

**DISTRICT COURT OF THE VIRGIN ISLANDS**  
**DIVISION OF ST. CROIX**

**UNITED STATES OF AMERICA,**

**v.**

**REINALDO BERRIOS,  
TROY MOORE,  
ANGEL RODRIGUEZ,  
FELIX CRUZ,**

**Defendants.**

**1:04-cr-00105-WAL-EAH**

**TO: Rhonda Williams-Henry, Esq., AUSA  
Harry C. Wallace, Esq., AUSA  
Kye Walker, Esq.  
Ramon M. Gonzalez, Esq.  
Javier A. Cuyar Olivo, Esq.  
Troy Moore, *Pro Se***

**REPORT AND RECOMMENDATION**

**THIS MATTER** comes before the Court on an Order by the District Judge, Dkt. No. 1114, referring the following motions to the undersigned for a Report & Recommendation ("R&R"): (1) "Motion to Vacate and Set Aside the Convictions and Motion to Dismiss Counts Two, Five, Seven, Eight, Ten, and Eleven Pursuant to FRCP Rule 12(b)(3)(B) and Pursuant to *Rosemond vs. United States*" (the "initial motion"), Dkt. No. 1085, filed by Javier A. Cuyar Olivo, Esq., attorney for Defendant Felix Cruz; (2) "Defendant, Reinaldo Berrios' Notice of Joinder in Motion to Vacate and Set Aside the Convictions and Motion to Dismiss Counts Two, Five, Seven, Eight, Ten, and Eleven Pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B) and Pursuant to *Rosemond v. United States*," Dkt. No. 1097, filed by Kye Walker, Esq., attorney for Defendant Reinaldo Berrios; (3) the "Joint Revised Motion to Dismiss Counts Two (2),

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Five (5), Seven (7), Eight (8), Ten (10), and Eleven (11) Pursuant to FRCP Rule 12(b)(3)(B) and in Light of *Rosemond vs. United States*” (the “revised motion”), Dkt. No. 1106, filed by Ramon M. Gonzalez, Esq., and Javier A. Cuyar Olivo, Esq., attorneys for Defendants Angel Rodriguez and Felix Cruz, respectively; and (4) the “Motion for Joinder of Parties Pursuant to Fed. R. Civ. P. 19 to add Troy Moore to Felix Cruz’s 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody,” Dkt. No. 1107, filed by Defendant Troy Moore, appearing pro se. The Government filed a “Response in Opposition to Defendant Berrios’ Motions to Vacate and Set Aside Convictions and Motion to Dismiss Counts Two, Three, Four, Five, Seven, Eight, Ten, and Eleven Pursuant to FRCP Rule 12(b)(3) and *Rosemond v. United States*,” Dkt. No. 1112, responding to Berrios’s Motion for Joinder, Dkt. No. 1097, and Berrios’s own pro se motion to dismiss, Dkt. No. 1101 (Berrios’s pro se motion to dismiss was not included in the District Judge’s Order referring certain pending motions in this case to the undersigned). The Government also filed an Opposition to the revised motion, Dkt. No. 1129,<sup>1</sup> and an Opposition to Moore’s motion for joinder. Dkt. No. 1132.<sup>2</sup>

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<sup>1</sup> The Court notes that each of the Government’s responses were filed out-of-time without leave of the Court. *Cf.* LRCi 6.1(b)(5) as made applicable by LRCr 1.2 (providing 14 days to respond after the service of a motion). However, because the Court lacks jurisdiction to consider Defendants’ revised motion, the timeliness of the Government’s motion is irrelevant. *But see United States v. Demelio*, No. 05-cr-15, 2009 WL 145949, at \*1 (finding that “it would be improper to enter a default judgment in favor of a state or federal prisoner based on a missed deadline” especially where the government’s failure to respond did not prejudice the movant).

<sup>2</sup> The Government’s untimely response to Moore’s motion is likewise irrelevant where, for the reasons detailed below, the Court’s recommendation would not change regardless of

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For the following reasons, the Court recommends that the initial motion, Dkt. No. 1085, be denied as moot; Berrios's motion for joinder, Dkt. No. 1097, be denied as moot; the revised motion, Dkt. No. 1106, be dismissed; and Moore's motion for joinder, Dkt. No. 1107, be granted in part and denied in part, without prejudice.

