

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

UNITED STATES OF AMERICA : CRIMINAL No. 02-CR-131
 :
 v. :
 :
 KHALIL ABDUL HAKIM : CIVIL ACTION NO. 04-2582

MEMORANDUM

Padova, J.

October 19, 2005

Before the Court is Khalil Abdul Hakim's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. A hearing was held on the Motion on April 21, 2005.¹ For the following reasons, the Motion is denied.

I. BACKGROUND

On June 6, 2002, Khalil Abdul Hakim ("Hakim") was convicted by a jury of one count of conspiracy to commit armed robbery in violation of 18 U.S.C. § 371; one count of armed bank robbery in violation of 18 U.S.C. § 2113(d); one count of using and carrying a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(d)(1); and one count of using, carrying, and brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii); arising out of the November 28, 2001 armed robbery by two men of the PNC Bank branch located at Main and Hamilton Streets in Norristown, Pennsylvania (the "Bank"). On September 30, 2002, after his Motion for a New

¹Hakim was permitted to supplement the grounds set forth in his Motion by Affidavit submitted on July 15, 2005. The Government responded to said Affidavit on August 29, 2005.

Trial and *pro se* Motion for Arrest of Judgment were denied, Hakim was sentenced to 136 months imprisonment, five years of supervised release, restitution in the amount of \$14,698.00 and a special assessment of \$400.00. Hakim has brought this Motion for relief pursuant to 28 U.S.C. § 2255 based upon his counsel's alleged ineffectiveness.

II. LEGAL STANDARD

28 U.S.C. § 2255 provides as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C.A. § 2255. "Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors." United States v. Rishell, Crim. No. 97-294-1, Civ. A. No. 01-486, 2002 WL 4638, at *1 (E.D. Pa. Dec. 21, 2001) (citation omitted). In order to prevail on a Section 2255 motion, the movant's claimed error of law must be constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962).

III. DISCUSSION

Hakim asserts thirteen claims for relief pursuant to 28 U.S.C. § 2255 based upon the ineffective assistance of his trial counsel, David Kozlow, Esquire, which he has grouped into the following four categories: 1) Kozlow was ineffective for failing to file a motion to suppress evidence of an out-of-court identification of Hakim from a picture taken by a surveillance camera at the bank; 2) Kozlow was ineffective for failing to object to the prosecutor's references to Hakim's religious faith in the wake of the terrorist attack of September 11, 2001; 3) Kozlow was ineffective for failing to make an adequate investigation of potential alibi witnesses; and 4) Kozlow was ineffective for failing to make timely and adequate objections to the prosecution's prejudicial interjections into the trial proceedings and miscellaneous additional claims.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance," id. at 687, and determined that a defendant claiming ineffective assistance of counsel must show the following:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. In order to meet his burden of proving ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. The Petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 690. "In evaluating counsel's performance, [the Court is] 'highly deferential' and 'indulge[s] a strong presumption' that, under the circumstances, counsel's challenged actions 'might be considered sound . . . strategy.'" Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999) (quoting Strickland, 466 U.S. at 689). "Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, . . . it is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'" Id. (quoting United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

If a defendant shows that counsel's performance was deficient, he then must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. The defendant

must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

A. Out-of-Court Identification

Hakim claims that Kozlow was ineffective in failing to file a motion to suppress evidence of Melvin Boone's out-of-court identification of Hakim from a bank surveillance photograph taken during the robbery (the "Photograph"). The Photograph shows the two men who committed the robbery. Hakim maintains that this evidence should have been suppressed because the police procedure used with respect to this identification was unduly suggestive and created a substantial risk of misidentification.

Boone, who was Hakim's business partner in Boone's Moving and Hauling, identified Hakim from the Photograph when it was shown to him by Detective Raymond E. Emrich of the Norristown Police Department during the police investigation of the robbery. Kozlow objected to introduction of evidence of that out-of-court identification during the Government's direct examination of Boone, and that objection was sustained by the Court. (6/4/02 N.T. at 115-119.) Boone did, however, make an in-court identification of Hakim from the Photograph during direct examination. (Id. at 132.) Boone based his in-court identification of Hakim from the Photograph on the thousands of times he had seen Hakim during the

ten years they had been acquainted prior to November 2001. (Id. at 131.)

Although Boone's out-of-court identification of Hakim was not introduced into evidence prior to Boone's cross-examination, Kozlow elected to cross-examine Boone about it. The Court approaches its examination of Kozlow's decision to use this evidence, with the presumption that such decision was sound trial strategy. United States v. Digregorio, Crim. No. 99-144-01, Civ.A.No. 03-1853, 2004 WL 1964875, at *2 (E.D. Pa. Aug. 12, 2004) (noting that "an informed decision not to file [a motion to suppress] is entitled to the same measure of deference we grant to counsel's other strategic decisions.").

Kozlow has explained to the Court that his strategy was to show that Boone's identification of Hakim from the Photograph was not credible because it was initially suggested by Detective Emrich and because Boone and James Gray (a former employee of Boone's Moving and Hauling) had reason to lie about whether Hakim appeared in the Photograph.² (4/21/05 N.T. at 21.) Boone testified on cross-examination that, at Detective Emrich's request, he had gone to the Norristown police station to meet with Detective Emrich who showed him a picture taken during the robbery.³ (6/4/02 N.T. at

²Gray also made an in-court identification of Hakim from the Photograph during the trial. (6/5/02 N.T. at 51-52.)

³Boone testified that he met with Detective Emrich twice and, on one of those occasions, he was accompanied by James Gray.

