IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO.
v.	:	NO. 95-124-5
	:	
	:	
NATHANIEL JONES,	:	CIVIL ACTION
Defendant.	:	NO. 99-3976

Memorandum and Order

YOHN, J. October ___, 2001

1. Background

On July 16, 1996, Nathaniel Jones ("Jones") was convicted of violating 21 U.S.C. § 846 (conspiracy to distribute cocaine base); 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1) (possession with intent to distribute cocaine base and aiding & abetting the same); and 18 U.S.C. § 924(c) (carrying a firearm during a drug trafficking crime). The essence of the government's case against him was that during the evening hours between December, 1992 and December, 1993, Jones distributed crack cocaine from a residence located at 62 West Rockland Street in Philadelphia, Pennsylvania. After receiving an informant's tip as to the activities transpiring at that address, law enforcement officers surveilled and ultimately obtained a search warrant for the premises. They forcibly entered the house on December 21, 1993. Jones, among others, was arrested, indicted, and the result of the ensuing criminal proceeding was his July 16, 1996 conviction.

Jones subsequently filed a motion for a new trial, arrest of judgment or a judgment

of acquittal, which this court denied as untimely. *United States v. Jones*, 1996 WL 472411, at *1 (E.D. Pa. Aug 20, 1996), *aff'd* 159 F.3d 1354 (3d Cir. 1998). On October 17, 1996, I sentenced him to a term of incarceration totaling 352 months. Jones directly appealed his conviction, but on appeal William T. Cannon, Esq., as counsel for Jones, filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), in which he asserted the absence of meritorious issues for appeal. The United States Court of Appeals for the Third Circuit affirmed Jones's conviction and sentence on July 16, 1998.

On August 30, 1999, Jones filed a pro se motion to vacate his sentence pursuant to 28 U.S.C. § 2255.[1] Following the appointment of new counsel on September 2, 1999, he submitted an amended motion in which he alleged seven distinct bases for claiming that he had been denied effective assistance of counsel, in contravention of the Sixth Amendment to the United States Constitution. In brief, Jones claimed that Cannon was ineffective for (1) failing to discover and present to the jury certain alibi evidence; (2) failing to object, ask for curative instructions, or move for a mistrial based on the prosecutor's vouching for the veracity of the government's police witnesses; (3) failing to object during the sentencing phase of the trial to the introduction of evidence of Jones's drug consumption as relevant conduct; (4) failing to move for

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[1] Generally, "a federal prisoner is procedurally barred from collaterally attacking his sentence under 28 U.S.C. § 2255 insofar as the attack is based upon issues that could have been, but were not, raised on direct appeal." *United States v. Swint*, 2000 WL 987861, at *5 (E.D. Pa. July 17, 2000) (citing *United States v. Frady*, 456 U.S. 152, 165 (1982)). Claims sounding in the ineffective assistance of counsel, however, are "an exception to this general rule. Such claims are generally eschewed on direct appeal in this Circuit . . . with the preference being that they be raised for the first time in § 2255 proceedings." *Id.* (citing *United States v. Cocivera*, 104 F.3d 566, 570 (3d Cir.1996)). Accordingly, as was the case in *Swint*, which also was decided after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, these claims are properly before the court today.

a downward sentencing departure under United States Sentencing Guideline ("U.S.S.G.") § 5K2.0 due to "outrageous conduct" by the government; (5) failing to move for a downward departure due to a large disparity between the sentence received by him and those received by his co-conspirators; (6) failing to advise him to plead guilty; and (7) failing to raise the issue of prosecutorial vouching (or, indeed, any other issue) on direct appeal, and choosing instead to file a brief pursuant to *Anders*.

An evidentiary hearing was conducted regarding these ineffectiveness claims on August 31, 2000. During the course of that proceeding, Jones relinquished the claims labeled (3), (4) and (5) above. I dismissed claim (7) on the ground that any failure by Mr. Cannon to raise the issue of prosecutorial vouching before the Court of Appeals did not rise to the level of plain error. Thus, the only allegations of ineffectiveness that remain for the court's consideration are those labeled (1), (2) and (6). Additionally, at the conclusion of the hearing, counsel for Jones orally requested leave to amend the motion to include a claim based upon the decision of the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This request was unopposed by the government, and was granted by an order of this court dated January 12, 2001. Accordingly, presently before the court are this *Apprendi* claim and the three remaining ineffectiveness claims.