### **BACKGROUND**

The procedural background of this case is set out in detail in the District Judge's July 2023 Memoranda that adopted as modified the then-Magistrate Judge's Report & Recommendations regarding Defendants Cruz's, Rodriguez's, and Berrios's motions to vacate their sentences pursuant to 28 U.S.C. § 2255. Dkt. Nos. 992, 995, 1001. The District Judge granted in part and denied in part the § 2255 motions, and scheduled resentencing for each of the three defendants. The Court will provide here only those details necessary to place the instant motions in context.

The four Defendants in this case—Berrios, Moore, Rodriguez, and Cruz—were convicted in 2007, after a jury trial, of eleven federal and Virgin Islands counts that stemmed from crimes they committed in 2004 that included carjacking, attempted robbery, and a murder at Wendy's Restaurant on St. Croix.<sup>3</sup> They were sentenced to, inter alia, life

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whether the Government was deemed to have conceded the arguments made. *See Bench Walk Lighting LLC v. LG Innotek Co., Ltd.*, 530 F. Supp. 3d 468, 477 (D. Del. 2021) ("When one side files a motion raising an issue, and the other side does not respond, the other side is considered to have conceded the point.").

<sup>3</sup> The charges in the Third Superseding Indictment were as follows: Count 1-Conspiracy to Interfere with Commerce by Threats or Violence, in violation of 18 U.S.C. § 1951(a); Count 2-Attempted Interference with Commerce by Threats or Violence by means of robbery, in violation of 18 U.S.C. §§ 1951(a) and 2; Count 3-Carjacking, in violation of 18 U.S.C. §§

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imprisonment. The Third Circuit affirmed their convictions and sentences. *United States v. Berrios*, 676 F.3d 118 (3d Cir. 2012).

Berrios, Rodriguez, and Cruz filed motions to vacate their sentences under 28 U.S.C. § 2255. Dkt. Nos. 746 (Rodriguez) 753 (Cruz), 776 (Berrios). Berrios asserted fourteen grounds for post-conviction relief, and four additional grounds in supplements that the District Judge permitted him to file. Rodriguez asserted eight grounds for relief and four additional grounds in his motions to supplement. Cruz asserted eighteen grounds for post-conviction relief, and eight additional grounds in his motions to supplement. Defendant Moore did not file a motion to vacate pursuant to § 2255.

In July 2023, the District Judge granted in part and denied in part the Defendants' § 2255 motions. Dkt. Nos. 991, 992 (Cruz); 994, 995 (Rodriguez); 1000, 1001 (Berrios). She concluded that the convictions on Counts 6 and 9 of the Third Superseding Indictment—causing the death of a person through the use of a firearm, in violation of 18 U.S.C. § 924(j)(1), predicated on Count 2, attempted Hobbs Act robbery, with a sentence of life imprisonment, and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §

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2119(1) and 2; Count 4-Use of a Firearm during a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and (ii) and 2; Count 5- First Degree Felony Murder, in violation of 14 V.I.C. § 922(a)(2) and 11; Count 6-Causing the Death of a Person Through the Use of a Firearm, in violation of 18 U.S.C. §§ 924(j)(1) and 2; Count 7-Unauthorized Use of a Firearm during a Crime of Violence, in violation of 14 V.I.C. § 2253(a); Count 8-Attempted Carjacking, in violation of 18 U.S.C. §§ 2119(1) and 2; Count 9-Use of a Firearm during a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and (ii) and 2; Count 10-Carjacking, in violation of 18 U.S.C. §§ 2119(1) and 2; Count 11-Use of a Firearm during a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and (ii) and 2. Dkt. No. 1106-1.

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2119(1), with a sentence of 25 years' imprisonment—must be vacated based on intervening changes in the law pursuant to *United States v. Taylor*, 596 U.S. 845 (2022). *See, e.g.*, Dkt. No. 992 at 42-47. The District Judge indicated that the three Defendants would be resentenced *de novo* on the nine remaining counts: Counts 1, 2, 3, 4, 5, 7, 8, 10, and 11. The Defendants' motions to vacate were otherwise denied. The Third Circuit dismissed Rodriguez's and Cruz's appeals. Dkt. Nos. 1016, 1018.

In January 2024, the District Judge set resentencing for Rodriguez, Cruz, and Berrios for April 29 and 30, and May 1, 2024. Dkt. Nos. 1026-1028. The Court appointed CJA Attorney Reuben Cerezo-Hernandez to represent Rodriguez, Dkt. No. 1022, 1025, and CJA Attorney Javier A. Cuyer Olivo to represent Cruz. Dkt. No. 1029. Attorney Kye Walker filed a notice of appearance on behalf of Berrios. Dkt. No. 1014. The resentencings were continued, Dkt. Nos. 1048-1050, Final PSRs for Rodriguez, Berrios, and Cruz were filed in May 2024, Dkt. Nos. 1066, 1070, 1087. Ramon Gonzalez, Esq., was substituted as Rodriguez's counsel at the end of May. Dkt. No. 1081. The resentencings were rescheduled for November 6, 7, and 8, 2024.

