

11-3867(L)

To Be Argued By:
GEOFFREY M. STONE

United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket No. 11-3867(L)
12-124(XAP)**

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

-vs-

KEVIN G. CARTER, aka Black,
Defendant-Appellant-Cross Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution pursuant to 18 U.S.C. § 3231. The district court entered its judgment on September 20, 2011. Government's Appendix ("GA")383. The defendant filed a timely notice of appeal on September 22, 2011, GA11, and this Court has jurisdiction to consider this appeal from the district court's final judgment pursuant to 28 U.S.C. § 1291.

**Statement of Issues
Presented for Review**

- I. Whether the gate-keeping requirements for a second or successive § 2255 motion preclude the defendant's appeal, which is another attempt to collaterally attack his conviction and sentence based on alleged ineffective assistance of counsel, where the defendant has not made a prima facie showing that his claims involve "newly discovered evidence" or "a new rule of constitutional law"?
- II. Whether the law of the case doctrine precludes the defendant from litigating substantive issues that he could have raised in his initial appeal?
- III. Whether the defendant's claims of ineffective assistance of counsel can be addressed on direct appeal or should be left to the district court to resolve in a habeas proceeding?
- IV. Whether, putting aside the various procedural defects and bars to review, the defendant can establish that his counsel's performance was constitutionally ineffective?

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ON APPEAL FROM THE UNITED STATES
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, who was convicted after trial of participating in an armed robbery of a jewelry store, was originally sentenced to 360 months' imprisonment. His direct appeal was unsuccessful, but the district court granted his habeas petition based on his claim that his counsel was ineffective for failing to object to the sentencing enhancements under both the career offender guidelines and the Armed Career Criminal Act. At his resentencing, the district court imposed a total effective sentence of 189

months' imprisonment, which was 171 months below his original term.

Now on appeal, rather than challenge the procedural or substantive reasonableness of his sentence, he raises numerous claims of ineffective assistance that he failed to raise in his prior habeas petition. The defendant argues that his counsel was ineffective for failing: (1) to challenge the inclusion in the indictment of the citation to 18 U.S.C. § 924(e)(1) and the brandishing allegation; (2) to argue that a constructive amendment occurred as a result of the inclusion of the 18 U.S.C. § 924(e)(1) citation; (3) to move to dismiss the indictment on the ground of prosecutorial misconduct before the grand jury; (4) to argue that a variance occurred between the trial evidence and the indictment; (5) to argue that the defendant was misled during pre-trial plea negotiations; (6) to challenge the loss determination and the restitution order at his original sentencing; and (7) to object to the use of the defendant's nickname, "Black."

The defendant's appeal should be denied for four principle reasons. First, the appeal is simply a poorly disguised second § 2255 motion attacking the effectiveness of counsel, and the defendant cannot make a prima facie showing that his claims involve "newly discovered evidence" or "a new rule of constitutional law" to justify a second or successive § 2255 motion.

Second, all of the substantive claims are precluded under the law of the case doctrine because the defendant could have raised them in his initial appeal. Third, even assuming *arguendo* that the defendant's ineffective assistance claims were properly before this Court, there is an inadequate factual record for this Court to address these claims, and they should have been raised, in the first instance, before the district court. Fourth, even assuming *arguendo* that the defendant's ineffective assistance claims were properly before this Court and that there was an adequate factual basis to resolve these claims, the defendant has not come close to showing that his counsel's performance "fell below an objective standard of reasonableness" or that his counsel's unprofessional errors actually prejudiced him.

Statement of the Case

On January 21, 2005, following a four-day trial, a federal jury found the defendant/appellant, Kevin Carter ("Carter"), guilty beyond a reasonable doubt on all three counts of a superseding indictment charging him with: (1) Hobbs Act Robbery, in violation of 18 U.S.C. § 1951; (2) Using and Carrying a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A); and (3) being a Convicted Felon in Possession of a

Firearm, in violation of 18 U.S.C. § 922(g). See Pre-Sentence Report (“PSR”) ¶ 1.¹ On May 2, 2005, the district court (Ellen Bree Burns, J.) sentenced the defendant to 240 months’ imprisonment on Count One, 84 months’ imprisonment on Count Two, to run consecutive to the sentence on Count One, and 360 months’ imprisonment on Count Three, to run concurrent to the sentences on Counts One and Two. GA286. On March 27, 2006, this Court affirmed the district court’s judgment of conviction. See *United States v. Carter*, No. 05-2177 (2d Cir. March 27, 2006) (GA288-GA292).

On October 5, 2007, the defendant filed a *pro se* motion to vacate, set aside, and correct his conviction and sentence pursuant to Title 28, United States Code, § 2255 (“Section 2255”) and thereafter filed several supplemental submissions in support of his § 2255 motion. GA389-GA390. On July 14, 2008, the district court denied the § 2255 motion. GA390. On July 29, 2008, the defendant filed a motion for reconsideration of his Section 2255 motion. GA390. On August 6, 2010, the district court granted the motion for reconsideration and ruled that trial counsel’s failure to object to the sentencing enhancements under both the career offender guidelines and the Armed Career

¹ The government has filed the PSR in a separate sealed appendix and will cite to it directly.

Criminal Act constituted ineffective assistance of counsel that prejudiced the defendant. GA317-GA318, GA342.

On September 19, 2011, the district court sentenced the defendant to concurrent terms of 105 months' imprisonment on Counts One and Three, and a consecutive term of 84 months' imprisonment on Count Two. GA383. Judgment entered on September 20, 2011. GA10-GA11. The defendant filed a timely notice of appeal on September 22, 2011. GA11.

The defendant currently is in federal custody serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. Trial evidence

The evidence adduced at trial established the following:

1. The robbery

On March 20, 2003, at approximately 8:00 p.m., the defendant and another man entered the Harstan's Jewelry Store on South Main Street in West Hartford, Connecticut. *See* PSR ¶ 4. Both wore ski masks, each carried a revolver, and one of them carried what appeared to be a stun gun. *See* PSR ¶ 4.

The defendant and the other robber forced three employees, at gun point, to lie on the ground behind a counter in a back room or hall.

See PSR ¶ 5. All three employees testified at trial, and all three made clear that they believed their lives were at risk. *See* PSR ¶ 5. One of the employees, Jean Zell, testified that, at one point, one of the robbers put a tray of jewels on her back. *See* PSR ¶ 5. The defendant and his confederate restrained the three employees for approximately ten to fifteen minutes. *See* PSR ¶ 5.

Before leaving the jewelry store, one of the robbers took wallets from two of the three employees, Michael Turgeon (the store manager) and Vito Sagbay. *See* PSR ¶6. During the robbery, the thieves had repeatedly asked the employees about the location of video surveillance tapes. *See* PSR ¶6. When the employees told the robbers that there were no such videotapes, the robbers threatened that they were taking the wallets so they would know where the employees lived, in the event that videotapes surfaced in the future. *See* PSR ¶6. The robbers took Rolex watches, diamonds, and other jewelry with a total retail value in excess of \$573,500. *See* PSR ¶6.

