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

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 94-276**
v.	:	
NATHANIEL SWINT	:	**CIVIL NO. 98-5788**

DuBois, J. **July 17, 2000**

MEMORANDUM

This matter is before the Court on the pro se Motion of petitioner, Nathaniel Swint, to Vacate, Set Aside or Correct his Sentence pursuant to 28 U.S.C. § 2255 (the "§ 2255 Motion") and a number of related motions – including several motions to amend or supplement the § 2255 Motion and a motion for leave to substitute handwritten motions for his typewritten motions.[1] For the reasons that follow, the Court will grant all of petitioner's motions to amend or supplement the § 2255 Motion and his motion for leave to substitute typed copies of motions for the original handwritten motions. The § 2255 Motion, as amended and supplemented, and all of the other motions filed by petitioner, will be denied.

I. BACKGROUND AND PROCEDURAL HISTORY

[1]Petitioner actually requested leave to substitute handwritten motions for typed motions (Doc. 190), but he obviously meant to ask for an order permitting substitution of typed copies of motions for the original handwritten motions.

This case arises out of the distribution of heroin and cocaine which petitioner, Nathaniel Swint, obtained from FBI Special Agent Kenneth Withers, who had stolen massive quantities of drugs from the FBI's evidence control room in the federal building in Philadelphia, Pennsylvania. Special Agent Withers is currently serving a twenty-five year sentence for his role in this drug trafficking conspiracy.[2]

The charges against petitioner may be summarized as follows: Count One charged that from in or about January, 1994, through in or about March, 1994, Swint conspired to distribute cocaine, a schedule II controlled substance, and heroin, a schedule I controlled substance, in violation of 21 U.S.C. § 846. Count Two charged that between in or about January, 1994, and in or about March, 1994, Swint possessed, with intent to distribute, in excess of one kilogram of heroin, in violation of 21 U.S.C. § 841(a)(1). Count Three charged that between in or about January, 1994, and in or about March, 1994, Swint possessed, with intent to distribute, in excess of five hundred kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1). Count Four charged that from in or about April, 1994, through in or about May, 1994, Swint attempted to possess, with intent to distribute, in excess of one kilogram of heroin, in violation of 21 U.S.C. § 846.

On February 24, 1995 Swint was convicted by a jury on all four counts. On September 20, 1996 he was sentenced by this Court, as follows: Counts Two and Four – terms of life imprisonment on each count, to run concurrently; Counts One and Three – terms of imprisonment for 250 months on each count, to run concurrently with each other and with the

[2] The facts are set forth in further detail in United States v. Swint, No. 94-276, 1996 WL 383118 (E.D. Pa. July 2, 1996).

sentence imposed on Counts Two and Four.

After his conviction, Swint, who was extremely active in his own defense, filed a number of post-verdict motions. All were denied by this Court, including a motion for an evidentiary hearing based on ineffective assistance of counsel.[3] Subsequently, Swint appealed to the Third Circuit alleging, inter alia, ineffective assistance of counsel, abuse of discretion by the trial court, and an improper jury charge regarding a possible entrapment defense. On August 8, 1997 the Third Circuit issued an opinion in which it refused to consider Swint's ineffective assistance of counsel claims, found this Court's entrapment charge to the jury proper, and rejected or dismissed all of petitioner's other claims.[4] Swint then petitioned the Supreme Court for a writ of certiorari; it was denied.

Subsequently, Swint filed the instant § 2255 Motion seeking to Vacate, Set Aside or Correct his conviction. He also filed several other motions related to the § 2255 Motion. Because Swint has numerous motions pending before this Court, the following overview is necessary.

A. The § 2255 Motion

Swint filed his § 2255 Motion on November 2, 1998 (Docs. 174/191).[5] On December 7, 1998 petitioner moved this Court for leave to amend his § 2255 Motion for the first time (Doc.

[3]See Swint, 1996 WL 383118, at *4-5.

[4]See United States v. Swint, 127 F.3d 1097 (3d Cir. 1997).

[5]As noted earlier, petitioner moved the Court for leave to substitute his handwritten motions for typewritten motions (Doc. 190). That Motion is granted by the attached Order. However, petitioner has already submitted typewritten duplicates of all his pending motions that were originally handwritten. This explains why in some instances there are two document numbers for certain documents, for example, "Docs. 174/191." In those instances, the first number represents the handwritten submission and the second number is the typewritten submission.

175), and that motion was granted by Order dated December 10, 1998 (Doc. 177). On December 9, 1998 petitioner moved this Court for leave to supplement his amended § 2255 Motion (Docs. 176/189), and that motion was granted by Order dated December 18, 1998 (Doc. 180). On January 11, 1999 the government filed its brief in response to petitioner's § 2255 Motion, as amended and supplemented (Doc. 181). On January 26, 1999 petitioner filed a rebuttal to the government's submission (Docs. 182/188).

On August 18, 1999, with the § 2255 Motion still pending, petitioner moved to amend his § 2255 Motion a second time (Doc. 199); and on September 10, 1999 he moved for leave to amend a third time (Doc. 200). The government filed responses to these motions to amend on September 24, 1999 and October 14, 1999, respectively (Docs. 201 and 202).

On November 29, 1999 petitioner moved for leave to amend the § 2255 Motion a fourth time (Doc. 203). The government filed its response to this motion on December 23, 1999 (Doc. 205). On January 7, 2000 petitioner filed his rebuttal to the government's submission (Doc. 206).

Finally, on March 3, 2000 petitioner moved for leave to amend the § 2255 Motion a fifth time (Doc. 207). The government filed its response to this motion on March 31, 2000 (Doc. 208).

B. Petitioner's Other Motions

Since filing the § 2255 Motion, petitioner has filed a number of related motions which are also presently before the Court. These include: On February 25, 1999 petitioner moved for

"Discovery of the Official Record" (Doc. 186); on March 1, 1999 he moved for "An Opportunity to be Heard" (Doc. 187); on March 4, 1999 he moved for "Leave to Substitute Handwritten Motions for Typed Motions" (Doc. 190); on April 21, 1999 he moved, for the first time, for the "Appointment of Counsel" (Doc. 194); and for "Leave to Issue Subpoenas of Habeas Corpus ad Testificandum" (Doc. 195). On May 3, 1999 the government filed a reply brief in opposition to these motions (Doc. 197). On May 12, 1999 petitioner filed a rebuttal to the government's reply (Doc. 198).

On August 18, 1999 petitioner filed his second motion for appointment of counsel (Doc. 199); and on September 10, 1999 he requested that this Court "Take Judicial Notice of its Certified Public Record" (Doc. 200). The government filed responses to these motions on September 24, 1999 and October 14, 1999, respectively (Docs. 201 and 202).

On November 29, 1999 petitioner moved this Court to "Take Judicial Notice of the Undisputed Adjudicated Facts" in this case (Doc. 203); and on December 6, 1999 he filed a Motion for "Bail" (Doc. 204). The government submitted a reply opposing these latest motions on December 23, 1999 (Doc. 205). On January 7, 2000 petitioner filed his rebuttal to the government's reply (Doc. 206).

Finally, on March 3, 2000 petitioner filed a Motion for "Leave to Amend/Supplement the Pending Motion for Leave to Issue Subpoenas of Habeas Corpus ad Testificandum" (Doc. 207), and a Motion to "Make a Harmless Error Analysis Upon the Pending Procedural Motions" (Doc. 207). The government filed its response to these motions on March 31, 2000 (Doc. 208).

II. DISCUSSION

Petitioner's motions will be grouped into three categories for purposes of the Court's discussion. First, the Court will address several motions that are preliminary to its consideration of the merits of the § 2255 Motion itself ("The Preliminary Motions"). These preliminary motions, in turn, fall into three sub-groupings: (1) petitioner's Motion for "Leave to Substitute Handwritten Motions for Typed Motions" (Doc. 190); (2) petitioner's latest Motions to Amend/Supplement the § 2255 Motion (Docs. 199, 200, 203 and 207); and (3) petitioner's requests that the Court "Take Judicial Notice" (Docs. 200 and 203).