169, 182.) Boone also testified that Detective Emrich told him that he knew the identities of the individuals in the photograph before he asked Boone if he could identify either individual. (Id. at 182.) During his cross-examination of Boone, Kozlow also asked him to confirm testimony he gave during the April 2002 suppression hearing held in this case about his meeting with Detective Emrich. (Id. at 185.) Boone confirmed that he had testified at the suppression hearing that, when Emrich asked him to examine the photograph, he believed that Emrich thought that he (Boone) or James Gray was one of the individuals in the photograph. (Id. at 185.)

Kozlow used Boone's testimony about his meeting with Detective Emrich, and Boone's identification of Hakim from the Photograph during that meeting, to undermine Boone's credibility in his closing argument. Kozlow argued to the jury that the quality of the Photograph is poor and that the only corroborating evidence that Hakim appears in the Photograph comes from the testimony of Boone and Gray, both of whom are convicted felons who had reasons to testify falsely against Hakim. (6/5/02 N.T. at 117, 119, 128.)

In light of all of these circumstances, the Court finds that Hakim has not overcome the presumption that Kozlow's decision to use Boone's out-of-court identification of Hakim in an attempt to

(6/4/02 N.T. at 176.) Boone could not recall whether Gray was with him the time he identified Hakim from the bank surveillance photo. (Id. at 180.)

show that Boone was not a credible witness should be "considered sound trial strategy." Strickland, 466 U.S. at 689. The Court further finds, accordingly, that Kozlow was not ineffective for failing to move to suppress Boone's out-of-court identification of Hakim. Hakim's Motion is, therefore, denied with respect to this ground for relief.

B. References to Hakim's Religious Faith

Hakim argues that he was denied effective assistance of counsel when his attorney failed to object to the prosecutor's references to his religious faith, and the passing of his passport to the jury, in the wake of the terrorist attacks of September 11, 2001. Petitioner's trial began June 3, 2002, less than nine months after September 11, 2001. Hakim maintains that the Assistant United States Attorney commented about his faith, and showed his passport to the jury, in order to inflame and prejudice the jury in the wake of September 11.

The only evidence before the jury of Hakim's religious affiliation came through the direct examination of Boone by the Government. Boone testified, in support of his identification of Hakim, that he had known Hakim for approximately 10 years and that they were very close friends. (N.T. 6/4/02 at 92.) In describing his long relationship with Hakim, and explaining why he entered into a business partnership with Hakim, Boone testified that both he and Hakim are Muslims, that Hakim is very intelligent, and that

Hakim taught spiritual classes which Boone attended, during which Hakim would read the Koran and lead prayer, in both English and Arabic. (N.T. 6/4/02 at 92-93.) Hakim's claim of ineffective assistance of counsel is based upon Kozlow's failure to object to the Assistant United States Attorney's references to this testimony, and the passing of Hakim's passport to the jury, during closing argument. During his closing argument, the Assistant United States Attorney said the following:

Now, he also told you that he had met the defendant, he had known him for about ten years, they were both members of the same religious community, Muslims. The defendant occupied the role of the Iman, the spiritual leader of the congregation and that he looked up to him, he admired him. He said, he was teacher, he was the leader.

And as you will see from the defendant's passport and I - and I urge you to take the time to look at this passport, not only from the standpoint of identification, but the facial hairs that was [sic] described by Segora Ward and the skin tone color. But you may remember that I asked the question of Mr. Boone, he's the spiritual leader? Yes. He speaks Arabic and English. And if you will look in the passport, you will notice that in 1996, the defendant visited Saudi Arabia and there are a number of other stamps in the passport, all showing that he's a worldly man, he's well traveled.

(N.T. 6/5/02 at 100.) Kozlow did not object to this reference to Hakim's religious affiliation. Kozlow has explained his failure to object as follows:

Frankly, I think that at the time it really didn't strike me as all that important and I

was probably distracted with other things. In retrospect, I probably would have objected if I had to do it again and move for a mistrial, because I filed post-verdict motions and raised that issue when I thought about it and had sufficient time to really reflect on it. .

. .

(4/21/05 N.T. at 31.)

Hakim previously raised this reference to his religious beliefs, and the passing of his passport to the jury, as grounds for a new trial in his Post Verdict Motion for a New Trial. Since Kozlow did not object to those references or to the passing of the passport at trial, the Court considered Hakim's argument according to the plain error standard. See United States v. Jones, 404 F. Supp. 529, 539 (E.D. Pa. 1975) ("In the absence of plain error, matters not called to the attention of the trial judge cannot be subsequently raised in the post trial stages of the proceeding.") Federal Rule of Criminal Procedure 52 provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). The plain error standard requires:

(1) an error; (2) which is clear or obvious; and (3) which affects substantial rights (i.e., it affected the outcome of the district court proceedings). Because Rule 52(b) is permissive, we only correct a plain error which (a) causes the conviction or sentencing of an actually innocent defendant, or (b) seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.