2. Events at the ATM in Springfield, Massachusetts

That same night, at approximately 10:00 p.m., two of the bank cards that the robbers had taken from one of the victims, Michael Turgeon, were used in five separate attempts to withdraw money from an automated teller machine (“ATM”) at a bank in Springfield, Massachusetts. *See* PSR ¶7. Investigating officers obtained the ATM videotape of the attempted transactions. *See* PSR ¶7. That videotape revealed an adult male, wearing a ski mask and a Timberland baseball hat, approaching the ATM between 10:02 p.m. and 10:04 p.m. *See* PSR ¶7. Bank records confirmed that the man in the ski mask was attempting to use two of Michael Turgeon’s bank cards. *See* PSR ¶7. The evidence at trial confirmed that it takes approximately 30 minutes to travel from West Hartford, Connecticut, to Springfield, Massachusetts. *See* PSR ¶7.

3. Search of the defendant’s vehicle and residence

On June 3, 2003, Windsor Police received a Failure to Appear warrant for the defendant. *See* PSR ¶9. Equipped with that warrant, the Windsor Police set up surveillance at 98 Longview Drive on June 4, 2003, shortly after 7:00 a.m. *See* PSR ¶9. Within a matter of minutes, the defendant’s wife, Sarah Carter, departed from the Longview Drive address. *See*

PSR ¶9. Almost two hours later, the defendant also left, driving a car registered to Sarah Carter. *See* PSR ¶9.

Police officers stopped the car that the defendant was operating, placed him under arrest pursuant to the Failure to Appear Warrant, and began an inventory search. *See* PSR ¶10. One of the officers found a marijuana cigarette in the ashtray of the vehicle and, thereafter, searched the remainder of the vehicle. *See* PSR ¶10. In the rear cargo area of the car, an officer located several Harstan's jewelry store bags. *See* PSR ¶10. Officers found a Waterford crystal clock inside one of the bags. *See* PSR ¶10. The manager of the Harstan's jewelry store came to the Windsor Police Department where he identified the Waterford clock as one of the items that had been stolen in the robbery on March 20, 2003. *See* PSR ¶10.

Based on the seizure of the clock, the police obtained a search warrant for the defendant's house from a judge of the Connecticut Superior Court. *See* PSR ¶11. The officers then searched the 98 Longview Drive residence and found the following evidence: a silver colored revolver, with 20 rounds of ammunition; various bank cards and business cards that belonged to victims of the Harstan's robbery; a business card from Canaly Buyers, a New York City diamond-district merchant; and a Timberland baseball hat. *See* PSR ¶11.

4. Witness testimony

The three robbery victims testified that both robbers had guns. *See* PSR ¶12. Michael Turgeon described the gun that had been used as a silver colored “cowboy gun,” that is, a revolver. *See* PSR ¶12. Vito Sagbay, another employee, stated that the gun that he saw was “white.” *See* PSR ¶12. He said that when the gun was pointed at him, he was able to see the bullets in the chamber. *See* PSR ¶12. Sagbay also testified that one of the robbers wore a green jacket. *See* PSR ¶12. Michael Turgeon testified that the gun seized from the defendant’s residence looked “exactly” like the gun that had been used in the robbery. *See* PSR ¶12.

FBI analyst James Smith testified as an expert witness at trial and identified unique characteristics on the Timberland baseball hat seen in the ATM videotape that corresponded to the Timberland baseball hat found in the defendant’s residence. GA295.

Records from the Mohegan Sun casino in Montville, Connecticut, indicated that the defendant appeared at the casino at 11:32 p.m. on March 20, 2003. *See* PSR ¶13. A Windsor police officer testified that he drove the distance from the Springfield ATM to the Mohegan Sun Casino in about an hour and 13 minutes. *See* PSR ¶13. Thus, it was quite possible to travel from the Springfield ATM machine after the

ATM transaction was concluded (at 10:04 p.m.) and arrive at the Mohegan Sun Casino, as did the defendant, at 11:32 p.m. *See* PSR ¶13.

A Mohegan Sun Casino employee, Henry Graffeo, testified regarding records of the defendant's gambling on the evening of March 20, 2003. *See* PSR ¶14. Those records make reference to the defendant as a black male who, in the eyes of various dealers, was seen that night wearing a Timberland hat and a green jacket on the night of the Harstan's robbery. *See* PSR ¶14.

Gary Kakorev, who had owned a jewelry operation in New York City between 2001 and late 2003, testified about the diamond merchant business card that had been located in the course of the search of the defendant's house. *See* PSR ¶15. Kakorev identified the card as one that he had distributed from his business, Canaly Buyers. *See* PSR ¶15. The back of this particular Canaly Buyers business card bore the notation "10,000." *See* PSR ¶15. Kakorev testified that he had written the figure "10,000" on the back of the card, and that it was the type of notation that he might make if someone had requested an appraisal from him, or perhaps a retail or wholesale sale estimate of a particular item. *See* PSR ¶15. Kakorev testified that he might also make such a notation if someone inquired as to how much Kakorev would pay to purchase a particular object. *See* PSR ¶15.

The government also introduced the testimony of Charles Devorce, who was incarcerated with the defendant immediately following the defendant's June 12, 2003 arrest. *See* PSR ¶16. Devorce testified that the defendant, whom he knew as "Black," had admitted to him that he had possession of a clock from the jewelry store because he was going to give it to his mother. GA52. Devorce, when asked if the defendant had told him where any of the items from the jewelry store had gone, testified that the defendant had fenced the items through a man who, in turn, was to fence the goods to Europe. GA51.

5. Evidence of the defendant's sudden acquisition of cash.

Through Henry Graffeo from the Mohegan Sun casino, and Joseph Perry, a witness from the Foxwoods Casino in Ledyard, Connecticut, the government established that the defendant engaged in regular gambling at both casinos. *See* PSR ¶17. Those records also showed that the defendant's gambling activity steadily diminished in 2003 until immediately after the robbery, at which time the defendant appeared at both casinos with significant funds and gambled with those funds at both casinos. *See* PSR ¶17. A witness from the Connecticut Department of Labor testified that, according to his agency, the defendant had no record of employment. *See* PSR ¶17.

The defendant opened a savings account on March 29, 2003, using a \$5,000 cash deposit to open the account. *See* PSR ¶18. The defendant cleaned out the account between June 5 and June 10, 2003. *See* PSR ¶18. The evidence established that when the defendant opened the account, he did so using his son's Social Security number. *See* PSR ¶18.

B. The sentencing on April 15, 2005

The PSR set forth the defendant's offense conduct and calculated the loss to the defendant's victims as \$241,732. *See* PSR ¶¶ 4-21. The PSR determined that the defendant was a career offender pursuant to U.S.S.G. § 4B1.1. *See* PSR ¶46. In addition, the PSR determined that the defendant was subject to the enhancement under the provisions of 18 U.S.C. §924(e) as an armed career criminal. *See* PSR ¶47. Accordingly, the PSR concluded that the defendant's guideline imprisonment range was 360 months' to life imprisonment pursuant to U.S.S.G. §§ 4B1.1(c)(3) and 4B1.4. *See* PSR ¶93. In addition, the PSR concluded that restitution was mandatory, with restitution to be paid as follows: \$25,490 to Hannoush Jewelers; \$216,042 to Jewelers Mutual Insurance Company; and \$200 to Jean Zell. *See* PSR ¶¶ 101-02.