Second, the Court will address the merits of petitioner's § 2255 Motion, as amended and supplemented ("The § 2255 Motion") (Docs. 174/191, 175, 176/189, 199, 200, 203 and 207). Third, the Court will deal with petitioner's remaining motions ("The Other Motions"). In these other motions petitioner requests: (1) additional discovery (i.e., Motion for "Discovery of the Official Record" (Doc. 186) and Motions for "Leave to Issue Subpoenas of Habeas Corpus ad Testificandum" (Doc. 195 and 207)); (2) an evidentiary hearing (i.e., Motion for "An Opportunity to be Heard" (Doc. 187)); (3) the appointment of counsel (Docs. 194 and 199); and release on bail pending the outcome of his § 2255 Motion (i.e., Motions for "Bail" (Doc. 204 and 207)).

A. The Preliminary Motions

1. Motion for Leave to Substitute Handwritten Motions for Typed Motions (sic)[6]

[6]See supra, note 1.

Petitioner filed his original, handwritten, § 2255 Motion on November 2, 1998. On March 4, 1999 he sought leave of Court to substitute typed copies of motions for his original handwritten submissions. See (Doc. 190). Before the Court ruled on this motion, petitioner submitted typed duplicates of several original handwritten motions. Among the later submissions was petitioner's typewritten substitute for his original handwritten § 2255 Motion.

The Court has reviewed petitioner's substituted filings and finds that they are identical in substance to his initial submissions. With regard to the original § 2255 Motion, the Court notes that petitioner has not added any claims; thus, he did not file a successive § 2255 Motion. Petitioner appears to have written his original submissions by hand because he was pressed to file them in a timely fashion. He later provided typed substitutes purely for the convenience of both the Court and the government.

The government consented to such substitutions. See (Doc. 197). Accordingly, because the Court finds that the typewritten substitutions are identical in substance to the handwritten originals, the Court will grant petitioner's motion, treated as a motion to substitute typewritten copies of motions for the original handwritten motions.

2. Motions for Leave to Amend/Supplement the § 2255 Motion

The Court begins its discussion of petitioner's latest motions to amend the § 2255 Motion (Docs. 199, 200, 203 and 207) by noting that petitioner has already amended the motion once as a matter of right, and that the Court also granted petitioner leave to supplement his § 2255 Motion on a second occasion. Nevertheless, the Court notes that petitioner filed his § 2255 Motion pro se. In considering these motions the Court is mindful of the instruction that it should

broadly construe normal pleading requirements when handling pro se submissions. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding pro se complaint "to less stringent standards than formal pleadings drafted by lawyers").

A § 2255 Motion by a federal prisoner to Vacate, Set Aside or Correct Sentence is not a proceeding in the original criminal prosecution, but is instead an independent civil suit. As such, it is governed by the rules governing civil proceedings. See Neely v. US, 546 F.2d 1059, 1065 (3d Cir. 1976). Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend [pleadings] by a district court "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); see also Fed. R. Civ. P. 7(b)(2) (making the rules applicable to the form of pleadings also applicable to motions). Thus, the grant or denial of an opportunity to amend the § 2255 Motion is within the discretion of the Court.

The government urges the Court to deny petitioner leave to amend the § 2255 Motion on the ground that his latest motions are untimely. However, in the absence of any apparent abuse by petitioner – such as undue delay or bad faith – and because the Court finds no prejudice to the government by virtue of allowing the amendments, the Court will grant all of the pending motions to amend his § 2255 Motion. The claims raised in petitioner's amendments and supplements will be addressed by the Court in connection with his § 2255 Motion.

3. Request that the Court Take Judicial Notice of its Certified Record

In his requests that this Court "Take Judicial Notice" (Docs. 200 and 203), petitioner draws the Court's attention to several evidentiary rulings during his trial, as well as to other

"undisputed adjudicated facts" which he claims are memorialized in this Court's trial record. In light of this somewhat unusual motion, the Court deems it necessary to clarify the purpose of a § 2255 Motion so that petitioner will not be misled.

A § 2255 Motion is a collateral challenge to a conviction. The scope of a collateral challenge to a conviction is very limited; only jurisdictional errors and errors of constitutional significance may generally be considered by the court in deciding such a motion. See United States v. Addonizio,442 U.S. 178, 185 (1979) (citing Stone v. Powell, 428 U.S. 465, 477 & n.10 (1976)). The time to remedy trial errors was in post-trial motions and on direct appeal, and relief will not ordinarily be given under § 2255 for errors such as those involving rulings on evidence, see e.g., Crismon v. United States, 510 F.2d 356, 359 (8th Cir. 1975), or instructions to the jury, see e.g., United States v. Frady, 456 U.S. 152, 165 (1982). Finally, a defense such as entrapment may be raised at trial and on appeal; it is not a proper ground for a § 2255 Motion. See Eaton v. United States, 458 F.2d 704, 707 (7th Cir. 1972).

Notwithstanding the foregoing, petitioner's request that the Court take judicial notice of certain facts in the record of this case has been duly noted. The Court has considered all appropriate parts of the record in this case in ruling on petitioner's § 2255 Motion, as amended and supplemented, and on all related motions.

B. The § 2255 Motion

Before addressing the merits of petitioner's § 2255 Motion, the Court must ensure that it is not barred from considering the § 2255 Motion by the gate-keeping provisions of 28 U.S.C.

§ 2255, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996. See 110 Stat. 1217.

1. Gate-keeping Considerations

Petitioner was convicted by a jury on February 24, 1995. On August 8, 1997 the United States Court of Appeals for the Third Circuit affirmed petitioner's conviction on all counts. Petitioner then filed a petition for a writ of certiorari in the United States Supreme Court. Certiorari was denied on May 4, 1998 and his conviction became final at that time.

Petitioner filed his § 2255 Motion on November 2, 1998, within one year of the time his conviction became final. Thus, the motion was timely filed. The several amendments to petitioners § 2255 Motion, for which leave was granted by this Court, are also timely because the claims raised in such submissions arose out of the same conduct set forth in the original § 2255 Motion, and are deemed to relate back in time to the original filing date. See Fed. R. Civ. P. 15(c).

A federal prisoner is procedurally barred from collaterally attacking his sentence under § 2255 insofar as the attack is based upon issues that could have been, but were not, raised on direct appeal. See Frady, 456 U.S. at 165. Claims of ineffective assistance of counsel are, however, an exception to this general rule. Such claims are generally eschewed on direct appeal in this Circuit, as they were in this case, with the preference being that they be raised for the first time in § 2255 proceedings. See United States v. Cocivera, 104 F.3d 566, 570 (3d Cir. 1996). The majority of the errors alleged by petitioner involve claims of ineffectiveness by both his trial counsel and his post-trial counsel. Accordingly, these claims are properly before the Court.

2. Analysis of the Merits of the § 2255 Motion

The Court will next address the merits of petitioner's § 2255 Motion, as amended and supplemented. At the outset, the Court notes that all of the following claims raised by petitioner have either been previously considered and rejected by this Court or the Third Circuit, or are altogether meritless. Thus, an evidentiary hearing will not be necessary, and petitioner's Motion for "An Opportunity to be Heard" (Doc. 187), which seeks an evidentiary hearing, will be denied.

Petitioner's numerous claims of error can be grouped under three legal theories. First, petitioner alleges various ways in which he was denied effective assistance of counsel. Second, he claims that the trial court abused its discretion by giving an improper jury instruction on entrapment. Finally, he seeks relief on the basis that the government failed to disclose certain exculpatory evidence. The Court will address these claims in turn.

a. Ineffective Assistance of Counsel Claims

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established a two-prong test by which to evaluate ineffective assistance of counsel claims. In order to obtain a reversal of a conviction on the ground that counsel was ineffective, the defendant must establish: (1) that counsel's performance fell well below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding. Id. at 687.