On July 2, 2024, Berrios, appearing pro se, filed a Motion to Dismiss Counts 2, 3, 4, 5, 7, 8, and 11 pursuant to Fed. R. Crim. P. 12(b)(3)(B) and in light of *Rosemond v. United States*. Dkt. No. 1101. Also in July 2024, Defendant Moore filed a pro se Motion for Joinder, seeking to reduce his sentence, given that co-Defendant Cruz's § 2255 motion had been granted to the extent that his conviction on Counts 6 and 9 had been vacated. Dkt. No. 1107. Adopting Cruz's arguments set forth in his § 2255 motion related to Counts 6 and 9 of the indictment, Moore argued that he was eligible for the same relief as Cruz, given the common facts and

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law between the two defendants. Dkt. No. 1107. He also sought appointment of counsel. *Id.* The Government construed Moore's motion as a § 2255 motion. Dkt. No. 1132 at 1-2. It then argued the one-year statute of limitations under § 2255(f) precluded Moore from adopting Cruz's § 2255 motion because more than a year had passed at the time of Moore's filing since the relevant change of law issued. *Id.* at 7-8.

#### **A. The Revised Motion**

On July 10, 2024, counsel for Cruz and Rodriguez (hereinafter "Defendants") filed the instant Joint Revised Motion to Dismiss Counts 2, 5, 7, 8, 10, and 11 of the Third Superseding Indictment pursuant to Fed. R. Crim. P. 12(b)(3)(B) and *Rosemond v. United States*.<sup>4</sup> Dkt. No. 1106. They asserted that the court had the "power and authority to dismiss these counts at this stage under Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure and the Due Process Clause of the U.S. Constitution." *Id.* at 1. They first argued that "Attempted Interference with Commerce" was not an enumerated felony offense listed under the V.I. felony murder statute, 14 V.I.C. § 922(a)(2), which defined felony murder as all murder that

is committed in the perpetration or attempt to perpetrate arson, burglary, kidnapping, rape, robbery or mayhem, assault in the first degree, assault in the second degree, assault in the third degree and larceny.

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<sup>4</sup> The attorneys indicated that Rodriguez and Cruz had filed their "respective Motions to Dismiss" at Dkt. No. 1068 (filed by Rodriguez, pro se) and Dkt. No. 1085 (filed by Cruz through counsel). The attorneys did not withdraw those earlier motions even though both of those motions raised the same arguments contained in the revised motion. Rodriguez's pro se motion, Dkt. No. 1068, was not referred to the undersigned for a R&R. Dkt. No. 1114.

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14 V.I.C. § 922(a)(2). Because “Attempted Interference with Commerce” was not a listed felony under the first-degree murder statute, it could not have served as the underlying felony for Count 5, first-degree felony murder, which was predicated on the underlying offense charged in Count 2, “Attempted Interference with Commerce by Threats of Violence.” *Id.* at 2. The jury instructions on Count 5 were therefore flawed and Count 5 should be dismissed. *Id.* at 3. Moreover, expanding the V.I. felony murder statute to include Attempted Interference with Commerce violated their due process rights because they were not given a “fair warning” of what the law proscribes since it was not an enumerated felony under § 922(a)(2), and the statute was vague. *Id.* at 3-5.

In addition, the jury instruction for felony murder constructively amended the indictment because the Defendants were never charged with Attempted Robbery in Count 2: they were charged with Attempted Interference with Commerce. *Id.* at 5-6. These two charges had different elements. The erroneous jury instruction provided the jury with a new offense that the Government never charged. *Id.* at 6.

Defendants then argued that since Count 5 lacked a predicate underlying felony, the required malice element to be charged with first degree felony murder was absent and it would be a miscarriage of justice for the court to honor a conviction showing that they were legally innocent. *Id.* at 6-7. The V.I. first degree felony murder statute was no longer a crime of violence under *Borden v. United States*, 141 S. Ct. 1817, 1824 (2021), and *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and therefore Count 7 should be vacated, as it was predicated on Count 5 which was not a crime of violence. *Id.* at 7-10.