United States v. Navarro, 145 F.3d 580, 584-85 (3d Cir. 1998)

(citations omitted). The Court found that the evidence of Defendant's religious beliefs was probative of an issue before the jury, Boone's identification of Hakim, and concluded that the Government's references to Hakim's religious beliefs were not plain error requiring a new trial because Hakim did not present any evidence that he was actually innocent of the bank robbery and did not demonstrate that the evidence of his religious beliefs seriously affected the fairness, integrity, or public reputation of his trial. United States v. Hakim, Crim. No. 02-131, 2002 WL 31151174, at *5 (E.D. Pa. Sept. 24, 2004) (citing Navarro, 145 F.3d at 584-85). The United States Court of Appeals for the Third Circuit affirmed, though it expressed some trouble with the Government's references to Hakim's faith so soon after September 11, 2001:

While we find the government's mention of Hakim's religion disturbing, we conclude that Hakim cannot demonstrate that it amounted to plain error. This is primarily because the government offers a plausible explanation for why it made these references to Hakim's faith: it wanted to demonstrate that Boone respected Hakim and had no incentive to lie about his identification. The fact that the government offered this permissible explanation and that it never directly drew the link between Hakim's faith and the events of 9/11 distinguish this case from [United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990)], and [United States v. Cabrera, 222 F.3d 590 (9th Cir. 2000)], in which the government offered no such explanation and drew direct links between the defendants' race or ethnicity and the crimes with which they were charged.

To meet his burden on plain error review, Hakim would have to show that the government's actions "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," Johnson v. United States, 520 U.S. 461, 467, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (quoting United States v. Young, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)), a showing difficult to make when there is a permissible explanation for the government's conduct. He has not made it here, hence we are constrained to reject Hakim's contention that these actions violated his right to a fair trial.

Despite so holding, we note that the government's explanation for its references to Hakim's faith, and even more so for its showing the jury Hakim's passport to demonstrate that he had traveled to Saudi Arabia, is by no means compelling. We do not reverse given the plain error standard of review, but we are troubled that the government, by making the references so soon after 9/11, needlessly made this case close.

United States v. Hakim, 344 F.3d 324, 333-34 (3d Cir. 2003).

Hakim now claims that Kozlow's failure to object was ineffective assistance of counsel. Kozlow's decision not to object to the prosecutor's comments and use of Hakim's passport can only constitute ineffective assistance of counsel if the prosecutor's comments and actions violated Hakim's constitutional right to due process. "Before the Court can conclude that a failure to object to an improper closing argument is ineffective assistance, the Court must first conclude that the closing argument was constitutionally improper." United States v. Lively, 817 F. Supp. 453, 464 (D. Del. 1993) (rejecting argument that trial counsel's

failure to object to prosecutor's comments in closing argument was ineffective assistance of counsel where prosecutor's comments were not improper); see also Hartey v. Vaughn, 186 F.3d 367, 372 (3d Cir. 1999) ("[I]f there is no merit to [petitioner's] claims that the prosecution's statements and [evidence] 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.").

Prosecutorial misconduct during closing argument may "so infect the trial with unfairness as to make the resulting conviction a denial of due process.'" Moore v. Morton, 255 F.3d 95, 105 (3d Cir. 2001) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). However, "[s]uch misconduct must constitute a 'failure to observe that fundamental fairness essential to the very concept of justice.'" Id. (quoting Donnelly, 416 U.S. at 642). In determining whether the prosecutor's references to Hakim's faith and the introduction of his passport during closing arguments violated Hakim's constitutional rights, the Court "must examine the prosecutor's offensive actions in the context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant." Id. at 107. "[T]he quantum or weight of the evidence is crucial to determining whether the prosecutor's arguments during

summation were so prejudicial as to result in a denial of due process." Id. at 111 (citing Darden v. Wainwright, 477 U.S. 168, 182 (1986); Donnelly, 416 U.S. at 644).

The Court thoroughly analyzed the evidence submitted at trial in its analysis of Defendant's Motion for New Trial, and determined that the "evidence submitted at trial was sufficient for any rational jury to determine the credibility of the Government's witnesses and find that the Defendant was one of the two men who robbed the Bank on November 28, 2001." United States v. Hakim, 2002 WL 31151174, at *6-*8. The Court has reexamined the evidence presented at trial in the context of this Motion, and concludes that the evidence against Hakim was so substantial that the prosecutor's comments and actions during closing did not violate Hakim's right to due process.⁴ Consequently, the Court finds that the Assistant United States Attorney's comments regarding Hakim's faith, and the passing of his passport to the jury, did not violate Hakim's constitutional right to due process. As the prosecutor's comments and the passing of Hakim's passport did not violate Hakim's due process rights, his counsel's failure to object was not ineffective assistance of counsel. See Lively, 817 F. Supp. at 464. Hakim's Motion is, therefore, denied with respect to this ground for relief.

⁴The Court also notes that the jury was instructed that closing arguments are not evidence. (6/3/02 N.T. at 66.)

C. Potential Alibi Witnesses

Hakim maintains that his counsel was ineffective in failing to investigate and call at trial certain potential "alibi" witnesses. Hakim claims that Kozlow should have investigated and called Vijaya Roa, who witnessed the robbery. According to Hakim, Vijaya Roa told the police that one of the suspects in the robbery was a white male with a stocky build and the other was a taller and skinnier black male. Hakim contends that Kozlow was ineffective for failing to call Roa at trial, because his testimony would contradict other witnesses who identified Hakim, who is an African American, as the shorter robber. Kozlow refused to subpoena Roa to testify at trial. Kozlow has explained that he initially thought that Roa would support the defense's theory of the case and, consequently, he sent his investigator, Mr. Gallagher, to interview him. (4/21/05 N.T. at 26-27.) Based upon that interview, he made a strategic decision not to subpoena Mr. Roa to testify at trial on Hakim's behalf:

I told [my investigator] to bring a photograph of Mr. Hakim with him to make sure that before we subpoena Veejay [sic] that . . . that's not the guy, because I have a police report that says there's a white guy and a black guy. And what happened was the -- Mr. Gallagher met with -- I wasn't there, but he informed me that he met with Veejay [sic] personally, there is a memorandum of interview in our case file, in the investigation file, and that when he met with him Veejay [sic] remembered the incident, remembered it very well and when shown the photograph of Mr. Hakim said, yes, that's the guy, that's one of the two robbers

. . . . Then Mr. Gallagher told me this and I said, I'm not subpoenaing him, that's the last thing in the world I want to do is subpoena someone that's going to help the Government's case.