Under the first or "performance prong" of Strickland there is a "strong presumption" that counsel's strategy and tactics fall "within the wide range of reasonable professional assistance" and "might be considered sound trial strategy [under the circumstances]." Id. at 689. Courts

should presume effectiveness and should avoid second-guessing with the benefit of hindsight. Id. at 688-89. The second, or "prejudice prong," requires proof "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. A court that finds that a defendant has failed to satisfy one prong of Strickland need not consider the other. Id. at 697.

Upon reviewing the record below, the Court has not found any evidence associated with any of petitioner's claims that would warrant relief under Strickland. In short, petitioner can not demonstrate objectively deficient performance by counsel and prejudice suffered as a result of counsel's performance. Nevertheless, the Court will address petitioner's ineffective assistance claims in the order in which they were raised.

In Section A of his § 2255 Motion (Docs. 174/191), petitioner alleges several ways in which his trial counsel, Eugene P. Tinari, Esq., was ineffective.[7] First (Claim A(1)(a)), petitioner asserts that Mr. Tinari was ineffective in that he did not object to the fact that petitioner was charged with conspiracy to distribute heroin, where heroin is "not defined" by Title 21 of the United States Code, and that as a result petitioner suffered prejudice and was subjected to "double jeopardy" during the trial and at the time of sentencing. As the Court understands this argument, petitioner is suggesting that counsel was ineffective because he failed to object to the fact that petitioner was charged with conspiracy to distribute, as well as attempt to possess with intent to distribute, controlled substances pursuant to 21 U.S.C. § 846, together with separate counts of

[7]Mr. Tinari represented petitioner at trial through his conviction on February 24, 1995. On May 12, 1995 Mr. Tinari was permitted to withdraw as petitioner's counsel. On May 19, 1995 Mark E. Cedrone, Esq. entered his appearance on behalf of petitioner. Mr. Cedrone represented petitioner at sentencing and on appeal.

possession with intent to distribute cocaine and heroin in violation of 21 U.S.C. § 841(a)(1). That argument is completely without merit.

There was nothing improper about the way in which petitioner was charged in the Indictment. See, e.g., United States v. Steele, 178 F.3d 1230, 1233 (11th Cir. 1999) ("An indictment is sufficient if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense."); United States v. Hodge, 211 F.3d 74, 76 (3d Cir. 2000). The Indictment in this case meets that standard in all respects. Moreover, petitioner has not explained how the Indictment subjected him to double jeopardy, or how he was prejudiced in any way; and in its review of the case the Court had not found any evidence of double jeopardy or prejudice stemming from the Indictment. Accordingly, the Court concludes that counsel was not ineffective for failing to move to dismiss the Indictment.

Petitioner next argues (Claim A(1)(b)), albeit in very general terms, that Mr. Tinari was ineffective for failing "to investigate the facts and the applicable law of conspiracy." According to petitioner, Mr. Tinari should have challenged the indictment because it "charged petitioner twice with the charge 21 U.S.C. § 846" – that is, a conspiracy in Count One and an attempt in Count Four. However, petitioner again fails to explain how trial counsel's representation was deficient, or what was improper about the charge of conspiracy and attempt under 21 U.S.C. § 846 in Counts One and Four. On the contrary, petitioner's own words suggest that his trial counsel properly instructed him on the applicable law. For example, while petitioner claims that "counsel

erroneously advised [him] that conspiracy and attempt were two different charges," the Court finds that such advice, if it was given, constitutes a correct characterization of the law applicable to conspiracy and attempt charges. Accordingly, the Court concludes that this claim by petitioner is meritless.

Petitioner further alleges (Claim A(1)(c)) that Mr. Tinari was ineffective due to his failure to challenge the "multiplicty of the Indictment." However, a defendant may be charged with multiple offenses based on the same underlying conduct so long as each offense requires proof of an element not required by the other. See United States v. Kelly, 204 F.3d 652, 656 (6th Cir. 2000) (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)). Upon review of the Indictment, the Court concludes that it is not multiplicitous; the facts supporting the counts arising under § 846 and § 841 are separate and distinct and do not constitute a single act.

In Section B of the § 2255 Motion, petitioner sets forth additional allegations of ineffective assistance by his trial counsel. First (Claim B(1)(a)), petitioner argues that Mr. Tinari was deficient in that he failed to object to the Indictment on the ground that it was based on a "substance made to look like heroin." Petitioner is obviously alluding to the fact that during its investigation of petitioner, law enforcement set up a "reverse sting" operation whereby federal agents purported to offer drugs for sale to petitioner but the drugs were not real. However, "reverse sting" operations such as the one in this case are lawful. See, e.g., United States v. Sandia, 188 F.3d 1215, 1219 (10th Cir. 1999); United States v. Asencio, 873 F.2d 639, 640 (2d Cir. 1989). Accordingly, the Court finds this claim meritless.

Next (Claim B(1)(b)), petitioner again argues that the Indictment was multiplictous and

that trial counsel should have objected. Specifically, he points to the language of Count Four and alleges that it was "capriciously and maliciously designed to separate a single scheme and offense into multiple offenses." The Court has reviewed the Indictment, including Count Four, and concludes that this claim is without merit. As already discussed, the charges in this case were brought for separate acts and the Indictment was proper.

For his final claim in Section B, petitioner argues (Claim B(1)(c)) that Mr. Tinari was ineffective because he "tolerated [the government's] bringing charges against a defendant in such a [sic] arbitrary manner." However, petitioner has failed to explain why the charges against him were "arbitrary" and, more importantly, why this alleged "arbitrariness" entitles him to § 2255 relief. In light of its own review of the record, the Court concludes that this claim fails both prongs under Strickland.

In Section C of the § 2255 Motion, petitioner argues that Mr. Tinari was deficient for failing to raise the "defense" of "false arrest" because the criminal complaint and the arrest warrant were "not supported by the facts." It appears from this part of the motion that petitioner is again claiming that the complaint and warrant were defective because one of the substances involved in the reverse sting operation was not heroin. Because, as stated above, there was nothing improper about the sting operation, see Sandia, 188 F.3d at 1219, this claim must be rejected.

In Section D of the § 2255 Motion, petitioner continues his allegations of ineffective assistance of counsel. The majority of these claims (i.e., D(1)(a), D(1)(b), D(1)(d) and D(1)(e)) involve the issue of Mr. Tinari's alleged failure to adequately develop an entrapment defense and

to investigate what petitioner argues is the erroneous position of the government that FBI Special Agent Kenneth Withers was a rogue government agent. Trial counsel's alleged ineffectiveness with respect to the entrapment defense was raised by petitioner and carefully considered by this Court at numerous times during the trial proceedings.[8] At each juncture the Court reviewed the issues presented with petitioner to ensure that he fully understood Mr. Tinari's trial strategy and that he agreed with the approach recommended by him. Not only did petitioner agree with Mr. Tinari that it was desirable to pursue an entrapment theory, his trial testimony was completely consistent with such a defense. For example, petitioner testified that soon after he had received the first unsolicited letter and sample from Withers, two individuals entered his shop, flashed badges, handcuffed him, searched the shop for the drug samples, and then ordered him to follow the instructions contained in the letter. See Trial Testimony, Feb. 21, 1995, at 146-48. With respect to the investigation of Withers, there was absolutely no evidence that he was anything other than a rogue agent, and he was charged, convicted and sentenced to twenty-five years

[8]For example, these issues were addressed during a pre-trial hearing on February 10, 1995 when the Court noted that it had received a pro se motion from petitioner to be relieved of his trial counsel, Mr. Tinari, and to have new counsel appointed. See Hearing Transcript, Feb. 10, 1995, at 2, 6-10, 72-81. Moreover, on February 13, 1995, during another pre-trial hearing, there was a discussion between counsel and the Court regarding whether petitioner could meet the criteria necessary to merit an entrapment defense as it related to former Special Agent Withers' conduct. See Hearing Transcript, Feb. 13, 1995, at 183-84.