At the defendant's sentencing, the district court ensured that the defendant and his counsel reviewed the PSR and agreed with the

determinations in the PSR. GA242-GA243, GA279. The district court adopted the guideline calculations in the PSR and imposed a guideline sentence. GA279-GA281. Specifically, the district court sentenced the defendant to 240 months' imprisonment on Count One, 84 months' imprisonment on Count Two, to run consecutive to the sentence on Count One, and 360 months' imprisonment on Count Three, to run concurrent to the sentences on Counts One and Two. GA281. In addition, the court ordered restitution of \$25,490 to Hannoush Jewelers, \$216,042 to Jewelers Mutual Insurance Company, and \$200 to Jean Zell. GA282.

C. The defendant's first appeal

In his first appeal to this Court, the defendant made three arguments. GA289-GA291. First, he challenged the district court's denial of his motion to suppress evidence seized from his car and his residence. GA289. Second, he challenged the admission of expert testimony from FBI analyst James Smith. GA290. Third, he argued that his Hobbs Act conviction should be reversed because there was insufficient evidence for the jury to find that the robbery had an impact on interstate commerce. GA291. On March 27, 2006, this Court issued a Summary Order rejecting the defendant's arguments and affirming the judgment of the district court. GA288-GA291.

D. The defendant's habeas motion

On October 5, 2007, the defendant filed a *pro se* section 2255 motion and thereafter filed several supplemental submissions in support of his motion. GA389-GA390. In his section 2255 motion, the defendant argued that he received ineffective assistance of counsel for several reasons. GA293. Specifically, he argued that “his trial counsel 1) failed to conduct adequate pre-trial investigation, 2) failed adequately to advise him during plea negotiations, 3) failed to call a witness who could have corroborated his defense, 4) failed adequately to cross-examine government witnesses, and 5) failed to challenge his classification as a career offender at sentencing.” GA293. In addition, the defendant argued that the government violated his due process rights by “failing to disclose exculpatory material before the trial and by . . . knowingly allowing a government witness to testify falsely.” GA293.

On July 14, 2008, the district court issued a ruling denying the section 2255 motion. GA293-GA316. The court addressed and rejected all five of the defendant's ineffective assistance of counsel claims and both of his due process claims. As to the only claim that the defendant now repeats on appeal, i.e., that defense counsel was ineffective during pre-trial plea negotiation, the district court made the following findings:

[The defendant] claims that the government offered him a “fifteen . . . year plea deal,” and that his attorney “failed to give . . . him any advice or suggestion on how to deal with the offered plea bargain.” (Pet’r’s Br. at 15.) He also claims that his lawyer did not tell him that “he would be sentenced as a career offender if he went to trial and was convicted” and that, had he been so informed, he would not have decided to go to trial in this case. (Id.)

Attorney Pattis states that these assertions are “simply untrue.” (Pattis Aff. ¶ 7.) He explains that he discussed with Carter the possibility of various sentence enhancements under the then-mandatory sentencing guidelines as well as the possibility “of a lengthy and catastrophic sentence if [Carter were] convicted.” (Id.) Pattis relates that Carter did not indicate a willingness to plead guilty at any point. (Id.)

GA301-GA302. In denying the defendant’s claim, the district court found that “there is sufficient evidence that defense counsel discussed with Carter the possible adverse consequences of going to trial.” GA302. The court further stated that it “is not convinced of the credibility of Carter’s unsupported claims that his lawyer

informed him of a plea offer but then failed to give him ‘any advice’ on how to evaluate the offer.” GA302.

E. The district court’s amended habeas order

On July 29, 2008, the defendant filed a motion for reconsideration of his section 2255 motion. GA390. The defendant argued that the district court should reconsider his claim that his counsel was ineffective at sentencing for failing to contest the sentencing enhancements for being a career offender and an armed career criminal. GA317.

On August 6, 2010, the district court granted the motion for reconsideration and amended its prior denial of the section 2255 motion. GA342. The court ruled that trial counsel’s failure to object to the sentencing enhancements under both the career offender guidelines and the Armed Career Criminal Act constituted ineffective assistance of counsel. GA342. As a result, the court amended its prior denial of the defendant’s section 2255 motion to grant the defendant a resentencing. GA342.

F. The resentencing hearing

In preparation for the defendant’s resentencing, the U.S. Probation Office prepared a Second Addendum to the PSR. The Second

Addendum calculated the base offense level for Count One to be level 20. *See* PSR, Second Addendum ¶ 27. Two levels were added pursuant to U.S.S.G. § 2B3.1(b)(7)(C) because the actual loss resulting from the robbery was \$241,732. *See id.* ¶ 28. This resulted in an adjusted offense level of 22. *See id.* ¶32. The Second Addendum determined that the defendant was in Criminal History Category VI, which resulted in a guideline range of 84 to 105 months of imprisonment. *See id.* ¶¶ 45, 92. Further, the Second Addendum concluded that Count Two required a mandatory consecutive sentence of 84 months, which resulted in a recommended guideline range of 168 to 189 months of imprisonment. *See id.* ¶ 93.

On September 8, 2011, the district court held a resentencing hearing. GA344. At the hearing, the government argued for a two-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(4)(B) because the three employees were physically restrained to facilitate the commission of the offense. GA354-GA357. The court rejected the government's argument and concluded, consistent with the calculation in the Second Addendum, that the defendant had a total offense level of 22 and fell into Criminal History Category VI, resulting in a guideline range of 84 to 105 months of imprisonment. GA367-GA375. The court then sentenced the defendant to concurrent terms of 105 months on

Counts One and Three, and a consecutive term of 84 months on Count Two. GA370. The court again imposed its original restitution order to the three victims in the amount of \$241,732. GA370. On September 15, 2011, the court entered the amended judgment. GA383.

Summary of Argument

This appeal represents yet another attempt by the defendant to collaterally attack his conviction and sentence based on alleged ineffective assistance of counsel. In raising these claims on direct appeal, however, the defendant cannot escape the various procedural requirements that bar review under 28 U.S.C. § 2255.

First, this appeal is a poorly disguised second or successive habeas petition and, as such, can only survive if the defendant makes a prima facie showing that his claims involve “newly discovered evidence” or “a new rule of constitutional law” to justify a second or successive section 2255 motion. The defendant has failed to make such a showing. Second, any substantive claim that is not construed as a challenge to the effectiveness of counsel is barred under the law-of-the-case doctrine, which precludes a defendant from raising issues now that could have been raised in his initial direct appeal. Third, even assuming *arguendo* that the

defendant's ineffective assistance claims are properly before this Court, there is an inadequate factual record for this Court to address them. Finally, even assuming *arguendo* that the defendant's ineffective assistance claims are properly before this Court and there is an adequate factual basis for this Court to resolve the claims, the defendant has not come close to showing that his counsel's performance "fell below an objective standard of reasonableness" or that his counsel's alleged errors actually prejudiced the defense.

Argument

I. The defendant's appeal should be denied as a second or successive section 2255 petition.

A. Governing law

1. Second or successive section 2255 petitions

Section 2255 requires that:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient

to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). Section 2244(b)(3)(C) further provides that “[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.” *Liriano v. United States*, 95 F.3d 119, 120 (2d Cir. 1996) (*per curiam*). A subsequent section 2255 petition qualifies as a second or successive petition where the “prior petition was adjudicated on the merits.” *Corrao v. United States*, 152 F.3d 188, 191 (2d Cir. 1998).