(Id. at 28-29.) The Court concludes that Kozlow's decision not to call a witness who would have undermined Hakim's defense by testifying that Hakim was one of the robbers was within the "wide range of professionally competent assistance." Strickland, 466 U.S. at 690. Consequently, the Court finds that Kozlow's decision not to call Roa as a trial witness was not ineffective assistance of counsel.

Hakim also claims that Kozlow was ineffective for failing to call witnesses or subpoena records from Poindexter's barber shop and the store next door to Poindexter's Barber Shop, where he claims he was at the time of the robbery. (Id. at 44.) Hakim has not, however, submitted any evidence that there are witnesses at either establishment who would have been able to testify at trial that they saw him during the time of the robbery, or that there are any records kept by those establishments which could support his claim. Consequently, the Court finds that Hakim has not overcome "the strong presumption" that Kozlow's failure to call unidentified witnesses or to subpoena unidentified documents was sound trial strategy. See Buehl, 166 F.3d at 169. The Court further finds that Kozlow's failure to call witnesses or subpoena records from Poindexter's barber shop and the store next door to Poindexter's

Barber Shop was not ineffective assistance of counsel. Hakim's Motion is, therefore, denied with respect to this ground for relief.

D. Failure to Object to Prejudicial Interjections and Miscellaneous Additional Claims

Hakim has made ten additional claims of ineffective assistance of counsel. These claims pertain to his attorney's failure to make timely and adequate objections to certain testimony presented by the Government as well as to other actions taken, or not taken, by Kozlow in connection with, and after, Hakim's trial.⁵

1. Failure to object to perjurious statements

Hakim argues that Kozlow was ineffective for failing to object to the Government's presentation of perjurious statements by Melvin

⁵Paul Hetznecker, Esq. was appointed by the Court to represent Hakim with respect to the instant Motion. Mr. Hetznecker did not argue most of these ten alleged instances of ineffectiveness during the April 21, 2005 hearing. Consequently, Hakim was given the opportunity to present these issue in Court during that hearing. On July 15, 2005, Hakim filed an Affidavit for the Enlargement of Court Records to Show Ineffectiveness of Counsel. Hakim maintains, in his Affidavit, that Hetznecker did not adequately represent him during the April 21, 2005 hearing with respect to these ten instances of ineffectiveness and, therefore, he asked to supplement the record by way of the Affidavit to further support his claim of ineffectiveness. On July 20, 2005, the Court ordered the Government to respond to the Affidavit by August 3, 2005. The Government failed to do so. On August 26, 2005, Hakim moved for default judgment based upon the Government's failure to respond to his Affidavit. Although Hakim is not entitled to judgment by default in connection with the instant Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, the Government was permitted to file a response to his request. In its response, the Government indicated that it did not oppose Hakim's request to enlarge the record. The Court has, accordingly, considered Hakim's Affidavit as part of the record on this Motion.

Boone and Detective Emrich at trial and during the suppression hearing. (4/21/05 N.T. at 44-49.) Hakim contends that Emrich's and Boone's trial testimony was inconsistent with their testimony during the suppression hearing, and that Kozlow was ineffective for not bringing up the issue of perjury. (Id. at 49.) The trial testimony in question pertains to whether Gray was present when Boone identified Hakim from the Photograph, and whether Emrich suggested to Boone that Hakim was shown in the Photograph before Boone identified Hakim. This testimony was elicited from both witnesses during their cross-examination by Kozlow in his attempt to demonstrate that Boone and Gray were not credible witnesses.

Boone testified at trial, on cross-examination, that he was interviewed twice by Detective Emrich. (6/4/02 N.T. at 169.) On the second occasion, he was accompanied by Gray. (Id.) He further testified, at trial, that he could not remember if he identified Hakim from the surveillance photo when he met with Emrich alone or when he was with Gray. (Id. at 176, 180.) During an April 22, 2002 suppression hearing in this proceeding, Boone testified that Gray was with him when he met with Emrich. (4/22/02 N.T. at 130.) Kozlow used that testimony from the April 22, 2002 hearing to cross-examine Boone at trial with respect to whether Gray had been with him when he identified Hakim. (6/4/02 N.T. at 177-180.) Kozlow read Boone's testimony from the suppression hearing into the trial record, after which Boone testified, again, that he could not

remember whether Gray was with him when Emrich showed him the Photograph. (Id. at 180.)

Boone also testified at trial that Emrich told him that he knew who was in the Photograph when he showed it to Boone, and that he did not think that Emrich believed that he (Boone) was one of the bank robbers. (Id. at 181-183.) Kozlow used Boone's testimony from the suppression hearing to cross-examine him on this issue:

Q. Sir, do you remember testifying on April 22nd, 2002, page 133 going to page 134 and testifying to the following:

Question: No. 12, right. And when he showed you No. 12, that's the photograph that you looked at and -- and you told him, hey, that Hakim?

Answer: Well, actually, I didn't tell him that. He told me who it was.

Question: Oh, okay. How did he do that, what did he say?