For the reasons that follow, each of these claims will be denied.

II. Remaining Ineffectiveness Claims

It is well-settled that the Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he [Sixth Amendment] right to counsel is the right to effective assistance of counsel."

(quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970))). The Supreme Court has laid out a two part test as a means of determining whether the representation provided to an accused rises to a constitutionally adequate level. "A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation 'fell below an objective standard of reasonableness,' and (2) that counsel's deficient performance prejudiced the defendant." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 688 and citing *id.* at 694).

Given that the range of choices faced–and decisions necessarily made–by defense attorneys are as broad as the spectrum of behaviors of which their clients are accused, there is no hard and fast standard for determining what constitutes an objectively reasonable degree of competency in counsel's representation. Instead, it is for courts to "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. This case by case evaluative mode is to be conducted in a manner that is highly deferential to the actions undertaken, and the judgment exercised, by defense counsel. *Id.* at 689. Translated into practical terms, this presumption that counsel's actions were reasonable generates inquiries into whether the actions in question could be considered "sound trial strategy." *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). If so, then the first component of the *Strickland* test is unsatisfied, and the claim of ineffective assistance must fail. *See, e.g.*, *Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000); *Buehl v. Vaughn*, 166 F.3d 163, 176 (3d Cir. 1999).

If those actions could not be viewed as tactically motivated then the requisite showing of "prejudice" remains to be made. In cases such as the one at bar, where the prosecution's case was subjected to meaningful adversarial testing, the defendant must establish

that he actually was prejudiced by counsel's ineffectiveness in order to satisfy *Strickland*'s second prong. *See Flores-Ortega*, 528 U.S. at 482 (indicating that actual prejudice is "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'" (quoting *Strickland*, 466 U.S. at 694)); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (reiterating this standard).

1. Cannon's Failure to Present Evidence of Jones's Participation in the Phoenix Program as Ineffective Assistance of Counsel

Jones alleges that Cannon was ineffective for failing to obtain, and thus to present to the jury, evidence that from December 17, 1992 through December 12, 1993 Jones was committed to the Phoenix People RHD Case Management facility, located at 1360 Ridge Avene, Philadelphia, Pennsylvania. Defendant's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 ("Def.'s Motion") ¶¶ 34-47. This was a shelter for people undergoing drug detoxification, and according to Jones, his enrollment within it renders it "impossible for him to have been selling crack cocaine" during the "night shift" between December, 1992 and December, 1993, as he was convicted of doing. *Id.* ¶ 13A. Specifically, he asserts that he was "required to be within the . . . facility during the evenings and nights," and thus he could not have been selling crack cocaine during those periods. *Id.* Jones claims that had the jury been given the opportunity to consider the records of his commitment to the Phoenix People facility, it is reasonably probable that it would have discredited the voluminous testimony that placed him at 62 West Rockland Street during much of 1993, and acquitted him as to all of the counts of the indictment. *Id.* ¶ 16. He also asserts that if this evidence had been presented to the court prior to sentencing, I would have found that he merely possessed cocaine for personal use, rather than for purposes of

distribution, and that he did not obstruct justice. Accordingly, Jones reasons, his total offense level would have dropped from 40 to 4, and his sentence would be proportionally abbreviated as well. *Id.* ¶ 45.

There are several shortcomings in this argument. First, the treatment records submitted by Jones (Exhibit D-1) do not necessarily indicate that he resided at the Ridge Avenue facility from December 17, 1992 through December 12, 1993. As was testified to at trial by Marie Cassel, the record clerk for the Diagnostic and Rehabilitation Center ("DRC"), located at 229 Arch Street in Philadelphia, they do establish that he was admitted to the DRC on November 23, 1992 and released on November 27, 1992, at which time he was referred to "outpatient orientation." Exhibit D-1. It is also true that a letter from a Phoenix People case manager suggests that Jones was placed in long-term shelter care on December 17, 1992, that he was referred for case management services on December 29, 1992, and that his discharge "accrued" on December 12, 1993, the date until which he purports himself to have been confined during the evening hours. However these statements are preceded by the sentence: "It is unclear exactly when Mr. Jones was discharged." Defendant's Exhibit D-3. Indeed, there is nothing contained in any of the records that have been submitted by Jones that indicates with any degree of clarity his presence at any particular facility beyond November 27, 1992.[2] Moreover, Bryant Washington, who was a senior counselor in the program during Jones's tenure there,[3] stated that

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[2] The records do indicate that Jones returned to the DRC for a period lasting from May 2, 1994 until May 9, 1994, but this episode is irrelevant to the question of whether he could have dealt crack cocaine during the evenings covered by the indictment.