2. Certificate of appealability

If the district court denies a section 2255 petition, the federal habeas appeals statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides that the court may issue “[a] certificate of appealability . . . only if the applicant has made a substantial

showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “[A] certificate of appealability is not to be granted unless the petitioner makes ‘a substantial showing of the denial of a constitutional right,’ . . . and ‘[t]he certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2)’ . . .” *Grotto v. Herbert*, 316 F.3d 198, 209 (2d Cir. 2003) (internal citations omitted). This Court has made clear that “[a]ppellate courts cannot waste scarce judicial resources by wading through trial records in an effort to guess which issues a district judge may have deemed worthy of appellate review.” *Blackman v. Ercole*, 661 F.3d 161, 164 (2d Cir. 2011).

B. Discussion

The defendant’s appeal represents another attempt to collaterally attack his conviction and sentence based on alleged ineffective assistance of counsel, and, therefore, it should be subject to the gate-keeping requirements for a second or successive section 2255 motion. The appeal, like the section 2255 motion, argues that the defendant’s conviction and sentence should be vacated and set aside because he received ineffective assistance of trial and appellate counsel. Specifically, the defendant argues that counsel was ineffective for failing: (1) to challenge the inclusion in the indictment of the

citation to 18 U.S.C. § 924(e)(1) and the brandishing allegation; (2) to argue that a constructive amendment occurred as a result of the inclusion of the 18 U.S.C. § 924(e)(1) citation; (3) to move to dismiss the indictment on the ground of prosecutorial misconduct before the grand jury; (4) to argue that a variance occurred between the trial evidence and the indictment; (5) to argue that the defendant was misled during pre-trial plea negotiations; (6) to challenge the loss determination and the restitution order at his original sentencing; and (7) to object to the use of the defendant's nickname, "Black." The appeal, thus, clearly seeks to collaterally attack defendant's conviction and sentence for a second time based upon alleged ineffective assistance of counsel.

The defendant has not, however, satisfied the requirements for a second or succession petition under section 2255(h). He has not made a prima facie showing that his claims involve: "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h). None of the claims here on appeal rely on newly discovered

evidence, argue the sufficiency of the evidence, or are based on a new rule of constitutional law. Instead, the defendant simply uses the appeal to suggest additional bases to attack the effectiveness of his counsel. As such, it must be dismissed under section 2255(h).

Moreover, to the extent that the defendant's claims could be construed as an appeal of the district court's original July 14, 2008 order denying his section 2255 motion, the claims are not properly before this Court both because any appellate challenge to the district court's order is untimely, *see* Fed. R. App. P. 4(a), and because the defendant did not obtain a certificate of appealability as to that order. *See Grotto*, 316 F.3d at 209 (“[A] certificate of appealability is not to be granted unless the petitioner makes ‘a substantial showing of the denial of a constitutional right’”).

II. The law of the case doctrine precludes the defendant from raising issues now that he could have raised in his initial appeal.

A. Governing law

The law of the case doctrine “requires a trial court to follow an appellate court’s previous ruling on an issue in the same case. This is the so-called ‘mandate rule.’” *United States v.*

Quintieri, 306 F.3d 1217, 1225 (2d Cir. 2002) (citation omitted). “The mandate rule ‘compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.’” *United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002) (quoting *United States v. Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quoting, in turn, *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993))) (emphasis deleted).

In addition, this Court has held that “the law of the case doctrine ordinarily will bar a defendant from renewing challenges to rulings made by the sentencing court that were adjudicated by this Court – or that could have been adjudicated by us had the defendant made them – during the initial appeal that led to the [] remand.” *United States v. Williams*, 475 F.3d 468, 475 (2d Cir. 2007); *see also United States v. Negron*, 524 F.3d 358, 360 (2d Cir. 2008) (holding that a defendant who is appealing a sentence from a *Crosby* remand cannot raise an argument that was adjudicated on direct appeal); *United States v. Frias*, 521 F.3d 229, 234-35 (2d Cir. 2008) (holding that, in an appeal after a *Crosby* remand, the defendant could not raise claims that he could have raised in the first appeal). “The law of the case ordinarily forecloses relitigation of issues expressly or impliedly decided by the appellate court. . . . [It] ordinarily prohibits a party, upon resentencing

or an appeal from that resentencing, from raising issues that he or she waived by not litigating them at the time of the initial sentencing.” *United States v. Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002) (internal quotations omitted).

B. Discussion

To the extent that the Court construes any of the defendant’s arguments, not as ineffective assistance claims, but as substantive claims of error, their review is precluded by the law of the case doctrine. This doctrine prevents a defendant from litigating issues now that could have been presented, but did not, in his initial appeal. *See Williams*, 475 F.3d at 475 (the law of the case doctrine ordinarily will bar a defendant from renewing challenges to rulings made by this Court or that could have been made by this Court).

At the time of his initial appeal, the defendant could have claimed error based on the inclusion of the § 924(e) citation and the brandishing allegation in the superseding indictment, the alleged constructive amendment to the indictment, the alleged prosecutorial misconduct before the grand jury, the alleged improper variance resulting from the trial evidence, the supposed confusion surrounding his consideration of the proposed plea

agreement, the challenge to the loss determination and the restitution order, and the alleged prejudice resulting from the use of the defendant's nickname, "Black." But the defendant did not raise these issues in his initial appeal to this Court, nor did he raise them in a pretrial motion, during trial, at sentencing or in any of his numerous *pro se* submissions in support of his section 2255 motion. Under the law of the case doctrine, therefore, the defendant is prohibited from raising these issues during this second appeal to this Court. *See Quintieri*, 306 F.3d at 1229 ("The law of the case . . . ordinarily prohibits a party, upon resentencing or an appeal from that resentencing, from raising issues that he or she waived by not litigating them at the time of the initial sentencing").

III. The defendant's ineffective assistance claims should not be addressed on direct appeal.

A. Governing law

"This Court is generally disinclined to resolve ineffective assistance claims on direct review." *United States v. Gaskin*, 364 F.3d 438, 467 (2d Cir. 2004) (citation omitted); *see also United States v. Khedr*, 343 F.3d 96, 99-100 (2d Cir. 2003) ("this Court has expressed a baseline aversion to resolving ineffectiveness claims on

direct review”) (citation omitted). “Among the reasons for this preference is that the allegedly ineffective attorney should generally be given the opportunity to explain the conduct at issue.” *Khedr*, 343 F.3d at 100 (citing *Sparman v. Edwards*, 154 F.3d 51, 52 (2d Cir. 1998)).

The Supreme Court has held that “in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance” because the district court is “best suited to developing the facts necessary to determining the adequacy of representation during an entire trial.” *Massaro v. United States*, 538 U.S. 500, 504, 505 (2003). “When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.” *Id.* at 504-505. “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. . . . inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions, just as it may be critical to a proper assessment of counsel’s other litigation decisions.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (citations omitted). Accordingly, the Supreme Court explained that few ineffectiveness claims “will be capable of

resolution on direct appeal.” *Massaro*, 538 U.S. at 508.