Answer: Well, he said he knew who this person in this photo was and he said, he already known him, he said he knew who the person in the photo was and the other person he didn't know who it was.

Question: Okay.

Answer: So, I think that they thought the person in the photo was Mr. Gray or myself.

(Id. at 183.) Kozlow used Boone's inconsistent testimony, and memory problems, during closing argument, to make the point that Boone had a motive to lie and was not a credible witness against Hakim:

Well, you heard from Mr. Boone that he had this business agreement and that after Mr. Hakim got arrested, now he's got the business, it's his. I'd suggest to you, it's a financial motive on his part. And I'd suggest to you that now that he's running the business, he has Mr. Hakim out of the way. What else? Mr. Boone -- I'd suggest -- had a convenient memory. How many times did he say, I don't remember? How many times, I don't recall? And I asked him and I showed him so that he could look at it, and again, I don't recall, again and again. A convenient memory. But, of course, on direct examination for the Government, oh, yeah, that's him, no memory problem on direct. Does he have a motive? Does he have a reason to lie? And is he someone, who you would rely on in an important decision in your own lives? And we'll get back to that So, I'd suggest to you that Mr. Boone is not a credible person and is not the sort of person that you should rely on in a case like this of such great magnitude, of such great importance How many lies did he tell to you? And I'd suggest to you, that when you consider and scrutinize his testimony that you should do it concerning the burden of proof, which is beyond a reasonable doubt.

(6/5/02 N.T. at 121-22.) Kozlow brought the inconsistencies in Boone's testimony to the attention of the jury and used those inconsistencies as part of his trial strategy of convincing the jury that Boone had motive to lie, was not a credible witness, and had lied. Although Kozlow did not use the word "perjury" in cross-examining Boone or in referring to Boone's testimony during closing argument, the Court finds that his use of this evidence, and failure to object to it on the ground of "perjury," was not "outside the wide range of professionally competent assistance."

Strickland, 466 U.S. at 690.

Detective Emrich testified at trial, on cross-examination, that he interviewed Boone twice. (6/5/02 N.T. at 45-46.) On the first occasion, Boone came to the police station with Gray, but Detective Emrich met with Boone separately and showed him the Photograph. (Id. at 38, 45.) On the second occasion, Boone came to the police station alone. (Id. at 46.) Detective Emrich also testified that, when he showed the Photograph to Boone, he told Boone that one of the individuals in the Photograph had been identified, but he did not tell Boone who it was. (Id. at 38.) During the April 22, 2002 suppression hearing, Detective Emrich consistently testified that he did not interview Boone and Gray together. (4/22/02 N.T. at 11, 38.) His suppression hearing testimony was not, however, consistent with his trial testimony with respect to what he told Boone before he showed Boone the Photograph. During the suppression hearing, Detective Emrich testified as follows on direct examination:

Q. And did you tell him that you knew who that person was but you didn't know his name, or what did you talk about when you showed him the photographs?

A. I just showed him the photographs and out of these two individuals that are walking up, do you recognize any of those individuals. He immediately pointed straight to this and said well, that's Khalil.

(4/22/02 N.T. at 16.) During the suppression hearing Detective Emrich was also asked, on cross-examination, whether, when he

showed the surveillance photo to Boone, he told Boone "I know who this guy is?" (Id. at 40.) He answered "no." (Id.) At trial, Detective Emrich testified that, when he showed Boone the photograph he "might have said, one had been identified, but I didn't say who it was." (6/5/02 N.T. at 38.) Kozlow did not cross-examine Detective Emrich at trial with his inconsistent testimony from the suppression hearing or object to that testimony on the grounds of perjury. Detective Emrich's trial testimony was, however, more consistent with Kozlow's strategy of demonstrating that Boone had a motive to lie than his suppression hearing testimony had been. Consequently, the Court cannot find that Kozlow's decision not to undermine Detective Emrich's trial testimony by pointing out that it was inconsistent with his previous testimony, or by objecting to it as "perjury," was not sound trial strategy. See Buehl, 166 F.3d at 169. Accordingly, the Court finds that Kozlow was not ineffective for failing to object to Detective Emrich's "perjurious" statements.⁶

⁶Hakim also referred, during the April 21, 2005 hearing on this Motion, to allegedly perjurious statements made by Boone and Emrich during their grand jury testimony. Hakim has not, however, identified any statements made by either Boone or Emrich to the grand jury which are not true. The Court has reviewed Boone's grand jury testimony, which was submitted by Defendant in connection with his Motion to Suppress. (Docket No. 27.) There is nothing in Boone's grand jury testimony which is inconsistent with his trial testimony. Hakim has not provided the Court with Emrich's grand jury testimony in connection with the instant Motion, and said testimony has not otherwise been made a part of the record before the Court. The Court finds, therefore, that Hakim has not met his burden of establishing that Kozlow was ineffective in connection with any allegedly perjurious statements

2. Failure to object to curative instruction

Hakim argues that Kozlow was ineffective for failing to object to the Assistant United States Attorney's introduction of evidence of drug use by the Petitioner and failing to object to the Court's curative instruction to the jury regarding that evidence. The testimony at issue is the redirect examination of James Gray by the Government, during which the Assistant United States Attorney asked Gray a question regarding alleged drug use by Hakim. Kozlow objected to the question and the Court overruled his objection, allowing the following testimony:

Q. Now, also in that same statement and this is D-4 - which you signed on 11/30 of 2001 - just a couple of questions:

Question: Does Khalil smoke rock or do any other drugs?

Answer: -

Mr. Kozlow: Objection

Mr. Miller: Your Honor, it's 106.