[3] Although Washington remembered treating Jones, he did not recall even the year during which this transpired. *See* Tr. 8/31/00 at 29.

he had no idea what "accrued," as used in the letter from the Phoenix People case worker, means. Transcript of Evidentiary Hearing, August 31, 2000 ("Tr. 8/31/00") at 34-35. Thus, the documentary evidence of the term of Jones's commitment at the Phoenix People facility is inconclusive at best; it does not appear to have been a valuable basis for an alibi defense, and Cannon accordingly was not unreasonable in failing to obtain it.

Second, I credit Cannon's testimony that Jones told him that he had been involved with the Phoenix People for "but a tiny portion of the period of the indictment and . . . probably in 1992," or "at best a couple of months." Tr. 8/31/00 at 41-42. Thus, Cannon did not attribute great significance to the fact of Jones's rehabilitation efforts "because even if he was at the rehab for the period that he referred to, it was just a small blip on the radar screen in terms of the length of the period of time set forth in the indictment." *Id.* at 41. This perception was reinforced by a conversation that Cannon had with Jones's nephew, who stated that Jones had been a resident at 62 West Rockland Street, the site of the crack cocaine sales, throughout 1993. *Id.* at 42-43. Thus, it was objectively reasonable for Cannon, who did make genuine, albeit unsuccessful, efforts to obtain the Phoenix People records,[4] to focus the bulk of his energies on

[4] Cannon testified that:

> [W]e tried to get the records from the Ridge [Avenue facility] so that we could see them and see if they had any value in terms of the defense of the case. I remember that we were unsuccessful in obtaining those records. I remember there being a situation where there were several agencies that seemed to be involved with the Ridge, each of which had their own counsel, each of which had to be subpoenaed, each of which had to give their concurrence to release of records. And, I know that I never did get the records. . . . I wasn't sure of what they were going to do for us in terms of the defense, but since Mr. Jones felt they were of some significance, we tried to get them.

more promising defense strategies. Framed in doctrinal terms, while Cannon probably could have been more diligent in securing the records,[5] it was not objectively unreasonable for him to otherwise devote the majority of his efforts–such was almost certainly "sound trial strategy."

Third, even if I were to assume that Jones was "committed" to the Phoenix People program for the full term alleged in his motion, the jury would not likely have been swayed by even conclusive evidence of such because participants in the program functionally were free to come and go. Although residents were obligated to sign in and out when they entered and left the facility, there was undisputed testimony from Kenneth Wilson, a case management supervisor for the Philadelphia Office of Emergency Shelter & Services, that they were not physically precluded from leaving. Tr. 8/31/00 at 13-14. After stating that "it's [the guards'] preference that the clients stay in once they're in," Wilson was asked: "but the guard wouldn't actually stop them [from leaving after hours]?" *Id.* at 13. He responded that he had never had the experience that a resident would be physically stopped from leaving. *Id.* at 14.

Bryant Washington testified similarly. He stated that inpatients at the Ridge Avenue facility were expected to sign in upon returning to the program before their 9 pm curfew, and were permitted to leave again around 5 am. *Id.* at 18-19. However, he indicated that residents often did leave the facility without signing out. *Id.* at 19. While there were

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Tr. 8/31/00 at 40-41.

[5] Jones asserts that Cannon's "cursory and halfhearted" approach to the records is evidenced by the fact that his sister was able to obtain them easily through a "straightforward request." Def.'s Motion at 8. While this may be so, it does not speak to the issues of whether Cannon's decision to focus on other efforts on behalf of Jones was objectively unreasonable, or could not properly be considered "sound trial strategy," and whether the availability of this evidence for the jury's consideration would have altered its verdict.

consequences for non-permissive curfew violations, for example treatment revisions, or dismissal from the program in the case of multiple infractions,[6] there was nothing physically preventing residents from leaving. *Id.* at 22. Accordingly, the most that the jury could have found was that for the period in question Jones was "encouraged" to remain in the facility from 9 pm to 5 am.