Nevertheless, direct appellate review is not foreclosed. This Court has held that “[w]hen faced with a claim for ineffective assistance of counsel on direct appeal, we may: (1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us.” *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003). “The last option is appropriate when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is ‘beyond any doubt’ or ‘in the interest of justice.’” *Gaskin*, 364 F.3d at 468 (quoting *Khedr*, 343 F.3d at 100).

B. Discussion

Even assuming *arguendo* that the defendant's ineffective assistance claims are properly before this Court, there is an inadequate factual record for this Court to address the claims. There is little, if any, evidence in the record regarding a number of important issues, such as what information was presented to the grand jury; whether defense counsel made a tactical decision to have the jury determine beyond a reasonable doubt whether the defendant had brandished a firearm; what advice counsel gave the defendant regarding his potential for an enhanced sentence; and the circumstances surrounding the defendant's discussion of the proposed plea agreement with his counsel.

On this record, the Court cannot meaningfully decide whether counsel's performance was so unreasonable under prevailing professional norms that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and whether the alleged ineffectiveness prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gaskin*, 364 F.3d at 468 (quoting *Strickland*, 466 U.S. at 694). Accordingly, even assuming *arguendo* that the defendant's ineffective assistance claims are properly before

the Court and are not subject to dismissal under either section 2255(h) or the law-of-the-case doctrine, these claims should be not be addressed on direct appeal because there is an insufficient factual record.

IV. The defendant has not shown that his counsel provided ineffective assistance, either before the district court or on direct appeal.

A. Governing law

A person challenging his conviction on the basis of ineffective assistance of counsel bears a heavy burden. In *Strickland*, the Supreme Court held that a defendant must establish (1) that his counsel's performance "fell below an objective standard of reasonableness" and (2) that counsel's unprofessional errors actually prejudiced the defense. See *Strickland*, 466 U.S. at 688.

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Id.*, 466 U.S. at 689. A defendant's *post hoc* accusations alone are not sufficient to overcome this strong presumption because a contrary holding would lead to constant litigation by dissatisfied criminal defendants and harm the effectiveness, and potentially even the availability, of defense counsel. See *id.* The

ultimate goal of the inquiry is not to second-guess decisions made by defense counsel; it is to ensure that the judicial proceeding is still worthy of confidence despite any potential imperfections. See *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000).

“The *Strickland* standard is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard.” *Linstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001). “The court’s central concern is not with ‘grad[ing] counsel’s performance,’ but with discerning ‘whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.’” *United States v. Aguirre*, 912 F.2d 555, 560 (2d Cir. 1990) (quoting *Strickland*, 466 U.S. at 696-97) (internal citations omitted).

The Supreme Court recently cautioned courts about the application of the *Strickland* test:

An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is

meant to serve. . . . Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. . . . The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.

Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (internal citations and quotation marks omitted); *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1406-1407 (2011) (holding that lower court had "misapplied" *Strickland*, failed to apply the "strong presumption of competence that *Strickland* mandates," and "overlooked the constitutionally protected independence of counsel and the wide latitude counsel must have in making tactical decisions") (internal quotation marks and ellipse omitted).

Moreover, to render constitutionally effective assistance, "[a]n attorney is not required to

forecast changes or advances in the law.” *Sellan v. Kuhlman*, 261 F.3d 303, 315 (2d Cir. 2001) (internal citations and quotations omitted); see also *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996) (“[I]n making litigation decisions, there is no general duty on the part of defense counsel to anticipate changes in the law.”); *United States v. Fields*, 565 F.3d 290, 296 (5th Cir. 2009) (stating, “The overwhelming majority of circuits to address the issue have suggested that defense counsel’s failure to anticipate, in the wake of *Apprendi*, the rulings in *Blakely* and *Booker* does not render counsel constitutionally ineffective”).

Forecasting advances in the law is not required because “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,” *Strickland*, 466 U.S. at 688, an inquiry that is “linked to the practice and expectations of the legal community,” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010), as viewed “from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. “To counteract this inclination to evaluate counsel’s performance against insight gained only through the passage of time, *Strickland* requires that [w]hen assessing whether or not counsel’s performance fell below an objective standard of reasonableness . . . under prevailing professional norms, we must consider the circumstances counsel faced at the

time of the relevant conduct and . . . evaluate the conduct from counsel’s point of view.” *Parisi v. United States*, 529 F.3d 134, 141 (2d Cir. 2008) (internal quotation marks and citations omitted).

The second element of the Strickland test requires a defendant to show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cullen*, 131 S. Ct. at 1403 (internal quotation marks omitted). “That requires a substantial, not just conceivable, likelihood of a different result.” *Id.* (internal quotation marks omitted).

B. Discussion

Even assuming *arguendo* that the defendant’s ineffective assistance claims were properly before this Court, the defendant has not come close to showing that his counsel’s performance “fell below an objective standard of reasonableness” or that his counsel’s unprofessional errors actually prejudiced the defense. *See Strickland*, 466 U.S. at 688.

The defendant argues that his counsel, who represented him at trial and on appeal, was

ineffective for: (1) failing to challenge the inclusion in the indictment and the submission to the jury of the citation to 18 U.S.C. § 924(e)(1) and the brandishing allegation; (2) failing to argue that a constructive amendment occurred as a result of the inclusion of the 18 U.S.C. § 924(e)(1) citation in the indictment; (3) failing to move to dismiss the indictment on the ground of prosecutorial misconduct before the grand jury; (4) failing to argue that a variance occurred between the trial evidence and the indictment; (5) failing to argue that the defendant was misled during pre-trial plea negotiations; (6) failing to challenge the loss determination and the restitution order at his original sentencing; and (7) failing to object to the use of the defendant's nickname, "Black."

With respect to each of these arguments, however, the defendant cannot satisfy either prong of *Strickland*.

1. Defense counsel's decision not to challenge the sentencing factors listed in the superseding indictment did not amount to ineffective assistance.

The defendant argues that the superseding indictment improperly charged the defendant with violating 18 U.S.C. § 924(e)(1) and improperly charged the defendant with

brandishing a firearm. *See* Def.’s Br. at 10-13. The defendant argues that these sentencing factors should not have been included in the superseding indictment and submitted to the jury and that their inclusion unfairly prejudiced the defendant. *See id.* Each of these arguments is unavailing.

It is well established that sentencing allegations in an indictment are “mere surplusage” that may be disregarded. *See United States v. Peters*, 435 F.3d 746, 753 (7th Cir. 2006) (“[S]entencing allegations in the superceding indictment amount to mere surplusage and do not constitute elements of a common law crime”); *see also United States v. Miller*, 471 U.S. 130, 136 (1985) (holding that “[a] part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as a useless averment that may be ignored”) (internal quotation omitted); *United States v. Bates*, 77 F.3d 1101, 1105 (8th Cir. 1996) (“References in the indictment to sentence enhancements such as section 924(e) are mere surplusage and may be disregarded if the remaining allegations are sufficient to charge a crime”); *United States v. Hammell*, 3 F.3d 1187, 1189 (8th Cir. 1993) (holding that government’s correction of typographical error to § 924(e) charge without grand jury’s approval was not reversible error because “section 924(e) does not create a

separate offense” so that “the statutory citation was mere surplusage, and its correction did not invalidate the indictment”).

