Answer at 35. In particular, counsel caused Kwon to admit that he never watched jihad videos with Khan, Trial Tr. at 1676; that Khan left the LET camps for almost a week, Id.

at 1660; and Khan would not have been able to hit a plane with his level of anti-aircraft gun training, Id. at 1703. Counsel caused Hasan to corroborate Khan's explanation that he left the LET camps to deal with legal issues in Pakistan, and to testify that Khan never said he planned to travel to Afghanistan, Id. at 1428 and 1426. Lastly, during cross-examination of Aatique, counsel elicited corroboration of Khan's defense that he went to Pakistan to deal with a property issue in Pakistani courts. Id. at 1001-02.

In sum, none of Khan's trial counsel's actions or omissions during cross-examination constituted ineffective assistance of counsel under Strickland. Therefore, all of these claims will be dismissed.

4. Eliciting damaging information

Khan also criticizes trial counsel for deciding to cross-examine Cynthia Reish, thereby eliciting evidence that helped the government build its case. Am. § 2255 Mot. at 38-41. Cynthia Reish was a government witness who testified about her sale of a model airplane control module to Khan after he returned from the LET camps. Khan claims that the cross-examination of "Reish provided no testimony that was helpful to Khan." Id. at 38. Khan misrepresents the cross-examination. As the government correctly argues, counsel elicited testimony from Reish that supported Khan's defense. Answer at 38. For example, Reish

acknowledged that Khan's e-mails did not indicate he was in a hurry to obtain the module; Khan did not order an airframe or video link that often accompanies the autopilot module; and Reish stated that Khan was not on a list of prohibited purchasers. Trial Tr. at 1589, 1590, and 1592. If trial counsel had declined to cross-examine Reish, as Khan now argues he should have, none of this helpful information would have surfaced. For these reasons, Khan fails to demonstrate that trial counsel's decision to cross-examine Reish was deficient or that it was prejudicial.

Khan also attacks what he describes as his counsel's decision to ask the government to re-examine Khan's computer, which ultimately led to significant inculpatory evidence. Upon re-examination, the government discovered an incriminating chain of e-mail messages between Khan and Khalid, who was later identified as Pal Singh, the LET member for whom Khan ordered the airplane control module. Again, Khan's memorandum does not accurately characterize the record. The re-examination occurred after Khan's lawyer notified the government that Khan wanted to call an FBI special agent as a defense witness to testify about the lack of inculpatory information on Khan's computer. Because a defendant cannot call an FBI agent to testify without satisfying the Justice Department's Touhy regulations, 28 C.F.R. § 1626, counsel had to provide the government with a general description of the testimony sought from the agent. Khan has

presented no evidence that he warned his counsel that his computer contained any incriminating messages. Moreover, the e-mail message was only a small part of the evidence on which the Court convicted Khan. Therefore, Khan has not demonstrated ineffective assistance of counsel in dealing with his computer.

5. Failure to investigate, prepare and call witnesses in Khan's favor

Khan complains that his trial counsel failed to call five witnesses who would have strengthened his case and did not properly question Khan's mother, when she testified. Am. § 2255 Mot. at 41-52. Trial counsel has great discretion in determining whether to call witnesses. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

Khan argues that counsel should have called Karen Grant, Khan's neighbor. Am. § 2255 Mot. at 42. In a declaration signed nearly five years after the trial, Grant, who is Jewish, stated that Khan "was fine" with her support of Israel and "perhaps the gentlest soul that I have ever met." App. at 30. Khan's reputation among his neighbors was neither relevant nor in dispute, and such character testimony would not have undercut the

government's evidence of Khan's meeting with Al-Timimi, participation in LET training, and assisting LET in obtaining military equipment.