Thus, given the inconclusiveness of the documentary evidence submitted by Jones regarding the time frame during which he was a resident in the Phoenix People facility, and the fact that Jones himself gave Cannon good reasons to believe that the defense would be best served by Cannon's investigation of more promising strategies, I find that his decision to do precisely that is "sound trial strategy." *See Strickland*, 466 U.S. at 689. Moreover, considering the permissiveness which characterized that program's approach to resident ingress and egress, and the resultant unlikelihood that evidence of Jones's commitment there would have altered the jury's verdict, *Strickland*'s actual prejudice requirement is also unsatisfied in this case. *See id.* at 694. Accordingly, this claim of ineffectiveness fails both prongs of the *Strickland* test, and will be dismissed.

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[6] Washington testified that he did not recall imposing any sanctions of any sort upon Jones. Tr. 8/31/00 at 31. While this is relevant to the issue of his presence within the facility during the evening hours of the period of his residency there, it is far from conclusive thereof. This is so not only because of the indeterminacy of Washington's recollection, but also because the punishment of any resident is wholly contingent upon the detection of their absence. There is no indication in the record as to the feasibility of a resident escaping undetected from the program, and I will not speculate as to such, but suffice it to say that while the jury could possibly have inferred from Washington's testimony that Jones was present during the evening hours of the period of his commitment, it would have been equally feasible for the jury not to make this inference. Thus the record's failure to definitively resolve these questions renders it doubtful that its presentation to the jury would have altered the verdict ultimately reached, especially given the wealth of evidence presented that indicated Jones's culpability. *See Strickland*, 466 U.S. at 694 (requiring that a contrary result be "reasonably probable" if actual prejudice is to be found to exist).

2. Cannon's Failure to Object, Ask for Curative Instructions, or Move for a Mistrial Due to the Government's Vouching for the Credibility of its Police Witnesses as Ineffective Assistance of Counsel

During her closing argument, the assistant United States Attorney focused upon the testimony given by three police officers who had served as witnesses for the government. There were some discrepencies among these witnesses' testimonies, and presumably as a means of bolstering their credibility in the view of the jury, she stated: "[t]he police are limited by the laws and the truth." Transcript of Proceedings of 7/16/96 ("Tr. 7/16/96") at 35. She then proceeded to remark that Officer Jeitner and Agents Piatrowicz and Woodcock would "put their careers on the line" if they were less than truthful in their testimony concerning Jones. Tr. 7/16/96 at 41. Jones alleges that in making these statements the prosecution improperly vouched for the credibility of these witnesses. Def.'s Motion ¶¶ 48-65. In particular, he claims that the prosecutor implied that some duty that is both incumbent upon police officers and known to her, but not made part of the evidentiary record, indicated the veracity of their testimony.

Cannon made no objection to this aspect of the government's closing, and he did not request that the jury receive a curative instruction. Accordingly, none was given. Nor did he move for a mistrial or appeal Jones's conviction on the basis of this alleged vouching. Jones claims that these failures on Cannon's part constitute a sufficient basis for finding that he was ineffective under *Strickland*.[7]

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[7] It is worth reiterating here that Jones's claim is one sounding in the deprivation of the Sixth Amendment right to effective assistance of counsel, *not* of the Fifth Amendment right to Due Process that would be impinged upon by prosecutorial vouching. In other words, it is not the vouching itself that animates Jones's instant contention, but rather the failure of his attorney to react appropriately to the same. Accordingly, the framework for evaluating this claim is that delineated in *Strickland*, not that featured in cases evaluating the effect of improper prosecutorial

As a preliminary matter, it is necessary to determine whether the statements did in fact constitute improper vouching. After all, if the statements were unobjectionable, then as a matter of law Cannon could not have been unreasonable in failing to object to them, and Jones's claim would fail the first prong of the ineffectiveness inquiry. *See Hartey v. Vaughn*, 186 F.3d 367, 372 (3d Cir. 1999) ("[I]f there is no merit to [petitioner's] claim[] that the prosecution's statements . . . should not have been permitted at trial, his counsel cannot be deemed ineffective for not having objected to their presentation, as it was not unreasonable for him to acquiesce in the presentation of proper statements and testimony.").

Vouching is "an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury." *United States v. Walker*, 155 F.3d 180, 184 (3d Cir. 1998). Indeed, the essence of improper vouching is not the espousal of a view that a witness is being truthful, but rather the explicit or implicit assertion of some extra-evidentiary source for this view. *See generally United States v. Saada*, 212 F.3d 210 (3d Cir. 2000) (holding that the statements at issue could not be considered vouching because they were grounded in the evidence presented).