This Court’s decision in *United States v Mui*, 2007 WL 177839 (2d Cir. Jan. 18, 2007) (unpublished summary order),² is instructive. The defendant in *Mui* was tried after the Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004), but before its ruling in *United States v. Booker*, 543 U.S. 220 (2005), “a period of ‘considerable consternation and concern’ in the federal courts as to the legality of judicial factfinding under the Sentencing Guidelines.” *Mui*, 2007 WL 177839 at *1. “The district court addressed this concern by submitting various relevant Guidelines factors . . . to the jury for its determination beyond a reasonable doubt.” *Id.* On appeal, the defendant raised several challenges to the

¹ Although the *Mui* case presented issues of first impression in this Circuit, the *Mui* decision is unpublished. *See id.* at *1. This Court determined that the issues in *Mui* “derive from an unusual set of circumstances unlikely to be repeated” and, thus, “any ruling on these issues . . . is unlikely to be of precedential value to the disposition of future cases.” *Id.* The Court stated, however, that “[w]ere a similar case to arise, the parties could move for publication of [the *Mui*] decision.” *Id.* at *1, n.2.

submission of Guidelines factors to the jury. This Court ruled that each of the defendant's challenges were "plainly without merit." *Id.*

In *Mui*, the Court rejected the defendant's argument that his trial counsel rendered ineffective assistance by failing to challenge the submission of Guidelines factors to the jury. *See id.* at *1. As to *Strickland's* first prong, the *Mui* Court stated, "[The defendant] cannot show that counsel's failure to object to the Guidelines pleadings or charge was objectively unreasonable given that the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders, appearing as amici curiae before the Supreme Court in *United States v. Booker*, urged the Court to conclude that the Sixth Amendment required Guidelines "enhancing facts [to] be alleged in indictments and proved to the jury beyond a reasonable doubt." *Id.* at *4 (internal citations omitted). In addition, the Court recognized that there were tactical reasons that supported this position: "Treating Guidelines enhancements as elements would impose a heavier pleading and proof requirement on the government, thereby enhancing a defendant's chance of escaping conviction either all together or on what might be characterized as Guidelines-aggravated charges." *Id.* Thus, the Court concluded that the defendant could not show that "counsel's failure to object to the

Guidelines pleading or submission was objectively unreasonable.” *Id.*

Further, as to the second *Strickland* prong, the *Mui* Court found that the defendant failed to demonstrate the requisite prejudice. *See id.* The Court noted that the defendant “cannot point to any evidence that would have been excluded if counsel had successfully objected to the challenged pleading or submission of Guidelines factors to the jury.” *Id.* The Court also stated that the defendant could not demonstrate that an objection by counsel to the Guidelines submissions would have resulted in a different jury verdict or court sentence. *See id.* Accordingly, this Court rejected *Mui*’s ineffective assistance claim. *See id.*

In the instant case, the defendant has not come close to showing that his trial counsel rendered ineffective assistance by failing to challenge the inclusion of the brandishing allegation and the § 924(e) citation in the superseding indictment. Here, as in *Mui*, the Guidelines factors included in the indictment and submitted to the jury were mere “surplusage” that did “not relieve the government of its critical obligation to prove beyond a reasonable doubt each element of the charged offenses.” *Id.* at *2. As the *Mui* Court concluded, the defendant “cannot show that counsel’s failure to object to the Guidelines

pleadings or charge was objectively unreasonable.” *Id.*

In addition, the defendant cannot show prejudice from his counsel’s alleged deficient performance. As this Court found in *Mui*, in this case there was “no confusion as to the government’s burden of proof with respect to the actual elements of the charged offenses.” *Id.* Here, like *Mui*, the district court “instructed the jury to reach the issue of Guidelines factors only if it found the traditional elements proved.” *Id.* Indeed, the district court here provided the jury with instructions and a verdict form that required the jurors to reach a unanimous decision on the charged offense *before* addressing the brandishing issue.² GA215, GA238-GA239. Further, as in *Mui*, there was “no evidence that was adduced at trial to support the Guidelines pleadings that would not otherwise have been admissible to prove the traditional elements of the charged offenses.” *Id.* Moreover, the defendant cannot show that if his counsel had moved to strike the Guidelines factors in the superseding indictment, then his jury verdict or sentence would have been different.

²The district court did not have the jury make any decision regarding § 924(e), which was nothing more than a statutory citation.

2. Defense counsel did not render ineffective assistance by failing to argue that there was a constructive amendment of the indictment.

The defendant argues that his counsel was ineffective for failing to argue that a constructive amendment occurred. *See* Def.'s Br. at 10-12. This argument is unfounded.

A constructive amendment of an indictment occurs when the trial evidence and jury instructions “so modify” the terms of an indictment that “there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.” *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988) (quoting *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986)). To prevail on such a claim, a defendant must “demonstrate that either the proof at trial or the . . . jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury’s indictment.” *United States v. Frank*, 156 F.3d 332, 337 (2d Cir. 1998) (*per curiam*). On this question, this Court’s cases “have ‘consistently permitted significant flexibility in proof, provided that the defendant was given *notice* of the *core of criminality* to be

proven at trial.” *United States v. Rigas*, 490 F.3d 208, 228 (2d Cir. 2007) (quoting *United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992)) (emphasis in original; footnote omitted).

In the instant case, there is no evidence of a constructive amendment of the superseding indictment. The defendant has not even alleged – let alone offered any evidence showing – that any trial evidence or jury instruction so altered an essential element of a charge that “there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.” *Mollica*, 849 F.2d at 729 (internal quotation and citation omitted).

The defendant argues that he “was resentenced absent both career offender and armed career criminal guidelines, constructively amending the indictment by removing § 924(e)(1)” from Count Three. Def.’s Br. at 12. Sentencing the defendant without regard for the Armed Career Criminal Act did not amount to a constructive amendment. Indeed, even redacting or removing § 924(e)(1) from the indictment would not amount to a constructive amendment. As discussed above, sentencing enhancements such as 18 U.S.C. § 924(e)(1) are “mere surplusage” which may be disregarded. *See Bates*, 77 F.3d at 1105 (“References in the indictment to sentence enhancements such as section 924(e) are mere surplusage and may be

disregarded if the remaining allegations are sufficient to charge a crime”). The citation to “18 U.S.C. § 924(e)(1)” did not in any way alter the elements that the government was required to prove. Moreover, there was no prejudice because the defendant was not sentenced as an armed career criminal.

Accordingly, the defendant’s counsel did not render ineffective assistance by failing to argue that the inclusion, and the effective removal at the defendant’s resentencing, of § 924(e)(1) amounted to a constructive amendment of the indictment.

3. Defense counsel’s failure to allege prosecutorial misconduct did not amount to ineffective assistance.

The defendant’s claim that his counsel was ineffective for failing to move to dismiss the indictment for prosecutorial misconduct before the grand jury is meritless.