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Defendants further argued that Counts 2, 6, 7, 8, 10, and 11 charged them under an aiding and abetting theory. In *Rosemond*, the Supreme Court held that an accomplice must have advance knowledge that a firearm would be used, which would show that the defendant intended to bring about the illegal scheme in its entirety. *Id.* at 10 (citing *Rosemond v. United States*, 572 U.S. 65 (2014)). The jury was never instructed as to the predicate advance knowledge required by *Rosemond*, and due process required that a defendant not be convicted unless a jury was first informed of the legal definition of the crime and the facts the prosecutor must prove. *Id.* at 10-11.

Finally, Counts 5 and 7 should be dismissed pursuant to *United States v. Taylor*, 596 U.S. 845 (2022), which held that attempted Hobbs Act robbery did not qualify as a crime of violence under § 924(c)(3)(A). No element of these offenses required proof that the Defendants used, attempted to use, or threatened to use force and since Attempted Interference with Commerce was no longer a crime of violence, it could not serve as the predicate for conviction under these Counts. *Id.* at 11-12.

#### **B. Government's Oppositions to Berrios's Motion and the Revised Motion**

The Government filed a "Response in Opposition to Defendant Berrios' Motions to Vacate and Set Aside Convictions," Dkt. No. 1112, responding to two of Berrios's filings: Dkt. Nos. 1097, the motion for joinder (which adopted Cruz's arguments in Dkt. No. 1085), and Dkt. No. 1101, Berrios's pro se motion to vacate/dismiss (containing the same arguments included in Dkt. Nos. 1085 and 1106). The Government noted that its response did not address codefendants Cruz and Rodriguez since their resentencing hearings had been reset

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for November 7 and 8, 2024 with a new briefing schedule. Dkt. No. 1112 at 1 n.1. Moreover, the arguments made by Berrios (and by extension, Cruz and Rodriguez) had either been rejected by the court or formed the bases for Berrios's pending resentencing; the only new—but belated—argument he raised concerned the application of *U.S. v. Taylor* to Counts 5 and 7 under Virgin Islands law. *Id.* at 2.

The Government contended that Rule 12(b)(3)(B) did not apply to this case. *Id.* at 3-4. That subsection referred to motions that “must” be made “before” trial, and nothing in Berrios's motion argued that any purported defect in the indictment was not known to him and his counsel before trial. The Rule was an inappropriate vehicle to raise questions about the indictment more than 17 years after trial ended. *Id.* at 3. Referring to this Rule was merely an attempt to relitigate the court's prior rulings that denied on the merits an overwhelming number of Berrios's previous claims and constituted an end-run around the requirements for filing a successive § 2255 motion under the Antiterrorism and Effective Death Penalty Act (“AEDPA”). *Id.* at 3-4. Since Berrios had already filed a § 2255 motion attacking his conviction and sentence, he was required to receive permission from the appellate court before filing a second or successive § 2255 motion. *See* 28 U.S.C. § 2255(h). Without such permission, a district court lacked jurisdiction to address such a motion, and the motion must be dismissed. *Id.* at 4. Although Berrios labeled his motion as one under Rule 12(b)(3)(B), courts evaluate the substance of a post-conviction motion to determine whether it is in fact a second or successive § 2255, and Berrios was attempting to file an unauthorized successive § 2255 motion. *Id.*

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On the merits, Berrios’s argument Attempted Hobbs Act Robbery could not serve as a predicate offense for V.I. felony murder ignored the text of the indictment and statute. *Id.* at 5. The Third Superseding Indictment provided that the Defendants knowingly attempted to “obstruct, delay and affect commerce and the movement of articles and commodities in commerce, by means of robbery,” as that term was defined in 18 U.S.C. §§ 1951(b)(1) and (b)(3), and planned to take personal property from the employees of Wendy’s Restaurant “by means of actual and threatened force, violence and fear of injury.” *Id.* at 5, quoting Dkt. No. 1112-1 at 3. The court instructed the jury that an attempted violation of 18 U.S.C. § 1951(a) made it a crime to “obtain or take the property of another by robbery, and in so doing to interfere with interstate commerce.” Dkt. No. 1112 at 5. Charge 5 of the indictment, the V.I. felony murder charge, stated that the defendants, “with malice aforethought, did unlawfully kill” the victim while engaged in the “attempted perpetration of a robbery,” and the jury was instructed that it was a crime to kill another human being while engaged in the perpetration of another felony offense—“an attempted robbery of Wendy’s Restaurant charged in Count 2.” *Id.*, quoting Dkt. No. 1112-2 at 7. Since first degree murder is defined in the Virgin Islands as “[a]ll murder which is committed in the perpetration or attempt to perpetrate . . . robbery,” Berrios was charged appropriately under the V.I. felony murder statute. *Id.* at 6.