Khan next challenges his counsel's failure to call co-defendant Royer as a witness. Am. § 2255 Mot. at 42. In a 2008 declaration submitted on behalf of Khan, Royer states that the September 16, 2001 meeting between Khan, some of his co-defendants, and Al-Timimi was "not an exhortation to arms." App. at 35. Royer would have been a very incredible witness because his 2008 declaration contradicts his grand jury testimony in 2004, in which he described Al-Timimi's call for Muslims to fight the United States. Answer at 45-46. Khan also cites Royer's 2008 statement that Khan never advocated violence against the United States or expressed a desire to travel to Afghanistan to fight Americans. App. at 36. That statement contradicts Royer's admission during his guilty plea, in which he admitted that he "aided and abetted the use and discharge of a semi-automatic pistol by Masoud Khan, Yong Kwon, Mohammad Aatique, and Khwaja Hasan in Pakistan during, in relation to, and in furtherance of a crime of violence for which the defendant may be prosecuted in a court of the United States." Answer at 46-47. Counsel's decision not to call Royer as a witness was a reasonable strategic decision and did not constitute ineffective assistance of counsel.

Khan also argues that trial counsel should have called his cousin, Ambreen Farzan, and a Pakistani attorney, Syed Mohammad Ali Rizvi, to testify about his stay in Pakistan. In a declaration made in 2008, Farzan stated that Khan stayed with him in Pakistan towards the end of September and beginning of October 2001. Syed Mohammad Ali Rizvi, a Pakistani attorney who handled the settlement of Khan's father's estate in 2001, would have testified that he met with Khan in Pakistan on September 24, October 3, and October 9, 2001. Am. § 2255 Mot. at 44-47. Testimony from Farzan and Rizvi about Khan's meetings in late September and early October, however, would not have defeated the government's clear evidence that Khan did, in fact, attend the LET training camps between October 18, 2001 and mid-December, 2001. Therefore, neither Farzan nor Rizvi would not have helped Khan's defense.

Khan further contends that counsel should have called Kelli Shelton, who worked with Khan at Home Depot. Am. § 2255 Mot. at 47. In a 2008 declaration, Shelton stated that Khan's Islamic views "were never extreme or hostile" and "I am sure he was not a terrorist." App. at 33-34. Such opinion testimony would not have been admissible.

Lastly, Khan complains that counsel did not adequately question his mother, Elizabeth Khan. Am. § 2255 Mot. at 47. Khan claims that his mother could have provided documents that

rebut Kwon's claim that Khan said he fought in Afghanistan in the 1980's. As the government correctly points out, the documents merely establish that Khan attended school in Saudi Arabia and Pakistan in the late 1980's. This evidence does not establish that Khan never traveled to Afghanistan sometime during that period. Therefore, counsel was not ineffective in failing to elicit these documents from Elizabeth Khan.

In sum, Khan has failed to point to any act or omission by trial counsel that was unreasonable and prejudicial under Strickland. Therefore, all of Khan's ineffective assistance of counsel claims will be dismissed.

C. Allegation that the government violated Brady by failing to provide Khan with exculpatory information

Khan requests an evidentiary hearing to determine whether the government violated Brady by withholding exculpatory information. Khan claims that at the time of trial, the government knew "much if not all of the information" that is contained in the 2008 affidavits of Kwon and Royer. Am. § 2255 Mot. at 52-53. Khan provides no basis for this allegation other than the government's decision not to call Royer to testify at trial, which Khan claims "lends support to Mr. Khan's belief that Royer's exculpatory testimony was known to the government before trial." Id.

The government carefully explains that it provided all of the information that was known to it at the time of Khan's trial.

Answer at 52-56. Moreover, as discussed above, the statements in Royer and Kwon's affidavits do not provide exculpatory evidence. "Unsupported, conclusory allegations do not entitle a habeas petitioner to an evidentiary hearing." Nickerson v. Lee, 971 F.2d 1125, 1136 (4th Cir. 1992). Therefore, Khan's request for an evidentiary hearing regarding the government's compliance with Brady will be denied.