Dismissal of an indictment is a “drastic” and “extreme” remedy for prosecutorial misconduct. *United States v. Fields*, 592 F.2d 638, 646-47 (2d Cir. 1978). An indictment may be dismissed because of misconduct occurring before a grand jury only where the misconduct prejudiced the defendant. *See United States v. Mechanik*, 475 U.S. 66, 71-72 (1986); *United States v. Friedman*, 854 F.2d 535, 583 (2d Cir. 1988). Typically a

supervening jury verdict makes the remedy of dismissal inappropriate, given that a petite jury's guilty verdict proves the defendant's guilt beyond a reasonable doubt. *See Mechanik*, 475 U.S. at 70.

Here, the defendant argues that the prosecutor "recklessly presented . . . false evidence to the Grand Jury." Def.'s Br. at 6. Specifically, the defendant argues that the government "drafted the indictment for the Grand Jury's approval and recklessly represented that Appellant had at least three prior convictions for a violent felony or serious drug offense . . . thus making him an armed career criminal." *Id.*

First, the defendant has not offered any grand jury testimony or other evidence showing that the government represented to the grand jury that the defendant had at least three prior convictions for a "violent felony" or a "serious drug offense." Def.'s Br. at 10-12. It appears that the defendant's alleged basis for this allegation is that Count Three included the statutory citation to "18 U.S.C. § 924(e)(1)." *See id.*

Second, the inclusion of the § 924(e) citation in the superseding indictment did not amount to prosecutorial misconduct. As this Court and other Circuit Courts of Appeal recognized, the Supreme Court's decision in *Blakely* in June

2004 generated substantial uncertainty about whether sentencing enhancements needed to be pleaded in the indictment and proven beyond a reasonable doubt to a jury.³ See, e.g., *Mui*, 2007 WL 177839 at *1.

In addition, the defendant did not suffer any prejudice as a result of the inclusion of the citation to 18 U.S.C. § 924(e) in the indictment. As this Court has recognized, Guidelines factors are mere “surplusage” that do “not relieve the government of its critical obligation to prove beyond a reasonable doubt each element of the charged offenses.” *Mui*, 2007 WL 177839 at *2; see also *Peters*, 435 F.3d at 753 (“[S]entencing allegations in the superseding indictment amount to mere surplusage and do not constitute elements of a common law crime”); *Bates*, 77 F.3d at 1105 (“References in the indictment to sentence enhancements such as section 924(e) are mere surplusage and may be disregarded if the remaining allegations are sufficient to charge a crime”).

³*Blakely* was decided on June 24, 2004. The superseding indictment in this case was returned on August 31, 2004. The jury trial started with voir dire on December 14, 2004. The first day of evidence was on January 12, 2005. That same day, the *Booker* decision was decided.

Further, the government did not offer any evidence at trial regarding the § 924(e) enhancement, nor did the district court provide the jury with any instructions, or ask the jury to make any findings, regarding a § 924(e) enhancement. *See* GA175-GA237. In fact, there is no evidence that the government made any reference whatsoever to § 924(e) during the trial, during summation or otherwise. *See* GA75-GA101, GA150-GA174. Moreover, the trial jury was properly instructed regarding the elements of the offense and found, based on admissible evidence, the defendant guilty beyond a reasonable doubt. *See Mechanik*, 475 U.S. at 70 (holding that a supervening jury verdict makes the remedy of dismissal inappropriate because a petite jury's guilty verdict proves the defendant's guilt beyond a reasonable doubt).

In sum, defense counsel did not provide ineffective assistance, either before the district court or on direct appeal, by failing to allege prosecutorial misconduct.

4. Defense counsel did not provide ineffective assistance by failing to argue that a variance occurred.

The defendant argues that his trial and appellate counsel were ineffective for failing to argue that the trial evidence resulted in an impermissible variance. *See* Def.'s Br. at 7-10.

Specifically, the defendant argues that the trial evidence that the defendant committed the jewelry store robbery because of his gambling habit contradicted the grand jury testimony of Charles Devorce that the defendant started committing robberies as an alternative to dealing drugs and that he needed money to pay down his mortgage. *See id.* at 8.

An impermissible variance occurs when the evidence introduced at trial “broadens the basis for conviction beyond that charged in the indictment.” *United States v. Patino*, 962 F.2d 263, 265 (2d Cir. 1992). The variance “must be material, such that the presentation of evidence and jury instructions [] so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.” *United States v. Wallace*, 59 F.3d 333, 337 (2d Cir. 1995). Moreover, this Court has “consistently permitted significant flexibility in proof, provided that the defendant was given notice of the ‘core of criminality’ to be proven at trial.” *Patino*, 962 F.2d at 266 (citation omitted). A defendant must show that the variance resulted in “substantial prejudice” in order to obtain relief from his conviction. *See United States v. McDermott*, 918 F.2d 319, 326 (2d Cir. 1990).

In this case, the defendant's argument that the trial evidence contradicted Charles Devorce's grand jury testimony is simply not true. Before the grand jury, Devorce testified, in part, that:

He spoke about needing money because -- well, he was a chronic gambler. I mean a *chronic gambler*, and by him curbing his trafficking in narcotics, he needed another flow of income.

So, what [the defendant] was doing was, what he was hoping he was going to do was build up enough money from the robberies to allow him to get his mortgages caught up. I guess he was behind on a couple of mortgages, couple of the vehicles and other financial stuff that was being neglected *because of the gambling* and because so much of the drug activity had been scaled down.

GA50-GA51 (emphasis added). This testimony is entirely consistent with the evidence adduced at trial, suggesting that the defendant's motive for robbing the jewelry store was driven, at least in part, by his gambling activities.

Moreover, there is no evidence even remotely suggesting that "the evidence adduced at trial establishe[d] facts different from those alleged in the indictment," thus resulting in an impermissible variance. *See Dunn v. United*

States, 442 U.S. 100, 105 (1979). Accordingly, the defendant cannot show that his trial and appellate counsel's failure to allege an impermissible variance (1) fell below objective standards of reasonableness or (2) that counsel's deficient performance prejudiced the defendant. *See Strickland*, 466 U.S. at 694.

5. The defendant has not shown that his counsel provided ineffective assistance in plea bargaining.

The defendant alleges that he received ineffective assistance of counsel during plea negotiations because his counsel misled him into believing that he was subject to a mandatory minimum penalty of fifteen years in prison. *See* Def.'s Br. at 13.

As an initial matter, the defendant previously litigated this claim in his first section 2255 motion. Specifically, in that motion, the defendant raised the claim "that his defense counsel was ineffective during his pre-trial plea negotiation." GA301. The district court rejected this claim. GA301-GA303. The defendant did not appeal that decision or obtain a certificate of appealability with respect to it, so the claim is not properly before this Court. *See Grotto*, 316 F.3d at 209 ("[A] certificate of appealability is not to be granted unless the petitioner makes 'a substantial showing of the denial of a

constitutional right”); *Blackman*, 661 F.3d at 164 (“Appellate courts cannot waste scarce judicial resources by wading through trial records in an effort to guess which issues a district judge may have deemed worthy of appellate review”).

Further, the defendant’s factual allegations contradict prior allegations that he has made. In its July 14, 2008 ruling on the defendant’s first section 2255 motion, the district court stated that the defendant “claims that his lawyer did not tell him that ‘he would be sentenced as a career offender if he went to trial and was convicted’ and that, had he been so informed, he would not have decided to go to trial in this case.” GA302. This claim contradicts the allegation here that his counsel and the prosecutor misled him into believing that he would be sentenced as an armed career criminal. *See* Def.’s Br. at 13.