The Court: Basis - basis?

Mr. Kozlow: 403.

The Court: Overruled.

Q. Answer: Yes. He smokes, I've seen him smoking crack before. I've seen him take pills, anything that will make him high. Do you remember saying that?

A. Yes.

(6/5/02 N.T. at 77.) The Court later changed its ruling, struck the

made by either Boone or Emrich to the grand jury.

evidence, and gave a curative instruction to the jury. Hakim claims that Kozlow was ineffective in failing to object to the curative instruction. Although Kozlow did not object to the curative instruction given by the Court, he did move for a mistrial on the grounds that a curative instruction would not be sufficient to cure the prejudice to his client caused by this statement. (6/5/02 N.T. at 92.) That Motion was denied. (6/5/02 N.T. at 94.) The Court finds that Kozlow did object to the admission of the evidence in question and that he actively opposed the Court's use of a curative instruction; therefore, the Court further finds that Kozlow's actions with respect to this testimony were not "outside the wide range of professionally competent assistance," Strickland, 466 U.S. at 690, and that Kozlow was not ineffective in failing to object to this testimony or to the Court's curative instruction.

3. Failure to request a Telfaire Instruction

Hakim contends that Kozlow was ineffective in failing to ask the Court to give a "Telfaire Instruction" to the jury regarding identification testimony. In United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), the United States Court of Appeals for the D.C. Circuit discussed the "importance of and need for a special instruction on the key issue of identification, which emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt." Id. at 555. The Telfaire court adopted model jury instructions with

respect to identification which inform members of a jury that they "must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before [they] may convict him." Id. at 558. Kozlow did not ask the Court to utilize the model instruction on identification adopted by the Telfaire court.

The Third Circuit has considered, and rejected, adopting a requirement that the Telfaire instruction be given in cases in which "convictions obviously turn on the testimony of eyewitnesses who are uncertain, unclear, or inconsistent" United States v. Wilford, 493 F.2d 730, 735 (3d Cir. 1974). Although the Third Circuit has recognized that, in such cases, "a cautionary instruction will help to obviate the danger of erroneous conviction," it does not require the use of any particular instruction by the Court. Id. The Third Circuit determined that jury instructions with respect to identification are sufficient if they, "read as a whole, sufficiently direct[] the jury's attention to the Government's burden of proving this broad aspect of 'identification,' that the defendant was the criminal actor, beyond a reasonable doubt." Id. at 734 n.9 (determining that instructions which described the elements of the crime charged sufficiently stated the Government's burden of proof with respect to identification) (citing United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972)).

Defendant has not established that his conviction rested on

"the testimony of eyewitnesses who [were] uncertain, unclear, or inconsistent" Wilford, 493 F.2d at 735. Consequently, there was no necessity for a special cautionary instruction with respect to identification in this case. Id. Moreover, the instructions in this case informed the jury that it must determine whether the Government proved, beyond a reasonable doubt, that the Defendant committed the crimes charged in the Indictment. (6/5/02 N.T. at 141-42, 158-76.) Since the Third Circuit has not adopted the Telfaire instruction, and there was no need for a special cautionary instruction with respect to identification in this case, the Court finds that Kozlow was not ineffective for failing to request a Telfaire instruction.

4. Seqora Ward

Hakim argues that Kozlow was ineffective for failing to object to, and move to exclude, Seqora Ward's testimony describing the second robber who entered the Bank, because the description she gave during trial was different from the description she initially gave the police. Hakim claims that Ward initially described the second robber as a dark-complexioned black male, and changed her description to a light-brown-skinned black male when she saw him in Court. Hakim, who has a beard, also asks the Court to recognize that Ward did not tell the police that the robber she described had a beard.

Ward gave the following description of the second robber to

enter the Bank to FBI Special Agent Tofani on November 28, 2001, the day of the robbery:

Race:	Black
Sex:	Male
Height:	5'9"
Weight:	Approximately 210 lbs.
Complexion:	Light to medium complexion
Facial Hair:	Light Mustache
Clothing:	Grey cotton sweat suit, white t-shirt underneath
Weapon:	Silver Automatic Handgun

(FBI 302, Docket No. 37, Ex. A.) At trial, Ward testified on direct examination that she was able to see the face of the second robber who entered the Bank. (6/3/02 N.T. at 100.) She testified that his complexion was "brown -- light brown", that "[h]e had close-cut facial hair," had distinctive wrinkle marks on his forehead, was heavysset, and was shorter than the first robber who entered the bank. (Id. at 101.) Kozlow cross-examined Ward about the inconsistency in her description of the second robber. (Id. at 106-07.) Ward stated that she told the FBI Agent that the second robber had a "close-cut mustache" and a "full beard," and that she did not tell the FBI Agent that the second robber only had a mustache. (Id.) There is no evidence on the record before the Court that Seqora Ward ever told anyone that the second robber was dark complexioned. Consequently, the Court finds that Kozlow's failure to object to, and move to exclude, Ward's testimony describing the second robber who entered the Bank was not "outside the wide range of professionally competent assistance."

Strickland, 466 U.S. at 690. The Court further finds, accordingly, that Kozlow was not ineffective with regard to Ward's testimony.