On February 15, 1995, before the start of the second day of trial, Mr. Tinari again informed the Court that petitioner needed to address the Court regarding petitioner's desire to dismiss him as trial counsel. During the course of an ex parte sidebar conference petitioner complained that Mr. Tinari had urged petitioner to consider a still-pending government plea offer, and that Mr. Tinari was wrong not to have put petitioner on the stand during an earlier pre-trial suppression hearing. Significantly, during the course of this sidebar conference in which petitioner highlighted what he felt to be trial counsel's "defective attitude," petitioner expressed no criticism of Mr. Tinari's theory of defense, that is entrapment, which Mr. Tinari had outlined in his opening statement to the jury. See Trial Transcript, Feb. 15, 1995, at 2-14. After trial testimony that day, this Court formally placed on the record its conclusion that there was "no good cause for substitution of counsel." The Court also stated that it found "no conflict of interest, no breakdown at all of communication between client and attorney and no irreconcilable conflict." Finally, the Court again asked petitioner if he had any questions, and petitioner stated that he did not. See id., at 114-15.

imprisonment as such. In short, the Court concludes that Mr. Tinari's trial strategy was not objectively unreasonable as required under Strickland, and these arguments of petitioner must fail.

Petitioner also asserts in Section D (Claim D(1)(c)) that trial counsel was ineffective for failing to allow him to testify at a suppression hearing. As the government argues, however, petitioner fails to state what his testimony would have been at this hearing, or why his testimony would have changed the outcome of the Court's ruling on the issue of suppression. Assuming arguendo that petitioner can satisfy the objective deficiency prong under Strickland, his claim does not establish that he suffered any prejudice. Thus, the Court will reject this claim.

Petitioner next asserts (Claim D(1)(e)) that Mr. Tinari was ineffective for failing to take an interlocutory appeal on the issue of whether Special Agent Withers was acting as a government agent, pursuant to the affirmative defense of "public authority" he raised at trial under Fed. R. Crim. P. 12(b). However, such an interlocutory appeal would have been improper. Finality of judgment is generally required as "a predicate for federal appellate jurisdiction." See Abney v. United States, 431 U.S. 651, 656 (1977) (noting that interlocutory or "piecemeal" appeals are generally disfavored in criminal cases); 28 U.S.C. § 1291. Under the final judgment rule of 28 U.S.C. § 1291, a federal appellate court has jurisdiction only of appeals from final decisions of the district courts. See Linder v. Department of Defense, 133 F.3d 17, 23 (D.C. Cir.1998) (noting that this rule "avoids the mischief of economic waste and of delayed justice that can accompany piecemeal litigation").

The ruling at trial in which the Court denied petitioner's attempt to raise a public authority defense was not dispositive in the case – that is, even if petitioner had been permitted to pursue

this affirmative defense, he was still required to prove it to the jury.[9] Accordingly, the ruling was not a final decision within the meaning of the final judgment rule and it could not be appealed as a final judgment.

In Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541(1949), the Supreme Court recognized a narrow class of collateral orders which do not meet the definition of finality, but which are nevertheless immediately appealable under § 1291. See United States v. Bertoli, 994 F.2d 1002, 1010-11 (3d Cir. 1993). To be appealable under the "collateral order doctrine," an "order must [1] conclusively determine [a] disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Id. at 1011 (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)). "If the order fails to satisfy any one of the requirements, it cannot be appealed under the collateral order doctrine." Rauscher Pierce Refsnes, Inv. v. Birenbaum, 860 F.2d 169, 171 (5th Cir.1988).

The Court's ruling concerning petitioner's assertion of the public authority defense could not satisfy two of the three aforementioned elements required for a collateral order. The second prong of the test could not be met because the Court's ruling involved the use of an affirmative

[9]The validity of a "public authority" defense "depends on whether the government agent in fact had actual authority to empower the defendant to perform the acts in question." United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 & n. 18 (11th Cir. 1994) (the Court also noted that in "reliance on the apparent authority of a government official is not a defense . . . because it is deemed a mistake of law, which generally does not excuse criminal conduct"); accord United States v. Pitt, 193 F.3d 751, 758 (3d Cir. 1999) ("This Court approves and will follow the holding in United States v. Baptista-Rodriguez . . . which limits the use of the defense of public authority to those situations where the government agent had actual authority to empower the defendant to perform the acts in question."). The Court has reviewed the record and finds no evidence that Special Agent Withers, in soliciting petitioner, was acting with actual government authority. On the contrary, Withers has been prosecuted, convicted and incarcerated for his unauthorized conduct. Thus, the public authority defense offered no chance of success in this case.

defense, an issue which was closely linked to the merits of the case – that is, petitioner's guilt or innocence. The third prong of the test could not be satisfied because the issues raised by petitioner's attempted use of the public authority defense were easily reviewable on appeal after the conclusion of the trial. In fact, petitioner did eventually appeal the Court's ruling to the Third Circuit, which dismissed all of his claims. See United States v. Swint, 127 F.3d 1097 (3d Cir. 1997). An interlocutory appeal from the Court's ruling denying petitioner's attempt to raise the public authority defense would have been improper. Accordingly, trial counsel's failure to take such an appeal was not deficient under Strickland.

In Section E, petitioner raises still other grounds of ineffective assistance by his trial counsel. These claims (i.e., E(1)(a), E(1)(b) and E(1)(c); see also Doc. 203) all relate to Mr. Tinari's alleged inability to "fully grasp" the law as it relates to the entrapment defense. In support of his argument, petitioner points to counsel's failure to take an interlocutory appeal on the issue of whether Special Agent Withers was acting as a government agent as it pertained to the entrapment defense. The short answer to this argument is that an interlocutory appeal on this issue would have been improper for the reasons stated above with respect to the public authority defense. Moreover, petitioner does not explain how Mr. Tinari was otherwise uninformed about the law, or how petitioner was prejudiced by his handling of the entrapment defense. Therefore, trial counsel's alleged conduct does not satisfy the objective deficiency prong of Strickland, and petitioner's ineffective assistance claims on this ground are meritless.

Petitioner next alleges that his post-trial counsel, Mark E. Cedrone, Esq., was ineffective

during sentencing and on appeal. In Section G,[10] petitioner raises numerous grounds (i.e., G(1)(a), G(2)(a), G(2)(b), G(3)(a), G(3)(b), G(3)(c), G(4)(a), and G(4)(b)) for relief.

First (Claim G(1)(a)), petitioner contends that Mr. Cedrone's representation was deficient because on appeal he "refused to argue any . . . of petitioner's non-frivolous issues other than articulate them to the court." Petitioner suggests, in other words, that counsel erred in basing his decision to pursue an appeal only on those issues he felt were viable in light of his legal training and experience. While a lawyer must abide by a client's decisions concerning the objectives of the representation, see, e.g., Pa. R. of Prof. Conduct, Rule 1.2(a), a lawyer does not have a constitutional duty to raise every issue requested by a defendant on appeal, even if such issues are non-frivolous, see Jones v. Barnes, 463 U.S. 745, 751 (1983). This discretion is justified by the strong policy interest in favor of allowing experienced advocates to winnow out weaker arguments on appeal and focus on the central issues involved in a case. See id.

The Court finds that Mr. Cedrone reasonably focused on two issues in his appellate brief, namely ineffective assistance of counsel and an improper jury charge by the trial court. His conduct was consistent with his duties under Anders v. California, 386 U.S. 738, 743 (1967). As a result, petitioner has failed to establish that Mr. Cedrone's legal representation was objectively deficient as required under Strickland, and this claim will be rejected.[11]

Petitioner further alleges (Claim G(2)(a) and G(2)(b)) that post-trial counsel was deficient in his representation during sentencing. In connection with these claims, petitioner begins by

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[10]Section F alleges abuse of discretion by the trial court. That claim is discussed infra.

[11]The Court also notes that the Third Circuit allowed petitioner to file a separate, pro se, appellate brief in which he raised all the issues he claims Mr. Cedrone should have raised.

arguing that the sentencing guidelines should not have applied to his case. As the government notes, however, petitioner does not explain why the guidelines were inapplicable. Petitioner then claims that "[b]y counsel's failing to adopt Petitioner's sentencing issues the appeals [court] summary [sic] dismissed each of Petitioner's claim(s)." However, petitioner fails to set forth precisely which issues his counsel was ineffective in advocating, the Court's review of the record at sentencing discloses no error, and the Third Circuit found no sentencing errors on direct appeal. Accordingly, these claims will be rejected as meritless.