In sum, the defendant has not shown, as required by *Strickland*, that his counsel’s performance during pre-trial plea negotiations “fell below an objective standard of reasonableness” and that counsel’s ineffectiveness prejudiced the defendant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

6. Defense counsel was not ineffective for failing to challenge the loss calculation or the restitution order.

The defendant argues that his counsel was ineffective for failing to challenge the loss determination and the restitution order at his original sentencing. *See* Def.'s Br. at 16-19. He argues that the district court made no finding regarding the loss figure or restitution amount. *See* Def.'s Br. at 16-17. The defendant is mistaken. The PSR calculated the loss to the defendant's victims as \$241,732, with restitution paid as follows: \$25,490 to Hannoush Jewelers; \$216,042 to Jewelers Mutual Insurance Company; and \$200 to Jean Zell. *See* PSR ¶¶ 4-21, 101-02. The district court adopted these findings and ordered restitution accordingly, both in its oral pronouncement of the sentence and its written judgment. GA279-GA282, GA286. Likewise, at the September 8, 2011 resentencing hearing, the court again found that the loss amount or restitution amount was \$241,732. GA370.

The defendant also claims that Jewelers Mutual Insurance Company is not a "victim" as defined in 18 U.S.C. § 3663A(a)(2) and, as such, is not entitled to restitution. *See* Def.'s Br. at 17-18. This argument is misplaced. The defendant has overlooked 18 U.S.C. § 3664(j)(1), which states, in part, "[i]f a victim has received

compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide compensation . . .” *Id.* Under this provision, the district court was required to order restitution to Hannoush Jewelers’s insurance company, Jewelers Mutual Insurance Company.

Accordingly, the defendant has not shown that his counsel’s failure to challenge the loss determination and the restitution order at his sentencing hearing was deficient or that such deficiency caused the defendant prejudice. *See Strickland*, 466 U.S. at 688.

7. Counsel’s failure to move to strike the nickname “Black” did not amount to ineffective assistance.

The defendant’s claim that his counsel rendered ineffective assistance by failing to challenge the use of his nickname, “Black,” is also unavailing.

“[T]he Government may introduce evidence of a defendant’s alias or nickname if this evidence aids in the identification of the defendant or in some other way directly relates to the proof of the acts charged in the indictment.” *United States v. Mitchell*, 328 F.3d 77, 83 (2d Cir. 2003). “Generally . . . aliases are stricken [from an indictment] only if they constitute prejudicial

surplusage and will not assist the trier of fact in identifying a particular defendant or defendants.” *United States v. Murgas*, 967 F. Supp. 695, 710 (N.D.N.Y. 1997) (citing *United States v. Miller*, 381 F.2d 529, 536 (2d Cir.1967)). In assessing prejudice, courts will consider whether the nickname is “suggestive of a criminal disposition,” the relevance of the nickname and “the frequency, context, and character of the use that the prosecution made of [the nickname].” *United States v. Farmer*, 583 F.3d 131, 146 (2d Cir. 2009). “[T]he misuse and overuse of [a defendant’s] nickname would not lead [this Court] to vacate a conviction unless the defendant suffered substantial prejudice, by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.” *Farmer*, 583 F.3d at 147 (quotation marks and citations omitted).

Here, defense counsel’s failure to move to strike the defendant’s nickname, “Black,” from the indictment was not unreasonable. As an initial matter, the evidence adduced at the suppression hearing revealed that the defendant’s nickname was highly relevant to the identification of the defendant. GA40-GA41. Indeed, investigators connected the defendant through his nickname, “Black,” to a series of jewelry store robberies, including the robbery of the Harstan’s Jewelry Store, which led to the instant indictment. GA40-GA41. Also, the

defendant's prison mate, Charles Devorce, knew him only by his nickname. Moreover, the defendant's nickname is not suggestive of a criminal predisposition. See *Farmer*, 583 F.3d at 145. Accordingly, the defendant cannot show that his trial counsel's failure to move to strike the nickname from the indictment falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

In addition, the defendant cannot meet the second prong of *Strickland* – that is, he cannot show that he was prejudiced by the use of his nickname. In *Mitchell*, the defendant argued that the government improperly referred to his nickname, "Phox," during trial by asking the defendant whether "a fox is an animal that is considered sly" and arguing in summation that the defendant had "outfoxed questions while testifying." *Id.*, 328 F.3d at 83 (internal quotations and brackets omitted). Significantly, the *Mitchell* Court found that "Mitchell's identity . . . was not at issue in this case, nor did the admission of the nickname directly relate to the proof of the acts alleged." *Id.* at 84. The Court held that, while the "references were arguably inappropriate[,] . . . references to Mitchell's nickname were not prejudicial in view of the fact that they were brief and isolated and in light of the substantial evidence of guilt adduced by the government." *Id.* (citation omitted).

Unlike in *Mitchell*, the nickname in this case is not suggestive of criminal or deceptive behavior. Moreover, in *Mitchell*, the government referenced the negative connotation associated with the defendant's nickname during cross-examination of the defendant and during summation. *See id.* at 83. In sharp contrast, in this case, the government never referenced the defendant's nickname during its opening summation or its rebuttal summation. GA75-GA101, GA150-GA174. Indeed, other than Devorce's testimony that he knew the defendant by his nickname, "Black," and the district court's reading of the indictment, the defendant's nickname was not mentioned during trial. Further, as in *Mitchell*, "[R]eferences to [the defendant's] nickname were not prejudicial in view of the fact that they were *brief* and *isolated* and in light of the substantial evidence of guilt adduced by the government." *Id.*, 328 F.3d at 84.

In sum, the defendant has not met either prong of *Strickland*. The defendant has not shown that his trial counsel's failure to move to strike the nickname from the indictment falls "below an objective standard of reasonableness." In addition, the defendant has not shown that he was actually prejudiced by the inclusion of his nickname -- that is, but for trial counsel's failure to move to strike his nickname from the indictment, "the result of the [trial] would have been different." *Strickland*, 466 U.S. at 694.

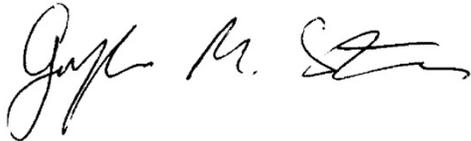
Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.⁴

Dated: October 15, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



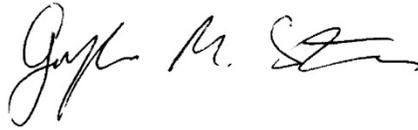
GEOFFREY M. STONE
ASSISTANT U.S. ATTORNEY

Robert M. Spector
Assistant United States Attorney (of counsel)

⁴ On October 15, 2012, the government moved to dismiss the pending cross-appeal in this case.

**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,379 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, appearing to read "Geoffrey M. Stone". The signature is fluid and cursive, with a large initial "G" and a long, sweeping underline.

GEOFFREY M. STONE
ASSISTANT U.S. ATTORNEY

Addendum

**28 U.S.C. § 2255 Federal custody;
remedies on motion attacking sentence**

...

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.