Count 7 charged the Defendants with violating 14 V.I.C. § 2253(a) and 11 when they “possess[ed] a firearm without authorization of law, during the commission of a crime of violence, to wit: murder.” *Id.* Berrios was relying on the trial court’s statement in the jury

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instructions that the Defendants had been charged in Count 2 with attempted robbery as having unfairly prejudiced him by constructively amending the indictment. *Id.*

In addition, the court had rebuffed Berrios's argument that *Taylor* impacted his convictions on Counts 4, 5, and 8 under the Virgin Islands statutes. Count 4 was the substantive crime of carjacking, Count 5 arose under territorial law, and Count 8 was a completed carjacking offense, and thus none of these charges implicated *Taylor*. *Id.* at 7, citing Dkt. No. 1001 at 33. Count 5 alleged that the basis for the felony murder charge was attempted perpetration of a robbery, which was an enumerated offense under 14 V.I.C. § 922(a)(2). As to Berrios's arguments that the V.I. felony murder statute was no longer a crime of violence based on *Borden* and *Leocal*, the district judge rejected the challenge under *Borden* as untimely under AEDPA's one-year statute of limitations, and *Leocal*—decided in 2004—was also outside the statute of limitations and predated every post-conviction motion filed by Berrios. *Id.* at 7-8. *Rosemond* was also inapplicable because the Supreme Court did not state that its holding was to be retroactively applied. Moreover, the trial testimony indicated that Berrios was one of the shooters during the attempted robbery, so *Rosemond* could not shield him. *Id.* at 8.

On October 6, 2024, the Government filed a "Response in Opposition to Defendants' Motions to Dismiss Counts Two, Five, Seven, Eight, Ten and Eleven Pursuant to FRCP Rule 12(b)(3)(B) and in Light of *Rosemond v. United States*," Dkt. No. 1129, addressing the arguments made in Cruz's and Rodriguez's revised motion, reiterating the arguments made in its opposition to Berrios's motions. *Id.*

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### **C. The Sentencing Memoranda**

In his Sentencing Memorandum, Rodriguez appears to raise all of the arguments that he had set forth in the revised motion. Dkt. No. 1124 at 4-19. Cruz raises some of the arguments made in the revised motion. Dkt. No. 1123 at 5-9 (arguments under *Rosemond* and the V.I. felony murder statute not being a crime of violence).

## **DISCUSSION**

### **A. Defendant Cruz's initial Rule 12(b)(3)(B) motion should be denied as moot.**

On May 31, 2024, Defendant Cruz, through counsel, filed a Rule 12(b)(3)(B) motion, Dkt. No 1085, that was nearly identical to the motion Defendants Cruz and Rodriguez later filed through counsel on July 10, 2024. Dkt. No. 1106. Both motions put forward the same arguments and made the same allegations.

When a litigant files one motion, then subsequently files a second motion seeking the same relief, it is prudent to treat the second motion as superseding the first. *Kromenhoek v. Cowpet Bay W. Condo. Assoc.*, No. 12-cv-25, 2014 WL 12975383, at \*3-4 (D.V.I. Dec. 12, 2014). In treating the subsequent motion as the operative motion, the initial motion should be denied as moot. *Id.* Therefore, the Court recommends Defendant Cruz's initial Rule 12(b)(3)(B) motion, Dkt. No. 1085, be denied as moot.

### **B. The operative motion before the Court is more properly construed as Defendants' second section 2255 motion, notwithstanding the pleading's title.**

In their joint, revised motion, Dkt. No. 1106, Defendants present a pleading stylized as a motion to dismiss the indictment pursuant to Rule 12(b)(3)(B) years after their

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conviction became final. The motion attacks the sufficiency of the indictment, while also raising constitutional claims arguing that due process requires several counts of conviction to be vacated, without explaining from where the Court derives authority to address those claims. Defendants allege that “[t]his Court has the power and authority to dismiss these counts at this stage under Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure and the Due Process Clause of the U.S. Constitution.” Dkt. No. 1106 at 1. It does not.