Continuing in Section G of the § 2255 Motion, petitioner claims (Claim G3(a), G(3)(b) and G(3)(c)) that Mr. Cedrone was ineffective for failing to adequately argue that trial counsel had been ineffective with respect to his handling of the entrapment defense. Petitioner makes two points in support of this argument, both of which the Court finds to be without merit. First (Claim G(3)(a)), petitioner contends that appellate counsel should have brought to the Third Circuit's attention that "both Petitioner and trial counsel had objected to [the erroneous] jury instruction" and that this omission served as a "devastating force" to his appeal. However, the Third Circuit considered the allegedly erroneous jury charge in this case and concluded that it was not erroneous. See United States v. Swint, 127 F.3d 1097 (3d Cir. 1997). Petitioner has therefore failed to establish that he suffered any prejudice as a result of Mr. Cedrone's handling of the entrapment jury charge on appeal.

Second, (Claims G(3)(b) and G(3)(c)) petitioner argues that Mr. Cedrone was ineffective for failing to argue that trial counsel was ineffective for not properly "investigating" the entrapment defense. As discussed above, trial counsel's handling of the entrapment defense was

adequately addressed at various junctures during the trial. Moreover, there is absolutely no evidence of improper investigation of the entrapment defense. Accordingly, appellate counsel can not be ineffective for failing to raise a claim on appeal that was clearly meritless. See Barnes, 463 U.S. at 751.

Lastly (Claims G(4)(a) and G(4)(b)), petitioner argues that Mr. Cedrone was ineffective for his failure to file a petition for writ of certiorari with the United States Supreme Court, particularly on the issue of whether Withers was in fact a government agent, in connection with the public authority defense. The Court disagrees. The fact that counsel did not file a petition for a writ of certiorari did not deprive defendant of effective counsel in violation of his constitutional rights. Review by the Supreme Court is discretionary, see Ross v. Moffitt, 417 U.S. 600, 616-17 (1974), and the Supreme Court has held that defendants have no right to counsel to pursue discretionary review. See Wainwright v. Torna, 455 U.S. 586, 587 (1982). Because defendant had no constitutional right to counsel, he was not deprived of effective assistance of counsel when his attorney did not file a petition for a writ of certiorari. See United States v. Ferrell, 730 F. Supp. 1338, 1340 (E.D.Pa. 1989); United States v. Lena, 670 F. Supp. 605, 613 (W.D. Pa. 1987), aff'd, 849 F.2d 603 (3d Cir. 1988); United States v. Lauga, 762 F.2d 1288 (5th Cir. 1985). Moreover, petitioner filed a writ of certiorari on this issue, pro se, which was denied.

Petitioner's various amendments to the § 2255 Motion also include allegations of ineffective assistance of counsel. In his first amendment (Doc. 175), petitioner argues (Claim I(1)(a))[12] that he was denied effective assistance of counsel due to Mr. Cedrone's failure to raise

[12]Section H alleges that the government failed to disclose certain Brady material. That claim is discussed infra.

certain sentencing issues on appeal. According to petitioner, he "argued the merits of the [sentencing] objections presented without the aid and assistance of counsel support." Yet, petitioner does not support this general claim with specific facts. He does not, for example, state what issues should have been raised, or what aid and assistance Mr. Cedrone failed to provide. Accordingly, petitioner has not satisfied either prong of the Strickland test, and this claim is rejected.

In his second amendment (Doc. 199), petitioner alleges ineffective assistance of counsel because trial counsel failed to request a "special verdict" in connection with the multiple objects of the conspiracy charged against him in Count One – that is, the conspiracy to distribute both cocaine and heroin. That argument is based on petitioner's assumption that the mandatory minimum sentence applicable to him for a conspiracy to distribute cocaine was five years whereas the mandatory minimum sentence applicable to him for a conspiracy to distribute heroin was ten years, and that the severity of his sentence was based, at least in part, on a determination as to the object or objects of the conspiracy. Petitioner is incorrect in his assumption.

The jury was properly charged ". . . that in order to sustain its burden with respect to the charge in Count One [the conspiracy count], the government need not prove beyond a reasonable doubt that the defendant conspired to distribute both heroin [and] cocaine. It is sufficient that the government establish – establishes beyond a reasonable doubt – that he [defendant] conspired to do one o[r] the other – distribute either heroin or cocaine." Trial Transcript (Charge of the Court), Feb. 23, 1995, at 120-21; United States v. Bey, 736 F.2d 891, 894 (3d Cir. 1984).

Petitioner's concerns about a distinction in severity of punishment between a conspiracy to

distribute heroin and one to distribute cocaine are misplaced. Count One of the Indictment, the conspiracy count, included all of the conduct charged in the substantive counts of the Indictment, Counts Two (heroin), Three (cocaine) and Four (heroin). Petitioner's sentence was based on the drug quantity for which he was criminally responsible, that is, the drug quantities involved in the offenses charged in Counts Two, Three and Four and collectively in Count One.[13] The sentence imposed would have been exactly the same regardless of whether the conspiracy in Count One had as its purpose the distribution of heroin, or the distribution of cocaine, or both.[14] Thus, petitioner has not satisfied the Strickland test with respect to this claim, and it will be rejected.

In his third amendment (Doc. 200) to the § 2255 Motion, petitioner raises three more claims of ineffectiveness of counsel. First (Claim I), petitioner complains that his trial counsel, Mr. Tinari, mishandled an evidentiary issue during trial concerning the admissibility of a newspaper article on the involvement of other FBI agents in illicit drug activities during the relevant time period. Petitioner states that "[u]pon the government's invitation to counsel to show relevancy to the extrinsic evidence . . . counsel's lips were sealed due to his incompetence by

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[13]Petitioner was also held criminally responsible under United States Sentencing Guidelines § 1B1.3 for two ounces of heroin possessed with intent to distribute.

[14]Because two different substances were involved – heroin and cocaine – the Court converted the substances into a common substance, marijuana, and determined that petitioner was criminally responsible for the equivalent of 4,856.7 kilograms of marijuana. For that drug quantity the base offense level (and the total offense level) was 34. Given petitioner's Criminal History Category, IV, the Guideline Imprisonment Range was 210 to 262 months imprisonment.

The government proceeded under 21 U.S.C. § 851 and filed an Information setting forth two previous convictions to be relied upon in seeking an enhanced sentence. As a result, the mandatory minimum sentences for Counts Two and Four were life imprisonment on each count, and those sentences were imposed by the Court. The mandatory minimum sentences on Counts One and Three were ten years. Because the Guideline Imprisonment Range for Counts One and Three exceeded these mandatory minimum sentences, the Court imposed concurrent sentences of 250 months, within the Guideline Imprisonment Range, on Counts One and Three. See Transcript of Sentencing Proceedings, Sep. 20, 1996.

reason of his unfamiliarity with the Rules of Evidence." Petitioner appears to be arguing that trial counsel erred by not relying on Fed. R. Evid. 404(b) in order to persuade the Court to receive in evidence a newspaper article reporting an investigation of other FBI agents, not Special Agent Withers, who were also suspected of stealing drugs.

While the use of extrinsic evidence of other crimes, wrongs or acts, pursuant to Fed. R. Evid. 404(b), is normally used in the context of the prosecution's case against an accused, such evidence may also be employed by the defense. See, e.g., United States v. McClure, 546 F.2d 670, 672-73 (5th Cir. 1977) (upholding a defendant's use of 404(b) evidence of a systematic campaign of threats and intimidation against other persons by a government witness to show lack of criminal intent). However, the newspaper article to which petitioner refers was not relevant to this case, and it was not admissible under Fed. R. Evid. 404(b).