5. Defendant's Medical Records

Hakim argues that Kozlow was ineffective for entering into a stipulation with the Government not to enter Hakim's medical records into evidence at trial. Hakim states that Kozlow had medical records documenting knee surgery and emergency room treatment which Hakim had ten days prior to the robbery. Hakim contends that this evidence would have demonstrated that he could not have physically performed actions ascribed by witnesses to the second robber, i.e., jumping over a counter and fleeing the bank. Kozlow testified during the April 21, 2005 Hearing on the instant Motion that his agreement not to use those medical records was part of his trial strategy:

My recollection regarding the medical records is that we got the medical records was [sic] because -- the reason we did was because Mr. Hakim had had I believe it was surgery on one of his knees at some point and there was some evidence of both the surveillance photograph from outside the bank before the robbers put their masks on of one of the robbers moving, it purported to be Mr. Hakim, with a fairly long stride, and there was some evidence from some of the witnesses of the robbers fleeing and running and [sic] after the bank robbery. So the question was whether the knee operation would make it less likely that Mr. Hakim was the robber because one of the robbers was moving fairly well and running. And my recollection was that -- that [at] one of the pretrial hearings we actually bargained away with the Government the medical records issue -- and my recollection is, and I'm not

positive on this, but I believe it was[,] it may have had something to do with the identification by the state trooper of the photograph from the bank surveillance photographs, and that is the Government had wanted to introduce this state trooper to testify that I have reviewed the surveillance photographs from the bank and that's Mr. Hakim. And then the foundation for that, of course I've already explained, was very prejudicial. And my -- my memory, my best memory, and, again I haven't reviewed the whole file, was that we -- there was a quid pro quo where we said, okay, we won't use the medical records but you don't use him, or something along those lines, that there was some deal that was worked out, that's my best memory

I mean, that was a very good deal for us because not having a state trooper get up and testify that the photograph from the bank surveillance cameras is Mr. Hakim was extremely important to us and frankly a critical issue in the case, now we just had two convicted felons who were drug addicts pointing them out, at least one of them was a drug addict. And so I could cross them and I had a good opportunity to go after them, instead of having a law enforcement officer say that's Mr. Hakim in the bank surveillance photographs, it would have been extremely damaging. And the minimal probative value of the medical records, in my view, in my opinion, was far outweighed by the need to keep out the law enforcement officer from identifying Mr. Hakim, that's my best recollection of it.

(4/21/05 N.T. at 36-38.) The Court finds that Hakim has failed to overcome the presumption that Kozlow's decision not to use the medical records was sound trial strategy. Accordingly, the Court also finds that Kozlow was not ineffective with respect to these medical records.

6. Government's request for extension of time

Defendant argues that Kozlow was ineffective for failing to object to the Government's April 10, 2002 Motion for a Continuance. (Docket No. 26.) The Government sought a thirty day continuance of Hakim's trial in order to protect an identification witness for the prosecution, a Pennsylvania state highway patrolman. The patrolman was to testify that he could identify Hakim as a result of an undercover law enforcement operation in Norristown, Pennsylvania. The undercover operation was still ongoing at the time of the Motion, and the Government sought a continuance of the trial to allow the undercover operation to end before the patrolman would have to testify. The Assistant United States Attorney represented to the Court that Montgomery County District Attorney's Office had informed him that, if the patrolman's identity became known prior to the end of the undercover operation, the undercover operation would be jeopardized.

Although Kozlow did not file a response to the Government's Motion, he did object to the continuance on Defendant's behalf. His objection was brought to the Court's attention in the Government's Motion. The Court granted the Motion despite Kozlow's objection. (Docket No. 34.) The Court finds, therefore, that Kozlow was not ineffective for failing to object to the Government's Motion for a Continuance.

7. Request for discharge of counsel

Hakim filed a "Motion to Discharge Counsel and Appointment of Substitute Counsel for Purpose of Sentencing" on August 26, 2002. (Docket No. 73.) The Motion was heard by the Court on September 24, 2002 and withdrawn by Hakim during the hearing. (9/24/02 N.T. at 23-25, Docket No. 76.) Hakim now contends that Kozlow was ineffective in advising him with respect to that Motion.

Hakim filed his Motion to Discharge Counsel on the grounds that Kozlow was ineffective during pre-trial preparation and during trial. (Mot. to Discharge at 2-3.) During the September 24, 2002 Hearing, Hakim described for the Court his claims that Kozlow was ineffective prior to and at trial, and also stated that Kozlow was ineffective because he had not filed certain post-trial motions which Hakim had asked him to file, and which Hakim subsequently filed *pro se*. (9/24/02 N.T. at 5-14.) Hakim also made it clear to the Court that he sought new counsel to assist him in connection with these post-trial motions, which were denied by Order dated September 24, 2002. (Id. at 5.)

The Court informed Hakim that, if his Motion was granted, his sentencing, scheduled for September 30, 2002, would probably have to be continued, in order to allow his new counsel to prepare. (Id. at 20-22.) Hakim expressed a reluctance to continue his sentencing and the Court recessed the hearing to give Hakim an opportunity to consider whether he wanted to withdraw his Motion.

(Id. at 22-23.) Hakim decided to withdraw his Motion, since he didn't believe that "new counsel would be of any assistance because [all of] the post verdict motions have been denied" and because he wanted to proceed with sentencing on September 30, 2002. (Id. at 21, 24.)

Hakim now claims that Kozlow was ineffective in not advising him with respect to his Motion to Discharge. He also claims that the Assistant United States Attorney pressured him to withdraw the Motion to Discharge by threatening, during the recess, to file a Motion for Upward Departure.

Kozlow explained, during the September 24, 2002 hearing, why he did not advise Hakim with respect to the Motion to Discharge:

I just would like to put a few things on the record. I did have an opportunity to speak with him about the procedural posture of the case and his legal rights that exist at this juncture of the case. He has requested in the past that I advise him in terms of my own ineffectiveness. I've told him that the conflict [sic] I really can't do that. It's his motion.