Rule 12(b)(3) is captioned “Motions That Must Be Made Before Trial.” Fed. R. Crim. P. 12(b)(3). It provides a list of “defenses, objections, and requests [that] must be raised by pretrial motion if the motion is then reasonably available[.]” *Id.* Rule 12(b)(3)(B) specifically enumerates objections regarding “a defect in the indictment,” that must be raised before trial. Fed. R. Crim. P. 12(b)(3)(B). The Rule states that 12(b)(3) motions must be filed before the deadline for pretrial motions or, if no deadline was set, before the start of trial. Fed. R. Crim. P. 12(c)(1).<sup>5</sup> The instant motion was filed seventeen years after trial based on long-apparent alleged defects in the indictment. Additionally, nowhere does Rule 12(b)(3) enumerate any method for making constitutional objections alleging a violation of a

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<sup>5</sup> A 12(b)(3) motion made after that deadline is untimely, “[b]ut a court may consider the defense, objection, or request if the party shows good cause.” Fed. R. Crim. P. 12(c)(3). Defendants have not offered any good cause to consider the motion belatedly. *See United States v. Rose*, 538 F.3d 175, 176 (3d Cir. 2008) (defendant failed to show good cause where he did not present “any colorable explanation [for] why he failed to raise” claims earlier). In any event, good cause does not exist to entertain this motion over 17 years after trial. *See United States v. Gumbs*, No. 11-cr-21, 2022 WL 17669171, at \*8-9 (D.V.I. Dec. 14, 2022) (finding good cause lacking where defendants had multiple opportunities over several years to raise claims through appeal and/or earlier filed § 2255 motions).

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defendant's due process rights. Therefore, Rule 12(b)(3)(B) is clearly not applicable to Defendant's present motion.

Because the time to argue that parts of the indictment should be dismissed has long passed, what Defendants are actually seeking is for their sentences to be vacated. Since Rule 12 does not contemplate relief from a conviction or sentence, "relief under Rule 12(b)[] is not available to defendant[s]." *United States v. Enigwe*, 212 F. Supp. 2d 420, 428 (E.D. Pa. 2002). The only way to properly argue for "the relief defendant[s] request[] in the instant Motion," is "as a collateral attack on [their] conviction under 28 U.S.C. § 2255." *Id.*; *see also United States v. Murphy*, 479 F. App'x 418, 419 (3d Cir. 2012) ("To the extent that [Defendant] wishes to challenge his conviction or sentence via an attack on the sufficiency of the indictment . . . the proper way to do so is via a motion to vacate under 28 U.S.C. § 2255."). This is so because "§ 2255 *must* be used to raise a challenge to the validity of a conviction or sentence unless that section is inadequate or ineffective." *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002) (internal quotation marks omitted) (emphasis added); *see also Jones v. Hendrix*, 599 U.S. 465, 474-76 (2023) (emphasizing the limitations on courts' authority to entertain postconviction motions made outside of § 2255).

Section 2255 motions are not inadequate or ineffective for "arguments challenging the sufficiency of the indictment." *Robinson v. Ortiz*, No. 18-cv-859, 2018 WL 6318372, at \*2 (D.N.J. Nov. 30, 2018). Nor is § 2255 an inadequate or ineffective vehicle for addressing Defendants' due process claims. In fact, such claims fall squarely within the ambit of § 2255. 28 U.S.C. § 2255(a) (a person in custody for violating federal law "claiming the right to be

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released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to vacate . . . the sentence.”).

Ultimately, despite Defendants’ attempted application of Rule 12(b), “the function of the motion, and not the caption, dictates which Rule is applicable.” *United States v. Fiorelli*, 337 F.3d 282, 287-88 (3d Cir. 2003); *see also Harris v. Paige*, No. 08-cv-2126, 2011 WL 1288672, at \*1 (E.D. Pa. Apr. 4, 2011) (“The court will construe a motion, however styled, to be the type proper for the relief requested”) (alterations omitted). Consequently, the Court will construe Defendants’ purported Rule 12(b)(3)(B) motion as a § 2255 motion. *See Gumbs*, 2022 WL 17669171, at \*9 (recognizing defendant’s 12(b)(3) motion to dismiss as, “in reality,” a successive § 2255 motion); *Fabian v. Lewisburg*, 588 F. App’x 203, 205 (3d Cir. 2015) (upholding district court’s recharacterization of postconviction motion alleging due process violations as § 2255 motion because those claims “could be raised only, if at all, in a § 2255 motion”); *see also Sanchez v. United States*, 836 F. App’x 807, 808 (11th Cir. 2020) (affirming district court’s construction of pro se Rule 12(b) motion as successive § 2255 motion); *Blood v. United States*, No. 04-cr-61, 2008 WL 11429446, at \*1 n.1 (D. Del. Sept. 22, 2008) (construing 12(b)(3)(B) motion as § 2255 motion and otherwise finding relief under Rule 12(b)(3)(B) unavailable).