The harms occasioned by this practice are two-fold, and were explained by the United States Supreme Court in *United States v. Young*:

> [S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely

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comments per se, for example *United States v. Young*, 470 U.S. 1 (1985) or *United States v. Hasting*, 461 U.S. 499 (1983). Ultimately, however, both analyses yield the same result here, as any harm occasioned by the prosecutor's comments was far outweighed by the weight of the overwhelming evidence on the basis of which Jones was convicted.

> on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

470 U.S. 1, 18-19 (1985). While vouching does not always suffice as grounds for a reversal of a conviction, it almost always is improper. *See, e.g., United States v. Robinson*, 485 U.S. 25, 33 n.5 (1988) (noting that "statements by the prosecutor which . . . vouch[] for the credibility of witnesses . . . [are] improper"); *United States v. Dispoz-o-Plastics, Inc.*, 172 F.3d 275, 283 (3d Cir. 1999) ("A prosecutor may not try to buttress his case by vouching for the credibility of a government witness) (citation omitted). *But see United States v. Gambino*, 926 F.2d 1355, 1365-66 (3d Cir. 1991) (holding that vouching is permissible where such is effected in response to attacks on the credibility of the witness for whom the prosecution vouches).

In this case, the prosecutor's statements regarding the credibility of the police witnesses constituted vouching. Indeed, the only conclusion that could have been drawn from the prosecution's comments was that some duty of veracity rests upon law enforcement officers. The contours of this obligation were not made part of the record, and it consequently was beyond the realm of the jury's informed evaluation, yet the import of the government's comments was that the jury should nonetheless rely upon its existence in taking the police witnesses at their word. This prosecutorial tactic did not permit an adversarial contest regarding the probative value of the government's statements. Moreover, it betrayed the rudimentary principle that the jury is to base its determination upon only the evidence that is presented and thus subjected to adversarial substantiation. *See Jermyn v. Horn*, ___ F.3d ___, 2001 WL 1110373, at *43 (3d Cir. Sept. 21, 2001) (discussing "the jury's duty to consider only the evidence presented to it").

Consistent with this reasoning, the Third Circuit has held that for a prosecutor to attempt to heighten the credibility of a police witness by commenting upon her occupational integrity is to engage in improper vouching. *United States v. Molina-Guevara*, 96 F.3d 698, 704-05 (3d Cir. 1996); *United States v. Pungitore*, 910 F.2d 1084, 1125 (3d Cir. 1990) (holding that where a prosecutor had engaged in improper vouching when he commented "that the U.S. Attorneys and law enforcement officers could not have behaved as unscrupulously as defense counsel alleged they did without violating their oaths of office and jeopardizing their careers"). Several of the other Courts of Appeals have concurred. *See, e.g.*, *United States v. Cornett*, 232 F.3d 570, 575-76 (7th Cir. 2000); *United States v. Boyd*, 54 F.3d 868, 871-72 (D.C. Cir. 1995); *United States v. Manning*, 23 F.3d 570, 572 (1st Cir. 1994); *United States v. Martinez*, 981 F.2d 867, 871 (6th Cir. 1992).

Because they constituted improper prosecutorial vouching, these comments were unquestionably objectionable. Accordingly, Cannon's failure to object or appeal may potentially form the basis for a claim sounding in the ineffective assistance of counsel. To determine whether this claim is meritorious, it is necessary to revisit the *Strickland* test, focusing first upon the reasonableness of Cannon's actions and then, if necessary, the prejudice caused to Jones. Again, as *Strickland* cautions, the reasonableness of counsel's actions is inherently circumstance-specific; if the steps taken by Cannon were animated by strategic considerations, as determined by examining the totality of the circumstances with which he was confronted, they will be deemed reasonable.

In its recent holding in *Werts v. Vaughn*, the Third Circuit discussed a situation in which a defense attorney's failure to object to the remark of a prosecutor in his opening statement

could be viewed as the product of strategic considerations. 228 F.3d 178, 204 (3d Cir. 2000). It stated:

> [C]ounsel testified that he did not object to the prosecutor's comment because he did not want to draw attention to it by continuously objecting, that he thought the statement "cut both ways," and because he thought the statement would "backfire" against the prosecutor because defense counsel "knew [he was] going to present evidence that [the prosecutor and the witness] had a deal and really that this guy was never in fear for his life." Counsel's explanation for his failure to object indicates that he employed what he believed to be sound trial strategy at the time.