The subject of the newspaper article in question was unnamed FBI agents who, like Withers, were suspected by FBI authorities of stealing drugs which had been seized. Because Special Agent Withers had been similarly charged with selling cocaine and heroin only a few weeks prior, his name was mentioned in connection with the story. Aside from this, there was no evidence of a link between Withers and the individual who was the subject of the article. See Trial Transcript, Feb. 21, 1995, at 83-84. Indeed, Special Agent Withers testified unequivocally that he acted alone and there was no other evidence on this subject. See id., at 95-99. In light of these facts, the newspaper article was completely irrelevant to the issues in the case and was inadmissible. Trial counsel's conduct was not objectively unreasonable or deficient, and there is no evidence that petitioner was prejudiced in any way by exclusion of this evidence. Thus, this

claim will be rejected.

Next (Claim II), petitioner claims ineffective assistance of counsel on the ground that his trial counsel neglected to address a conflict of interest involving himself and his father, who had represented petitioner in a previous matter. In petitioner's own words, his trial counsel, Eugene P. Tinari, Esq.,

> failed to contest the use of prior drug and firearm convictions . . . [w]hich were unconstitutionally obtained by the misrepresentation of [Eugene Tinari's] father, Nino V. Tinari, Esq. Trial counsel's father, [Nino Tinari,] had represented petitioner in [prior proceedings]; and he ill-advised petitioner to plead guilty. . . . [Therefore,] trial counsel's lips were sealed due to the conflict of interest between his father's misrepresentation and petitioner's right to effective assistance of counsel.

In other words, petitioner's allegation is that trial counsel, Eugene Tinari, did not "investigate" the propriety of several of petitioner's prior convictions because that would have involved second-guessing the earlier representation of petitioner by trial counsel's father, Nino Tinari.

The Rules of Professional Conduct, by which both trial counsel and his father were bound, identify certain prohibited transactions involving family relationships between lawyers. See, e.g., Pa. R. Prof. Conduct, Rule 1.9(i) (Conflict of Interest: Former Client), in Pennsylvania Rules of Court - State (West 2000). There is no conflict of interest, however, simply because a client is represented in separate matters by lawyers with a familial relationship; rather, a conflict exists when the representation of one client will be directly adverse to that of another client. See, e.g., Pa. R. Prof. Conduct, Rule 1.7 (Conflict of Interest: General Rule). The Court concludes that petitioner has not alleged a conflict of interest in light of this standard. Nor has petitioner established that trial counsel breached his duty of confidentiality, his duty of loyalty, or any other

duty. Therefore, the Court rejects petitioner's claim that trial counsel's representation was marred by any conflict of interest.

Petitioner raises one final ineffective assistance of counsel claim (Claim III) in his third amendment to the § 2255 Motion. Specifically, he argues that trial counsel failed "to invoke the legal rule" required to enter in evidence Special Agent Withers' job resume, which petitioner claims was prepared and submitted by the CIA, Withers' prior employer, to the FBI. According to petitioner, the resume contained certain inaccuracies with respect to Withers' prior employment with the CIA which were relevant to his defense.[15] Petitioner's trial counsel argued that these inaccuracies were relevant to Withers' overall credibility, on the theory that even though the CIA prepared the resume and sent it to the FBI, Withers "basically corroborated with the false information that was sent to the FBI, so that he is acting just as the CIA did, he is acting in a way to deceive the FBI." See Trial Transcript, Feb. 21, 1995, at 43.

The Court has reviewed the trial record and finds that the resume was properly excluded. Pursuant to Federal Rule of Evidence 403, evidence that is otherwise relevant may be excluded if its probative value is substantially outweighed by the danger of, among other things, confusion of the issues. See Fed. R. Evid. 403. The issue of the CIA resume had no independent relevance to the issues at trial, and instead could have served to confuse the issues by having jurors focus on the alleged publication by the CIA of "fake resumes" rather than on the relevant facts of the case. Moreover, as the Court noted at trial, "[t]he CIA might have sent in a [false] resume, if indeed they did, in order to protect the covert nature of the activities in which [Withers] was previously

[15]These inaccuracies, petitioner claims, supported his theory that there was a massive CIA/FBI conspiracy designed to entrap him. See Trial Transcript, Feb. 21, 1995, at 42.

involved." Trial Transcript, Feb. 21, 1995, at 44. This claim is totally without merit and will be denied because petitioner can not satisfy either prong under Strickland.

In his fourth amendment (Doc. 203) to the § 2255 Motion, petitioner raises four additional grounds for ineffective assistance of counsel. First (Ground 1), petitioner asserts that both his trial counsel, Mr. Tinari, and his post-trial counsel, Mr. Cedrone, were ineffective for failing to "offensively plead" that Special Agent Withers "deprived petitioner and others of their 'intangible' rights of honest government. . . . Thus, triggering the protection of the due process clause." The short answer to this claim is that there was absolutely no evidence that Withers' conduct was authorized by the government. Furthermore, although citizens are entitled to honest government, petitioner's assertion of a right to honest government has no bearing on this case. Accordingly, this claim will be rejected because petitioner can not satisfy either prong under Strickland.

Next (Ground 2), petitioner claims that his trial counsel was ineffective for relating to the Court his belief that petitioner would not be truthful on the stand during trial, and for "hindering" petitioner from calling his own wife as a witness for the defense. First, with respect to trial counsel's concern about petitioner's truthfulness, Mr. Tinari was under an ethical duty not to offer any evidence that he reasonably believed to be false. See, e.g., Pa. R. Prof. Conduct, Rule 3.3 (Candor Toward the Tribunal). Moreover, the Court is satisfied that trial counsel did not act in bad faith when he expressed his concerns about petitioner's veracity. Petitioner's trial counsel can not be deemed to have been ineffective for complying with his ethical obligations.

Second, in connection with petitioner's assertion that trial counsel somehow prevented

him from calling his wife at trial, petitioner has failed to articulate any prejudice stemming from any such "hindrance." Moreover, as the Court has previously noted, petitioner was addressed several times during trial in order to ensure that he was satisfied with his choice of trial counsel, and counsel's trial strategy. See supra at note 8. Therefore, the Court concludes that this claim is meritless.

Third (Ground 3), petitioner once again raises an ineffective assistance of counsel claim in connection with his entrapment defense at trial. This time, petitioner alleges that trial counsel failed to effectively force the Government to meet its burden of proof with respect to the government's position that Special Agent Withers had not acted in an official capacity as an FBI agent when he approached petitioner regarding illegal drug transactions. Specifically, petitioner points to the government's closing argument at trial, where the prosecutor argued to the jury that Withers was essentially a rogue agent. Petitioner contends that by failing to object to this line of argument by the prosecution, his trial counsel allowed the government to "vouch" for Withers' testimony and thereby "fertilized in the jury's mind as an uncontested truth" that Withers' conduct had not been part of a legitimate law enforcement operation.

The Court finds this last attempt to find error related to the entrapment defense to be meritless. At trial, the Court ruled that the issue of whether Withers' actions were attributable to the government was a question for the jury. Accordingly, the government introduced evidence, including Withers' own testimony, which tended to prove that Withers was indeed a rogue agent. Such evidence was admissible. When in its closing argument the government referred to Withers as a rogue agent, the government was thereby commenting on the evidence, not "vouching" for a

witness. Thus, the Court finds no ineffectiveness by petitioner's trial counsel as asserted in this claim.

Fourth (Ground 4), petitioner claims that post-trial counsel, Mr. Cedrone, was ineffective for failing to appeal on the ground that the prosecution erred at trial when it caused a government witness to identify petitioner's brother-in-law in the courtroom upon the playing of a previously tape-recorded conversation between the government witness and petitioner in which petitioner mentions his brother-in-law. In petitioner's own words, this identification "relieved the government of proving beyond a reasonable doubt that the others alleged in the Indictment existed. Especially, where the evidence at trial only showed a buy and sell relationship [Special Agent] Withers and petitioner." As the Court understands this argument, petitioner objects to the government's identification of his brother-in-law during trial because it created the undesired inference before the jury that his brother-in-law was an unindicted co-conspirator in connection with the conspiracy charged in Count One of the Indictment.