D. Defects in the conviction under Count 5

Khan argues that the government's introduction of evidence about his purchase of radio controlled model aircraft equipment amounted to a constructive amendment of Count 5, in violation of the Fifth Amendment. He also argues that his conviction under Count 5 should be dismissed because the indictment failed to allege a crime or overt act that would constitute material support for LET or amount to a conspiracy. Am. § 2255 Mot. at 53-59.

Count 5 charged Khan with conspiring between February 2000 and June 2003 with the co-defendants to provide and conceal material support and resources knowing and intending that the materials and resources would be used in preparing for and carrying out a violation of 18 U.S.C. § 956 (the Neutrality Act). Count 5 explicitly realleged and incorporated all the allegations and overt acts alleged in Count 1, which included Overt Act 83 (describing Khan's purchase of "an auto-pilot module for a radio-

controlled model aircraft."). Although Overt Act 83 did not allege that the purchase was for LET's benefit or that Khan transferred the equipment to LET, other sections of Count 1 sufficiently alleged the involvement of LET.

Khan waived this legal attack on the indictment by failing to raise it on direct appeal. "[T]o collaterally attack a conviction or sentence based upon errors that could have been but were not pursued on direct appeal, the movant must show cause and actual prejudice resulting from the errors . . . or he must demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack." United States v. Mikalajunas, 186 F.3d 490, 492-93 (4th Cir. 1999). "Cause" must "turn on something external to the defense, such as the novelty of the claim or a denial of effective assistance of counsel." Id. at 493. Khan has not demonstrated that he failed to raise the constructive amendment argument because of ineffective assistance of counsel.

Even if he had raised this argument on appeal it likely would have failed because Count 5 clearly incorporated Overt Act 89. In addition, the trial evidence established that Khan purchased and transferred the auto-pilot module to Pal Singh, who was identified as an LET agent. Specifically, the Court found that "Khan was aware and intended that his straw purchase of the autopilot module was for LET's military use." Khan I, 309 F.

Supp. 2d at 822.

An indictment is constructively amended only when the government or court "broadens the possible bases for conviction beyond those presented by the grand jury." United States v. Floresca, 38 F.3d 706, 710 (4th Cir. 1994) (en banc). The government is not required to include all of the overt acts in furtherance of a conspiracy in the indictment, nor is it limited by the indictment in presenting evidence of additional overt acts at trial. See, e.g., United States v. Janati, 374 F.3d 263, 270 (4th Cir. 2004) ("It is well established that when seeking to prove a conspiracy, the government is permitted to present evidence of acts committed in furtherance of the conspiracy even though they are not all specifically described in the indictment.").

Alternatively, Khan argues that he should receive "[f]urther discovery on what the government knew about whether the remote control equipment Mr. Khan allegedly provided Khalid [Singh] had ever left England or had been used for any purpose other than Khalid's own personal use[.]" Am. § 2255 Mot. at 56. Without providing any factual support, Khan alleges that "[u]pon information and belief, Khalid was arrested before Khan's trial and the government had knowledge of the whereabouts and possibly the fact that the model airplane equipment was never delivered to Pakistan." Id. Khan is not entitled to an evidentiary hearing if

he can provide nothing more than "unsupported, conclusory allegations." Nickerson, 971 F.2d at 1136. Therefore, the request for an evidentiary hearing will be denied.

Khan cannot demonstrate that counsel was ineffective in failing to raise the adequacy of Count 5 on appeal. It was entirely reasonable for Khan's appellate counsel to choose not to raise such weak arguments and failing to raise them was not prejudicial.