The Court already considered and ruled on Defendants’ first § 2255 motions. Dkt. Nos. 991, 993, 1000. In the Orders partially denying the Defendants’ § 2255 motions, the Court made clear that, aside from the vacated counts of conviction, the Defendants’ judgments of conviction “remain valid.” *Id.* Because the present motion attacks the same judgments of

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conviction, it must, therefore, be treated as a second § 2255 under AEDPA. *See In re Edwards*, 98 F.4th 425, 433 (3d Cir. 2024) (a § 2255 motion is successive if it attacks the same judgment as a prior § 2255 motion, even if that prior judgment has been modified, so long as the judgment has not been invalidated); *see also United States v. Ramsey*, 349 F. App'x 692, 693 (3d Cir. 2009) (“An attempt to advance claims that attack the validity of an underlying conviction following [a first] § 2255 motion should be treated as a second or successive § 2255 motion.”).

**C. The Court lacks jurisdiction to consider Defendants’ second § 2255 motion.**

AEDPA created strict procedural rules an applicant must abide by when filing a second or successive § 2255 motion. To submit a second or successive motion for relief under § 2255, Defendants must first obtain certification from a panel of the relevant appeals court—here, the Third Circuit. 28 U.S.C. § 2244(a)(3)(A). The Third Circuit will only certify a successive motion if the applicant demonstrates that the second motion contains newly discovered evidence or a new rule of constitutional law. 28 U.S.C. § 2255(h). Without certification, the district court is without jurisdiction to consider the merits of a petitioner’s argument. *Benchoff v. Colleran*, 404 F.3d 812, 813 (3d Cir. 2005) (a district court lacks subject matter jurisdiction to hear second or successive habeas claim under AEDPA without certification from court of appeals); *see also Robinson v. Johnson*, 313 F.3d 128, 140 (3d Cir. 2002) (“It would circumvent the intent of the gatekeeping function of § 2244 for a district court to proceed to rule on the merits of a second or successive petition . . . before the court

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of appeals has made a decision whether to let the petition for habeas corpus proceed in district court.”).

Because Defendants present an attack on a valid judgment that they previously attacked in a § 2255 motion, they were required to obtain certification from the Third Circuit to file a successive motion for relief under §2255. With the revised motion, Dkt. No. 1106, lacking such certification, the Court recommends it be dismissed for lack of subject matter jurisdiction.

#### **D. Defendant Berrios’s Notice of Joinder in Motion**

Berrios, through counsel, filed a “Notice of Joinder” to Cruz’s initial 12(b)(3)(B) motion. Dkt. No. 1097. The Court will construe Berrios’s “Notice” as a motion. *Fiorelli*, 337 F.3d at 287-88 (courts construe motions based on their function, not title). Should the District Judge adopt this R&R, which recommends denial of the initial motion, Berrios’s motion for joinder will be moot, and the Court recommends that it be denied as such.<sup>6</sup> *See United States v. Narducci*, 18 F. Supp. 2d 481, 502 (E.D. Pa. 1997) (denial as moot of motion to join codefendant’s motion is appropriate where defendant seeks to join motion for habeas relief that has been denied).

#### **E. Defendant Troy Moore’s Motion for Joinder and for Appointment of Counsel**

Unlike his codefendants, Moore did not file a § 2255 motion. Instead, years after his judgment of conviction became final, Moore—filing pro se—now seeks relief via a motion

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<sup>6</sup> Were Berrios’s motion seeking joinder in his codefendants’ joint, revised motion, the result would be the same.

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for joinder in Defendant Cruz's § 2255 motion. "[F]or efficiency's sake, and out of a sense of fairness to pro se petitioners," postconviction claims are construed quite liberally by district courts. *United States v. Miller*, 197 F.3d 644, 646 (3d Cir. 1999). In the interests of efficiency and fairness, this Court will follow the practice of liberal construction of pro se pleadings and construe Moore's motion as a motion for a reduction in sentence, since that is the relief he actually seeks. Moore, however, provides no authority upon which the Court can rely when arguing why his motion should be granted. Dkt. No. 1107. It is therefore recommended that the District Judge deny his motion for a reduction in sentence without prejudice.