However, the Court has reviewed the trial record and finds no error relating to the government's in-court identification of petitioner's brother-in-law. To begin with, a defendant can be indicted and convicted of conspiracy even if the names of his co-conspirators are unknown, as long as government presents evidence of an agreement between two or more persons. See e.g., United States v. Nason, 9 F.3d 155, 159 (1st Cir. 1993). Moreover, it is recognized that it is seldom possible, as a practical matter, to prove a conspiracy by direct evidence. Therefore, the "[e]xistence of and participation in a conspiracy . . . may be established . . . through circumstantial evidence." See United States v. Sanzo, 673 F2d. 64, 69 (2d Cir.), cert denied, 459 U.S. 858

(1982); United States v. Scanzello, 832 F.2d 18, 20 (3d Cir. 1987).

In this case, the government was required to prove the existence of an unlawful agreement between petitioner and at least one other person in order to satisfy the essential elements of the conspiracy charged in Count One. Accordingly, the government was entitled to use, as circumstantial evidence of petitioner's involvement in a conspiracy, the in-court identification of petitioner's brother-in-law, whose name had been specifically mentioned in a monitored telephone call between petitioner and a government witness. The Court finds no error or prejudice resulting from the government's conduct, and this claim will be rejected for failing to satisfy either prong under Strickland.

For all of the foregoing reasons, the Court concludes that petitioner failed to establish ineffectiveness by either his trial counsel, Mr. Tinari, or his post-trial counsel, Mr. Cedrone, at any point during their representation of petitioner. The Court analyzed each of petitioner's claims notwithstanding the authority to reject ineffective assistance of counsel arguments without addressing the specifically alleged deficiencies of counsel where, as in this case, the evidence of guilt is clear. See Strouse v. Leonardo, 928 F.2d 548, 556 (2d Cir. 1991) ("We need not address [petitioner's] alleged deficiencies [of counsel] because we conclude that [petitioner] cannot satisfy the second prong of Strickland, given the overwhelming evidence of guilt adduced at trial."). Indeed, the record in this case provides overwhelming evidence that petitioner was involved in a substantial drug conspiracy and that he was guilty of all counts charged in the Indictment.[16] As a

[16]For example, during the course of the government's case, it presented evidence that: (1) pen registers revealed telephone calls to "Salvatore" (i.e., Special Agent Withers' alias for purposes of his illegal drug dealing), using petitioner's personal code to order narcotics, which were made from petitioner's home and business address; (2) a package containing a kilogram of heroin and a letter to petitioner from "Salvatore" containing instructions to

result, in the event that the Court has misconstrued any of petitioner's ineffective assistance of counsel claims, it is nevertheless assured that all of the claims of ineffectiveness of counsel in the § 2255 Motion, as amended and supplemented, must be rejected because petitioner can not establish that he suffered any prejudice as required under Strickland.

b. Abuse of Discretion by Trial Court/Improper Jury Instruction Claim

In Section F of the § 2255 Motion (see also Doc. 203), petitioner alleges that this Court abused its discretion with respect to the jury charge given at trial. Specifically, petitioner claims that the Court erred when it instructed the jury on the issue of whether Special Agent Withers was acting in an official capacity when he solicited petitioner to buy drugs from him. The Court rejects this claim. Petitioner previously raised this claim of error with respect to the entrapment charge by the trial court on direct appeal. The issue was considered by the Third Circuit, which found the charge to be proper. See Swint, 127 F.3d at 1097.

In general, a § 2255 Motion may not be employed merely to re-litigate on collateral attack questions which were raised and considered on direct appeal. See United States v. DeRewal, 10 F.3d 100, 105 & n.4 (3d Cir. 1993). The Third Circuit has identified four exceptions to this general rule: (1) newly discovered evidence that could not have reasonably been presented at the

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further engage in a drug distribution conspiracy, had been intercepted en route to petitioner; (3) private postal records confirmed that petitioner had previously mailed two packages to Thomas Wilcox, which was the name supplied by "Salvatore" to be used for payment purposes; (4) tape recordings between petitioner and undercover agents revealed petitioner acknowledging substantial purchases of drugs from "Salvatore" and money owed in relation to those purchases; (5) petitioner provided $41,000 in cash to the undercover agents, for partial payment of drugs he had received from "Salvatore"; (6) petitioner was recorded on audio tape referring to his own years of experience in the illegal narcotics business, and the network of individuals with whom he was then dealing; (7) petitioner received a series of highly explicit letters from "Salvatore," which petitioner himself turned over to the FBI; (8) petitioner delivered money to FBI agents posing as "Salvatore" to purchase more drugs; and (9) petitioner admitted to FBI agents that he had ordered and received drugs from "Salvatore."

original trial; (2) a change in applicable law; (3) incompetent prior representation by counsel; or (4) other circumstances indicating that an accused did not receive full and fair consideration of his federal constitutional and statutory claims. Because petitioner's claim does not fall into any one of the four categories of claims which may be re-litigated in the Third Circuit, this Court may not review this issue again.

c. Failure to Disclose Material – Brady/Giglio Claims

Petitioner lastly alleges that his due process rights were violated by the government's failure to disclose certain information in advance of trial, pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Under Brady, the government was required to disclose any evidence in its possession that was both favorable to the defendant and material to guilt or punishment. See id. at 87. In Giglio v. United States, 405 U.S. 150 (1972), the Supreme Court extended the Brady duty, and required the government to disclose impeaching evidence in cases where the "reliability of a given witness may well be determinative of guilt or innocence." Id. at 154 ("[a] new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury....'") (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)).

In his first amendment to the § 2255 Motion (Doc. 175) petitioner claims (Claim H(1)(a), H(1)(b), H(2)(a) and H(2)(b); see also Doc. 203) that he was prejudiced by the government's failure to produce certain information that would have been "favorable" to his defense. He makes two points in support of this argument. First, petitioner contends that the government did not disclose a "charge-bargain" it allegedly made with Special Agent Withers. In response, the government denies that it ever made any deal for cooperation of any kind with Withers. As proof,

the government points to Wither's own testimony at the trial, when he admitted on cross-examination that when he was sentenced the government advocated for the harshest possible sentence. See Trial Transcript, Feb. 21, 1995, at 104-06. The Court agrees with the government on this issue. There was no evidence of a "charge bargain" with Withers.

Second, petitioner alleges that the government "suppressed material information as to the investigation of Petitioner." The Court understands this claim to allege in essence that the government failed to produce Brady material regarding whether Special Agent Withers was acting in his "official" capacity when he solicited petitioner. As discussed above, however, Withers has been prosecuted, convicted and sentenced to a twenty-five year term of imprisonment. The Court is satisfied, therefore, that Withers' illegal actions were undertaken on his own volition and not in his official capacity as an FBI agent. Thus, the Court concludes that there was no information related to Withers' official status which the government failed to produce.

In his motion to supplement (Doc. 176/189) the § 2255 Motion, as amended, petitioner alleges another Brady/Giglio violation. It pertains once again to the issue of whether Special Agent Withers was acting as a government agent. Petitioner claims (Claim 3(a)-(f)) that "the government withheld favorable material evidence of the Federal Bureau of Investigation [] impeachment proceeding [concerning Special Agent Withers, held] on June 3, 1993." However, petitioner does not identify the specific information he claims the government withheld. Moreover, he fails to explain how this information would have been "favorable" to him in any way. As discussed above, there was ample evidence in the record that Withers acted on his own, and his actions were in no way attributable to the government. Thus, the Court concludes that

petitioner has failed to establish any prejudice entitling him to relief on this claim.

Finally, in his fifth amendment (Doc. 207) to the § 2255 Motion, petitioner alleges two more Giglio violations. First, petitioner claims that during his trial the government "suppressed that former [Special Agent] Withers was the 'target' of the particular news paper [sic] article involving theft of drug evidence."[17] The significance of this alleged suppression, according to petitioner, is that it inhibited petitioner's ability to effectively attack Wither's credibility at trial. Specifically, petitioner claims that if he had access to this allegedly withheld information he could have more effectively argued that Withers was not a rogue agent, as Wither's testified, and thereby buttressed his entrapment defense.