Id.

A similar discussion was featured in *Hubbard v. Jeffes*, where the Court of Appeals held that:

> [T]rial counsel's failure to object to allegedly improper closing comments by the prosecutor "was born of a reasonable, calculated, and apparently successful trial strategy." Trial counsel testified that he anticipated that the prosecutor would become shrill and alienate the jury, thereby diminishing the likelihood that the government would gain a conviction for first degree murder. The course chosen by counsel was reasonably designed to effectuate his client's interests, and indeed, the jury failed to return the verdict urged by the prosecution, and convicted Hubbard only of murder in the second degree.

653 F.2d 99, 104 (3d Cir. 1981) (citation omitted); *see also Swofford v. Dobucki*, 137 F.3d 442, 446 (7th Cir. 1998) (speculating as to the strategic considerations that likely motivated defense counsel's failure to object to a comment made during the prosecutor's closing argument).

Yet this case is distinguishable from those quoted above, as no strategic purpose appears to have been served by Cannon's failure to object to the prosecutor's comments. Cannon never was questioned by the prosecutor or Jones's post-conviction counsel during the August 31, 2000 evidentiary hearing as to the reason(s) for his failure to object to the trial prosecutor's comments, so any estimation thereof would be entirely the product of this court's speculation.

Indeed, upon a careful examination, such considerations are indiscernible. This was not a situation akin to that in *Werts*, in which the comments "cut both ways," or where there is evidence that Cannon anticipated presenting damaging, contrary evidence regarding the proclivity of law enforcement officers to tell the truth, and allowed the statement to stand as a means of setting the stage for this presentation. Nor is there any evidence that this decision was made because Cannon believed that the comments had alienated the jury or embittered it to the cause of the government, as was the case in *Hubbard*; *see also Flamer v. Delaware*, 68 F.3d 736, 756 (3d Cir. 1995) (deeming "strategic" defense counsel's failure to object where he believed the prosecutor's comments to have undermined the government's own case more than they damaged that of his client).

Instead, this case seems far more analogous to *Combs v. Coyle*, in which the Sixth Circuit held that "[c]ounsel's failure to have objected at any point is inexplicable, and we can perceive no possible strategic reason for such failure." 205 F.3d 269, 286 (6th Cir. 2000), *cert. denied* 531 U.S. 1035 (2000); *see also Freeman v. Class*, 95 F.3d 639, 644 (8th Cir.1996) (holding that there was no "reasonable tactical basis" for defense counsel not to object to prosecutor's comments on defendant's post-arrest silence). Indeed, the comments served simply to bolster the credibility of the government's own witnesses, and they did so by implying that there were extra-evidentiary considerations that bore on the veracity of those witnesses. Thus they were improper and helpful to the prosecution only, as was Cannon's failure to raise an objection to them. Notably, this conclusion is supported by the fact that the government, in its answers to both the instant motion and Jones's memorandum of law in support thereof, does not note any tactical purpose that was, or could have been, served by Cannon's actions. *See*

Government's Answer to Defendant's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 at 5-6; Government's Answer to Defendant's Memorandum of Law in Support of Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 at 5-6. Thus I proceed to the prejudice component of the *Strickland* inquiry.

To reiterate, ineffectiveness can be substantiated only by proving that "there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kimmelman*, 477 U.S. at 375. This standard is unsatisfied in this case, as any prejudicial effect to Jones occasioned by the government's vouching for its police witnesses was vastly outweighed by the evidence indicating Jones's involvement in the crack cocaine distribution conspiracy. *See Buehl*, 166 F.3d at 172 ("We note that *every* other circuit has also recognized that, in analyzing *Strickland* 's prejudice prong, a court must consider the magnitude of the evidence against the defendant.") (emphasis original) (citations omitted).

Jones's conviction, in large part, was based on the testimony of two main groups of witnesses. First, three of his co-conspirators, Randy Washington, Kareem Gibson and Idris Enlow, each testified at length as to their first hand knowledge of Jones's involvement in the distribution conspiracy. They described the sales he made, the exchanges of new quantities of crack vials for the money procured from selling the preceding batch, and his use of a .38 caliber handgun as protection during these activities. *See* Tr. 7/11/96 at 29-34, 113-15, 164-68, 201-203; Tr. 7/12/96 at 54. Their testimonies were consistent, rife with details, and were not impeached in any significant sense on cross examination.