In his motion, Moore also requests that counsel be appointed for him. A defendant is not entitled to appointed counsel to pursue postconviction relief. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). But "counsel should be appointed where an indigent plaintiff with a potentially meritorious claim is not fully able to prosecute [his] own case in light of the overall complexity of the case." *United States v. Gibbs*, 787 F. App'x 71, 72 (quoting *Shifflett v. Korsznjak*, 934 F.3d 356, 367 (3d Cir. 2019)) (discussing appointment of counsel for reduction of sentence). To appoint counsel in sentence reduction cases, a district court must first determine whether the litigant's claims have "arguable merit." *Id.*; see also *Tabron v. Grace*, 6 F.3d 147, 155-57 (3d Cir. 1993) (courts may also consider the petitioner's capacity to represent himself, the difficulty an incarcerated person would have pursuing their claim, and the complexity of the claim).

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Given the fact that Moore's codefendants are to be resentenced after successfully challenging their sentences under § 2255 for reasons that appear to apply also to him, Moore's claim that he is entitled to relief has arguable merit.

Although Moore has the benefit of his co-Defendants' petitions and supplements, Moore's claim is complex, given that it must be raised as a motion for reduction of sentence, rather than as a copy of his codefendants' § 2255 motions.<sup>7</sup> Additionally, the substance of the motion for reduction itself is sure to be complex. *See, e.g.*, Dkt. No. 992 (Court's 51-page memorandum opinion on Cruz's § 2255 motion). To best brief the proper issues and to best understand the Court's authority to even consider Moore's motion to reduce his sentence, counsel would be beneficial for both Moore and the Court.

Accordingly, so long as Moore can demonstrate financial eligibility for appointed counsel,<sup>8</sup> it is recommended that the District Judge grant Moore's motion, Dkt. No. 1107, to the extent that he has moved for appointment of counsel. Appointed counsel should assess whether a motion to reduce a sentence may be filed on Moore's behalf. The Court further recommends the remainder of Moore's motion be denied without prejudice.

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<sup>7</sup> Moore cannot join in his codefendant's motion because he is statutorily time-barred from filing a § 2255 motion. 28 U.S.C. § 2255(f).

<sup>8</sup> Moore was appointed CJA counsel before trial in 2004. Dkt. No. 108. Still, the District Judge may order Moore to file a motion for leave to proceed *in forma pauperis* to demonstrate indigency. *Thomas v. United States*, No. 23-cv-53, 2023 WL 8827216, at \*5 (D. Del. Dec. 21, 2023) (requiring incarcerated movant to file *in forma pauperis* to obtain appointed counsel ahead of resentencing).

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### **CONCLUSION**

In the light of the foregoing, the Court **RECOMMENDS** that Defendant Cruz's "Motion to Vacate and Set Aside the Convictions and Motion to Dismiss Counts Two, Five, Seven, Eight, Ten, and Eleven Pursuant to FRCP Rule 12(b)(3)(B) and Pursuant to *Rosemond* vs. [sic] *United States*," Dkt. No. 1085, be **DENIED AS MOOT**.

The Court further **RECOMMENDS** that Defendants Cruz's and Rodriguez's "Joint Revised Motion to Dismiss Counts Two (2), Five (5), Seven (7), Eight (8), Ten, (10) [sic] and Eleven (11) Pursuant to FRCP Rule 12(b)(3)(B), and in Light of *Rosemund* vs. [sic] *United States*," Dkt. No. 1106, be **DISMISSED** for lack of subject matter jurisdiction.

The Court further **RECOMMENDS** that Defendant Berrios's "Notice of Joinder" to Cruz's Rule 12(b)(3)(B) Motion, Dkt. No. 1097, be **DENIED AS MOOT**.

The Court further **RECOMMENDS** that Defendant Moore's Motion for Joinder, Dkt. No. 1107, be **GRANTED IN PART AND DENIED IN PART, WITHOUT PREJUDICE**. The motion should be **GRANTED IN PART** to the extent that counsel shall be appointed to assess whether a motion to reduce a sentence may be filed on behalf of the Defendant, and **DENIED IN PART, WITHOUT PREJUDICE**, as to whether the Defendant is eligible for such relief.

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice, 28 U.S.C. § 636(b)(1), and must "specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis of such objection." LRCi 72.3. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and

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Recommendation before the assigned District Court Judge. *See, e.g., Thomas v. Arn*, 474 U.S. 140 (1985).

The Clerk of Court shall provide a copy of this R&R to the pro se Defendant, Troy Moore, by certified mail, return receipt requested.

ENTER:

Dated: October 9, 2024

/s/ Emile A. Henderson III  
EMILE A. HENDERSON III  
U.S. MAGISTRATE JUDGE