The short answer to this assertion that the government withheld information is that petitioner has not provided any details to support his claim. For example, petitioner claims that he learned of the government's suppression of this evidence through "sworn testimony," yet he does not disclose the source of that testimony. Also, he states that he is entitled to any "material evidence which could have been used by defendant's counsel to attack the credibility of former [Special Agent] Withers," but does not describe the "material evidence." (emphasis added). The Court will not entertain such a "fishing expedition" on collateral attack. Thus, because petitioner has failed to offer any evidence that the government deliberately suppressed any information whatsoever that was relevant in any way to petitioner's trial defense, this claim must be rejected.

Second, petitioner alleges that the government "suppressed material information

[17]As discussed earlier in this Memorandum, the subject of the newspaper article to which petitioner refers was an investigation by FBI authorities of FBI agents other than Withers who were similarly suspected of stealing drugs from FBI evidence control rooms.

concerning the credibility of former [Special Agent] as to the denial of a 5k.1 motion on [Wither's] behalf." As the Court understands this argument, petitioner is once again suggesting that there was a "charge bargain" between the government and Withers and that the government withheld this information from him. However, as discussed earlier in this Memorandum, not only does the government deny that there was ever an agreement with Special Agent Withers, Withers was tried, convicted and sentenced to a twenty-five year term of imprisonment. Thus, this claim is meritless.

C. The Other Motions

Having analyzed the merits of petitioner's § 2255 Motion, the Court will next address petitioner's four remaining pending motions. Because the Court rejected all of petitioner's claims in the§ 2255 Motion , the Court will deny all other motions.

Petitioner has moved for "An Opportunity to be Heard" (Doc. 187). By this motion, he seeks an evidentiary hearing in order to more fully develop the record with respect to his claims in the § 2255 Motion. However, a hearing is not required if the record conclusively shows that the petitioner is not entitled to relief, see Hodges v. United States, 368 U.S. 139, 140 (1961). In this case, the complete record was available to the Court and it has carefully reviewed the record as appropriate. The Court finds that the record clearly demonstrates that petitioner's numerous claims are meritless. Accordingly, the Court concludes that an evidentiary hearing is unnecessary, and the motion for a hearing will be denied.

Petitioner has also moved for further discovery in support of the § 2255 Motion. Specifically, he has moved for "Discovery of the Official Record" (Doc. 186) and for "Leave to

Issue Subpoenas of Habeas Corpus ad Testificandum" (Doc. 195 and 207). In connection with the latter motion, petitioner has provided the names of numerous individuals whom he claims can produce testimony "material to his claims." See (Doc. 207). However, the Rules Governing § 2255 Proceedings provide that discovery may be made available "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." 28 U.S.C.A. § 2255, Rule 6; see also United States v. Balistrieri, 606 F.2d 216, 221 (7th Cir. 1979) (noting that the rule is deliberately not specific about what discovery methods should be used). In light of the foregoing analysis regarding the merits of petitioner's § 2255 Motion, the Court concludes that petitioner has failed to establish good cause for any further discovery. Therefore, the Court will deny these discovery motions.

Next, petitioner has moved for an "Appointment of Counsel"(Docs. 194 and 199) in order to assist him with the preparation of the § 2255 Motion. Again, the Court will deny this request in light of its conclusions with respect to the merits of the § 2255 Motion. While the Rules Governing § 2255 Proceedings allow the Court to appoint counsel on behalf of defendants, see Rule 8(c), no appointment of counsel is required where the petitioner's claims lack merit, and where assistance of counsel would not significantly aid in presenting those claims in a more persuasive manner, see United States v. Olmo, 663 F. Supp. 102, 105 (N.D. Ca. 1987), affirmed, 875 F.2d 319 (9th Cir. 1989). Accordingly, because the Court concludes that the § 2255 Motion is meritless, there is no need to appoint counsel, and these motions will be denied.

Finally, petitioner moved this Court to be released on bail pending the outcome of his § 2255 Motion (Docs. 204 and 207). That claim is now moot. He also moved the Court to

undertake a "harmless error analysis." As the Court understands the latter motion, petitioner wants the Court to vacate or modify his sentence on many grounds already addressed in this Memorandum and in light of the claimed impact of petitioner's current imprisonment upon his family's well-being. There is absolutely no authority for doing so at this stage of the proceedings, nor is any such relief warranted. Accordingly, this request will be denied.

IV. CONCLUSION

For all the foregoing reasons, petitioner's Motion for "Leave to Substitute Handwritten Motions for Typed Motions," treated as a motion to substitute typewritten motions for the original handwritten motions, will be granted. Additionally, petitioner's several motions to amend and supplement the § 2255 Motion will be granted. The Court has considered all the claims raised in all such motions as part of petitioner's § 2255 Motion.

The § 2255 Motion, as amended and supplemented, will be denied. Furthermore, petitioner's Motion for "An Opportunity to be Heard," Motion for "Discovery of the Official Record," Motion for "Leave to Issue Subpoenas of Habeas Corpus ad Testificandum," Motions for "Appointment of Counsel," and Motion for "Leave to Amend/Supplement the Pending Motion for Leave to Issue Subpoenas of Habeas Corpus ad Testificandum" will be denied. The Motion for "Bail" pending the Court's ruling on the § 2255 Motion will be denied as moot; the Motion to "Make a Harmless Error Analysis Upon the Pending Procedural Motions" will be denied.

An appropriate order follows.

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

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 94-276**
v.	:	
NATHANIEL SWINT	:	**CIVIL NO. 98-5788**

ORDER

AND NOW, to wit, this 17th day of July, 2000, upon consideration of petitioner's: (1) Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (the "§ 2255 Motion"), as previously amended and supplemented (Docs. 174/191, 175 and 176/189); (2) Motions for Leave to Amend/Supplement the § 2255 Motion (Docs. 199, 200, 203 and 207); (3) Motion for "Discovery of the Official Record" (Doc. 186); (4) Motion for "An Opportunity to be Heard" (Doc. 187); (5) Motion for Leave to Submit Handwritten Motions for Typed Motions (treated as a motion to substitute typewritten motions for the original handwritten motions) (Doc. 190); (6) Motions for Appointment of Counsel (Docs. 194 and 199); (7) Motion for "Leave to Issue Subpoenas of Habeas Corpus ad Testificandum" (Doc. 195); (8) Motion for "Leave to Amend/Supplement the Pending Motion for Leave to Issue Subpoenas of Habeas Corpus ad Testificandum" (Doc. 207); (9) Requests that the Court "Take Judicial Notice" (Docs. 200 and 203); (10) Motion for "Bail" (Doc. 204); and (11) Motion to "Make a Harmless Error Analysis Upon the Pending Procedural Motions" (Doc. 207); together with the government's responses to

these Motions (Docs. 181, 197, 201, 202, 205 and 208); and petitioner's rebuttals (Docs. 182/188, 198 and 206); **IT IS ORDERED**, for the reasons set forth in the accompanying Memorandum, as follows:

1. Petitioner's Motion for "Leave to Substitute Handwritten Motions for Typed Motions" (treated as a motion to substitute typewritten motions for the original handwritten motions) (Doc. 190) is **GRANTED**;
2. Petitioner's Motions for Leave to Amend/Supplement the § 2255 Motion (Docs. 199, 200, 203 and 207) are **GRANTED**;
3. Petitioner's § 2255 Motion, as amended and supplemented (Docs. 174/191, 175, 176/189, 199, 200, 203 and 207), is **DENIED**;
4. Petitioner's Motion for "Discovery of the Official Record" (Doc. 186), Motion for "An Opportunity to be Heard" (Doc. 187), Motions for "Appointment of Counsel" (Docs. 194 and 199), and Motion for "Leave to Issue Subpoenas of Habeas Corpus ad Testificandum" (Docs. 195 and 207) are **DENIED**;
5. Petitioner's Motion for "Bail" (Doc. 204) is **DENIED AS MOOT**; and
6. Petitioner's Motion to "Make a Harmless Error Analysis Upon the Pending Procedural Motions" (Doc. 207) is **DENIED**.

BY THE COURT:

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JAN E. DUBOIS, J.