Second, three law enforcement officers who participated in the raid on the residence at 62 West Rockland Street that led to Jones's arrest–ATF agent Jerry Piotrowicz, DEA

Agent Richard Woodcock, and Philadelphia Police Officer William Jeitner–testified as to the surveillance that preceded the raid, and what they found upon entering the premises. Each described the presence of several individuals, including Jones, in a rear kitchen, and of large quantities of crack vials in the immediate vicinity. Further, each indicated that when they asked if anyone possessed any weapons, Jones replied that he had a gun. Tr. 7/12/96 at 89, 135, 138, 158-60, 193-96, 198. They each described both Jeitner's actions in removing the gun from Jones's person, and the weapon itself, a .38 caliber revolver. Like those of the co-conspirators, theirs were first hand accounts, were largely consistent with those given by each other and by Washington, Gibson and Enlow, and were highly damaging to the defense's case.

At the conclusion of the testimony of Jeitner, the jury had been presented with close to ten successive government witnesses, with these six being the most significant, almost all of whose testimonies pointed in unambiguous terms to Jones's guilt of the charges against him. This was not a case where the evidence was in relative equipoise, where the prosecutor's comments concerning the occupational integrity of the police witnesses was likely to play a determinative role vis-a-vis the jury's verdict. Indeed, Jones admits as much in a different section of his motion pursuant to 28 U.S.C. § 2255. *See* Def.'s Motion ¶ 105 (noting "the overwhelming weight and quality of the government's evidence"). Accordingly, it is not reasonably probable that but for Cannon's failure to object, appeal[8] or move for a mistrial based

[8] Had this issue been raised on appeal, it would have taken the form of a straightforward due process claim based upon the prosecutorial vouching. The ultimate issue to be determined in the context of such claims is whether the prosecutor's comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974)). Because the evidence against Jones was so great, this standard would be unmet here as well; in fact there is no action that Cannon could have taken based on the prosecutor's statements

upon these statements, Jones would have been acquitted. Jones suffered no actual prejudice as a consequence of Cannon's actions, and accordingly his claim of ineffective assistance of counsel fails the second of *Strickland*'s prongs.

3. Cannon's Failure to Sufficiently Inform Jones as to Render His Guilty Plea a Voluntary, Intelligent Choice Among the Alternative Courses of Action Available to Him as Ineffective Assistance of Counsel

Jones contends that his plea of not guilty was not the product of an educated decision making process, and that Cannon's failure to inform him of the sentencing consequences of pleading guilty constituted ineffective assistance of counsel. Def.'s Motion ¶¶ 102-26. Specifically, he asserts that Cannon did not tell Jones that, due to the overwhelming quantity and quality of the government's evidence, he had virtually no chance of prevailing at trial. *Id.* ¶ 105-06. He also alleges that a guilty plea could have led to a sentence reduction through either a plea agreement, whereby Jones would have agreed to testify against his co-conspirators, or a 3 point reduction in offense level for "acceptance of responsibility" under U.S.S.G. § 3E1.1. *Id.* ¶¶ 108-09. Contrarily, Jones claims, Cannon did not advise him that a plea of not guilty would almost certainly result in a sentence enhancement under U.S.S.G. § 3C1.1 for "obstruction of justice." *Id.* ¶ 110. Jones concludes by alleging that Cannon failed to advise him that pleading guilty would not effect a waiver of any defenses at the sentencing stage, and that he was affirmatively misadvised that the only way to reduce a sentence pursuant to a guilty plea was via a plea agreement (without any mention of a reduction for "acceptance of responsibility"). *Id.* ¶¶ 112-13.

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that would have entailed a reasonable probability of generating a verdict of not-guilty.

It is now firmly established that a criminal defendant is entitled to effective assistance of counsel during the plea stage of litigation. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). *Baker v. Barbo*, 177 F.3d 149, 153-54 (3d Cir. 1999). Importantly, though, the essence of Jones's claim is that he was unfairly denied the informed opportunity to plead guilty, and thus to subject himself to a lengthy term of confinement. Thus, the typical ineffectiveness analysis, with its focus on the likelihood of an acquittal in the absence of counsel's conduct, must bend a bit to encompass this sort of claim – the "different result" demanded by *Strickland*'s prejudice component may be satisfied here through a showing that but for counsel's unprofessional errors, "the court would have sentenced [defendant] to a shorter sentence than that it ultimately imposed." *Baker*, 177 F.3d at 154.