E. Vagueness and overbreadth of §§ 2339A and 956

Khan claims that 18 U.S.C. §§ 2339A and 956, the statutes involved in Counts 5 and 12-14, are unconstitutionally vague and overbroad because "[a] person of ordinary common sense would not believe that visiting LET under these circumstances in the fall of 2001 could be a criminal act." Am. § 2255 Mot. at 59. Although Khan failed to raise this issue on direct appeal, he attempts to avoid procedural default by again arguing that appellate counsel was ineffective. This argument fails because a decision not to pursue a meritless appellate argument is not deficient performance. The trial record established that Khan did far more than "visit" LET camps. During the several weeks he stayed in the camps, he engaged in paramilitary training and after returning to the United States he stayed in touch with an LET operative and purchased military equipment for him. Even if the statutes were vague as applied to some defendants, Khan's

actions clearly were within their scope. Therefore, appellate counsel's decision not to raise this argument did not fall below an "objective standard of reasonableness." Mikalajunas, 186 F.3d at 493. Moreover, Khan has not demonstrated that such an argument would have been successful on appeal; therefore, he has not demonstrated prejudice.

F. Inconsistency between conviction on Count 5 and acquittal on Count 10

Khan argues that his conviction on Count 5, which charged a conspiracy to violate the Neutrality Act, is inconsistent with the acquittal on Count 10, which charged the substantive offense of violating the Neutrality Act, 18 U.S.C. § 960, and that appellate counsel was ineffective for failing to raise the issue. Am. § 2255 Mot. at 60.

The elements of a Neutrality Act violation are: 1) a military expedition organized in this country; 2) against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace; and 3) defendant provided means for the expedition in this district with knowledge of its character. Because Khan failed to raise the issue on appeal, the argument is procedurally defaulted unless he demonstrates that his appellate counsel's failure to raise the issue was deficient and prejudicial.

Counts 5 and 10 are entirely different charges. The Court dismissed Count 10 because it found that there was insufficient

evidence that Khan organized his trip to the LET camp as an expedition against India. Khan I, 309 F. Supp. 2d at 824. Such evidence is not required for a conviction on Count 5, which charged that Khan conspired to provide material support to LET with the knowledge that LET was engaged in a conspiracy to commit crimes of violence and damage property in India. As with all of Khan's complaints about the failure of appellate counsel to raise various arguments, this claim fails. As the Supreme Court has recognized, there is no constitutional requirement for counsel to raise every colorable issue on appeal. Jones v. Barnes, 463 U.S. 745, 752 (1983).

G. Predicate offenses for the three gun counts

Khan argues that the Court should vacate at least one of the convictions charged in Counts 24, 25, and 27 on the ground that only Counts 2 and 4 can serve as predicate offenses for the gun counts. Am. § 2255 Mot. at 60-61. Counts 24, 25, and 27 were brought under 18 U.S.C. § 924(c), whose elements are: 1) knowing use and discharge of a firearm; 2) during and in relation to a crime of violence. Khan was convicted of using and discharging an AK-47 rifle (Count 24), a 12 mm anti-aircraft gun (Count 25), and a rocket-propelled grenade (Count 27), while training at the LET camps. The Court found that the "conspiracies charged in the indictment" were among the predicate crimes of violence for these counts. 309 F. Supp. 2d at 826-27. Khan was convicted on four

conspiracy counts: Counts 1, 2, 4, and 5.

Khan argues, and the government concedes, that because Count 1 should be vacated, it cannot serve as a predicate offense for the firearm counts. Khan also argues that Count 5 cannot serve as a predicate offense because the firearms were not fired in Pakistan "in furtherance of the transfer of the model airplane equipment purchase and transfer in Count 5, which happened more than a year later and in another country." Am. § 2255 Mot. at 61. Because only two conspiracy counts remain, Khan argues, at least one of the gun counts must be dismissed. The government responds that Count 5 can serve as a predicate offense and that non-constitutional violations of federal law are not subject to collateral review. Answer at 68.

Khan does not dispute that Counts 2 and 4 can serve as predicate offenses for the gun convictions. In fact, the superseding indictment incorporated Counts 1 through 10 as predicate offenses for all of the gun charges. Khan was convicted of three firearm counts, each based on a different weapon that he discharged, but all in furtherance of the multiple conspiracies alleged including Counts 2, 4, and 5. Khan cites no law that requires each gun count to be based on a separate predicate offense. Therefore, he is not entitled to relief as to these convictions.