(Id. at 23.) The Court also notes that the issue of a possible upward departure arose during the hearing when Hakim informed the Court that he would object to an upward departure based upon his criminal history. (Id. at 18-19.) The Court informed the Government and Hakim that an upward departure would require prior notice to the parties, and, since prior notice had not been given, the Court would not consider an upward departure. (Id. at 19-20,

25-26.) The Court finds that Kozlow's declining to advise Hakim regarding his own ineffectiveness because of the conflict created by such advice was not "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The Court also finds that Hakim has not presented the Court with any evidence that Kozlow was ineffective in connection with the Government's suggestion that it might request an upward departure. The Court further finds, therefore, that Kozlow was not ineffective in connection with Hakim's Motion to Discharge.

8. Failure to call identification witnesses

Hakim maintains that Kozlow was ineffective in failing to call as trial witnesses people who know him and would testify that he is not depicted in the Photograph. Hakim has not submitted any evidence that there are any individuals who would have been willing to so testify on his behalf at trial. Hakim also has not suggested that he told Kozlow about any such potential witnesses. Consequently, the Court cannot find that Kozlow's failure to call unidentified witnesses was unsound strategy or that such failure prejudiced Hakim's defense. The Court finds, therefore, that Kozlow was not ineffective for failing to call individuals who know Hakim to testify at trial that he was not depicted in the Photograph.

9. Failure to Object to Kaarby Testimony

Hakim argues that Kozlow was ineffective for failing to object

to certain trial testimony of Hain David Kaarby, a car salesman with Elan Imports. Mr. Kaarby testified at trial that he sold a 1992 Lexus to Hakim and his wife, Shannon King, and that Hakim made a partial payment for the car using \$6700 in cash. (6/4/02 N.T. at 15-17.) He also testified that Hakim paid him with crisp hundred dollar bills. (Id. at 18.) Hakim maintains that Kozlow was ineffective for failing to object to the testimony that he paid for the car with \$100 bills on the grounds that there was not any evidence at trial that new, crisp \$100 bills were taken in the robbery.⁷

Kozlow did not object to Kaarby's testimony regarding the money used by Hakim to purchase the Lexus. He did, however, cross-examine Kaarby about that money. During that cross-examination, Kozlow asked Kaarby questions designed to demonstrate that Hakim had obtained the money used to purchase the car through legitimate means:

Q. Okay. And at some point in time during the transaction when you were in the process of selling this car, did you have -- or did you see Shannon King go to a MAC machine to get additional cash to -- to put into the deal?

A. Yes, indeed, somebody did actually go to get some more money from the MAC machine.

⁷Hakim also claims that Kaarby's testimony was perjurious and that Kozlow knew that Kaarby had accused him of passing used counterfeit money. Hakim has not, however, presented any evidence in support of this claim.

Q. Okay. And that would have been, what, about four or five hundred dollars?

A. Four or five, yeah.

Q. Okay. And that somebody was, in fact, Shannon King that went and got the four or five hundred dollars -

A. Yes.

(Id. at 26.) In light of this cross-examination, the Court finds that Hakim has not overcome the presumption that Kozlow's failure to object to Kaarby's testimony regarding the money used to purchase the Lexus was part of a sound trial strategy. See Buehl, 166 F.3d at 169. Consequently, the Court finds that Kozlow was not ineffective with respect to this testimony.

10. Failure to object to jury instruction

Hakim argues that Kozlow was ineffective for failing to object to the Court's jury instruction with respect to the elements of armed bank robbery on the grounds that the instruction did not require the jury to find that the Bank met the definition of a bank at the time of the robbery. Hakim states, correctly, that one of the elements of the offense of armed bank robbery is that the institution from which the money was stolen is a bank as defined in 18 U.S.C. § 2113(f). Section 2113(f) defines the term "bank" to mean any member bank of the Federal Reserve System, any bank organized or operating under the laws of the United States, and "any institution the deposits of which are insured by the Federal Deposit Insurance Corporation." 18 U.S.C. § 2113(f). The jury was

instructed that one of the elements of armed bank robbery which it had to find that the Government had proved beyond a reasonable doubt was that "the bank was an institution, whose deposits were insured by the Federal Deposit Insurance Corporation." (6/5/02 N.T. at 165.) As the instruction given to the jury required the jury to find that the Bank met the definition of "bank" as set forth in Section 2113(f), the Court finds that Kozlow was not ineffective for failing to object to the jury instruction on this element of the offense of armed bank robbery.

For the reasons stated above, the Court finds that Kozlow was not ineffective with respect to any of the actions which form the basis of Hakim's final ten claims of ineffective assistance of counsel. Hakim's Motion is, therefore, denied on these grounds.

IV. CONCLUSION

For the reasons stated above, the Court finds that Kozlow's representation of Hakim prior to his trial, during his trial, and prior to his sentencing was not ineffective. Hakim's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is, therefore, denied. An appropriate order follows.

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

UNITED STATES OF AMERICA : CRIMINAL No. 02-CR-131
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KHALIL ABDUL HAKIM : CIVIL ACTION NO. 04-2582

AND NOW, this 19th day of October, 2005, upon consideration of Khalil Abdul Hakim's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Crim. Docket No. 99), the Government's response thereto, the other documents submitted in connection therewith, and the Hearing held in open court on April 21, 2005, **IT IS HEREBY ORDERED** that the Motion is **DENIED**. As Hakim has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.