In this case, however, that standard is unmet. I credit Cannon's testimony to the effect that it was he, not Jones, who believed a guilty plea to be desirable. When asked whether he ever had discussed with Jones the possibility of a guilty plea, and a possible downward sentencing departure pursuant to U.S.S.G. § 5K1, Cannon responded:

> Always. . . . I took him in for a proffer. It didn't go well. He didn't – his heart wasn't in it. He didn't come across well. I don't think he was totally truthful. The government told me they weren't interested in talking with him anymore. I didn't feel as though that was a door that could not be reopened. I urged Mr. Jones to reflect upon it, perhaps decide that cooperation was in his best interest. I didn't – I told him I didn't want to see people like Enlow end up with less time in jail than he. That he had only been a worker for Enlow and that he should not be counting more months in jail than a person like Enlow. But, it was Mr. Jones's decision to pursue – to proceed to trial.

Tr. 8/31/00 at 43.

Subsequently, Cannon sent a letter to Jones in an effort to convince him to rethink

his decision concerning going to trial. Tr. 8/31/00 at 44. Indeed by this point, despite Cannon's optimism regarding the possibility of reopening the door to a cooperation agreement, it is likely that a downward departure based on cooperation was no longer on the table due to Jones's apparent untruthfulness during the initial proffer session. Moreover, Cannon testified that he did review the strength of the government's case with Jones. *Id.* at 43-44. They also discussed Jones's likely sentence in the event of a guilty plea "with the idea of frightening him into cooperation." *Id.* at 68. Yet in the end, despite what I find to be Cannon's best efforts to the contrary, Jones simply refused to plead guilty, which ultimately was a choice that lay with him alone. *Flores-Ortega*, 528 U.S. at 490 ("[T]he decision whether to plead guilty . . . must be the defendant's own choice." (quoting ABA Standards for Criminal Justice 21-2.2(b) (2d ed.1980))). Cannon's actions in this regard unquestionably constituted strategic, reasonable advocacy, and Jones's claim of ineffectiveness based upon them must fail.

III. The *Apprendi* claim

As indicated above, at the close of the August 31, 2001 evidentiary hearing on the instant motion, counsel for Jones moved to amend the motion to include a claim based upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This motion was unopposed, and granted by an order of this court dated January 12, 2001.

Before proceeding to an examination of the merits of this claim, it is necessary to determine whether Jones is procedurally barred from raising it at all. In *In re Turner*, ___ F.3d ___, 2001 WL 1110349 (3d Cir. Sept. 21, 2001), the Court of Appeals considered whether the Supreme Court's decision in *Apprendi* has been made retroactive to cases on collateral review. It noted that under *Tyler v. Cain*, 121 S. Ct. 2478 (2001), a given holding is retroactively applicable

only if the Supreme Court explicitly states that it is, or if one or more holdings of that Court logically permit no other conclusion. I need not engage in any analysis of the application of this standard to the *Apprendi* decision, as the Third Circuit concluded that the Supreme Court has not "'made' *Apprendi* retroactive to cases on collateral review, in the sense that *Tyler* requires." *Turner*, 2001 WL 1110349, at *3. Given that Jones's conviction unquestionably became final before the issuance of the *Apprendi* decision on June 26, 2000, under *Turner* he may not avail himself of its benefit in the instant motion.

IV. Conclusion

For the sum of the foregoing reasons, none of the grounds asserted by Jones as bases for his motion pursuant to 28 U.S.C. § 2255 are meritorious. Accordingly, the motion will be denied in its entirety.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
	:	CRIMINAL NO.
v.	:	NO. 95-124-5
	:	
	:	
NATHANIEL JONES,	:	CIVIL ACTION
Defendant.	:	NO. 99-3976
	:	
	:	

Order

And now, this _____ day of October, 2001, upon consideration of defendant's motion pursuant to 28 U.S.C. § 2255 (Doc. # 363), the government's answer thereto (Doc. # 371), defendant's memorandum of law in support thereof (Doc. # 378), the government's answer thereto (Doc. # 380), defendant's application for leave to amend the motion (Doc. # 381) and the government's answer thereto (Doc. # 383), it is hereby ORDERED that the motion is DENIED WITH PREJUDICE. The defendant having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability.

_____

William H. Yohn, Jr., Judge