H. Resentencing for the 924(c) gun counts

Khan also argues that he should be resentenced on Counts 24, 25, and 27 because the trial court opinion did not repeat the verbatim language of the indictment. Am. § 2255 Mot. at 61-62. For Counts 24, 25, and 27, the indictment charged Khan and his co-conspirators with violating Section 924(c) by knowingly using, carrying, possessing, and discharging firearms "during, in relation to, and in furtherance of crimes of violence." Indictment at 38. In its findings, the trial Court listed the elements of these crimes as "1) knowing use and discharge; 2) during and in relation to a crime of violence." Khan I, 309 F. Supp. 2d at 826. Khan argues that by omitting "in furtherance of," the Court convicted Khan on a weaker evidentiary standard. To support his argument, Khan cites United States v. Combs, 369 F.3d 925 (6th Cir. 2004), which involved flawed jury instructions. Khan's case is entirely different because he was found guilty in a bench trial, in which the Court was the fact-finder. The government correctly argues that the Court was merely reciting elements of the crime as an explanation for its decision. Answer at 70-71. Therefore, the discrepancy between the language in the indictment and the Memorandum Opinion does not give rise to resentencing.

Khan also argues that trial counsel was ineffective for failing to argue that there was no evidence that Khan actually fired an AK-47. Am. § 2255 Mot. at 62. Khan complains that in

his closing argument, trial counsel "erroneously (conceded) that a witness stated that Khan fired an AK-47." But counsel's statement, when read in its entirety, was aimed at disproving the AK-47 charge:

> Does this story even make sense? He's been there three days when the other people arrive, and apparently they then start training together. Most notably, he says, none of them fired antiaircraft guns. He has them only firing an AK-47 and RPGs, once each.
>
> How can the Court know that the AK-47s can even be fully automatic if the witnesses testified to only shooting them once? There's no testimony from Mr. Aatique or any of the other witnesses that there are any other machine guns fired.

Trial Tr. at 3410. Contrary to Khan's view of the record, it was witness testimony that supported the conviction on these counts, not counsel's argument. For example, Hasan testified that the group shot AK-47s:

> Q: And what type of training did you and Masaud (sic) Khan and Yong Kwon receive at the ibn Masood training camp?
>
> A: We got different types of training. We got to shoot an AK-47.

Trial Tr. at 1379. Therefore, Khan has not demonstrated that his arguments about counsel's performance concerning the AK-47 charge constituted ineffective assistance.

I. Rule 35(b) and Due Process

Finally, Khan argues that most of the evidence came from cooperating witnesses who expected sentence reductions under Fed. R. Crim. P. 35(b). Without citing to any case law or other

authority, Khan argues that this quid pro quo system violated his due process rights. Am. § 2255 Mot. at 63.

As the government points out, each plea agreement explicitly required the cooperating witness to testify truthfully and this obligation was recognized by the witnesses. For example, Aatique testified that his plea agreement required him "to be truthful to the government and whenever I'm asked to testify for - regarding any, any of the trials that may result from this investigation." Trial Tr. at 785. Given the lack of authority supporting Khan's view of cooperation agreements and the evidence in the record, Khan fails to establish that the testimony of these witnesses or the plea agreements under which they testified deprived him of due process.

IV. Conclusion

For the reasons stated above, Masoud Khan's Amended Motion Under 28 U.S.C. § 2255 [Dkt. No. 694] will be granted in part and denied in part on the basis of the pleadings and without an evidentiary hearing. Count 1 will be vacated, and Khan will be reimbursed $100.00 for the special assessment he paid; however, because the sentence of imprisonment imposed on Count 1 runs concurrent to the sentences imposed on Counts 2, 4, 5, and 11, no other changes will be made to the Judgment.

An Order consistent with this Memorandum Opinion as well as an Amended Judgment will issue.

Entered this ___ day of May, 2011.

/s/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia