

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 97-423-02
vs.	:	
	:	CIVIL ACTION
RAFAEL ABREU, a/k/a “ITO”	:	NO. 00-3964

MEMORANDUM

DuBOIS, J.

September 5, 2002

I.	INTRODUCTION	2
II.	PROCEDURAL HISTORY	3
III.	EVIDENCE PRESENTED AT TRIAL	3
IV.	DISCUSSION	6
A.	Ineffective Assistance of Counsel – Witnesses, Other Evidence, Failure to Assert Conscious Avoidance Defense	7
1.	Standard	7
2.	Trial counsel’s conduct with respect to four potential witnesses did not constitute ineffective assistance of counsel	8
a.	Yimmy Lazala	9
b.	Martha Abreu	13
c.	Jesus Fermin and Eusebio Inoa	16
1)	Reasonableness Inquiry	16
2)	Prejudice Inquiry	17
3.	Trial counsel was not ineffective in deciding not to subpoena Franklin Ferreiras’ New Hampshire driving records	20
4.	Trial counsel was not ineffective in choosing not to request documents evidencing government payments to Franklin Ferreiras	21
5.	Trial counsel’s decision not to employ a conscious avoidance defense did not constitute ineffective assistance of counsel	22
B.	Ineffective Assistance of Counsel – Conflict of Interest and Bias	23
V.	CONCLUSION	28

I. INTRODUCTION

On August 7, 2000, Rafael Abreu filed a Motion under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody based on alleged ineffective assistance of counsel at trial, sentencing, and on appeal. The Court conducted an evidentiary hearing (“hearing”). At the hearing, petitioner withdrew his claims of ineffective assistance of sentencing counsel and appellate counsel. Thus, the Court will only consider petitioner’s ineffective assistance of counsel claims with respect to his trial counsel.

Abreu claims in his Motion that his trial counsel was ineffective on the following grounds: (1) in choosing not to investigate and call at trial four witnesses who would testify that, from August 3 through August 7, 1997, Franklin Ferreiras, a co-defendant, had the opportunity to hide heroin in a secret compartment of Abreu’s car without Abreu’s knowledge or consent; (2) in not subpoenaing the New Hampshire driving records of Ferreiras and documentation regarding Ferreiras’ role as a paid government informant for use on cross-examination; and (3) in failing to employ a conscious avoidance defense. For the reasons set forth below the Court will deny petitioner’s claim of ineffective of counsel on these grounds.

Abreu also claims that his trial counsel was ineffective because he had a conflict of interest caused by counsel’s request for and acceptance of a retainer from Abreu notwithstanding his appointment as counsel under the Criminal Justice Act and trial counsel’s breach of his duty of loyalty to his client as a result of trial counsel’s bias and mistrust of Abreu and his witnesses and belief in Abreu’s guilt. According to Abreu, this conflict of interest resulted in counsel choosing not to introduce testimony and other evidence that Ferreiras had the opportunity to hide the drugs in Abreu’s car without Abreu’s knowledge or consent. For the reasons set forth below

the Court will deny petitioner's claim of ineffective assistance of counsel based on an alleged conflict of interest.

II. PROCEDURAL HISTORY

On September 3, 1997, Rafael Abreu, a/k/a "Ito," Franklin Ferreiras, a/k/a "Emilio Galarza-Montalvo" and "Moreno," Ubaldo Victor Cabrera, a/k/a "Jochi," and Wilma Aurich Peguero-Cruz, were indicted on one count of conspiracy to distribute and possess with intent to distribute in excess of one hundred grams of heroin, in violation of 21 U.S.C. § 846 (Count One), and one count of possession with intent to distribute, and aiding and abetting the possession with intent to distribute, more than 100 grams of heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count Two). Ferreiras was also indicted on one count of false claim of citizenship, in violation of 18 U.S.C. § 911 (Count Three). At petitioner's initial appearance, the Court appointed counsel to represent him under the Criminal Justice Act ("CJA").

Petitioner's co-defendants, Ferreiras, Cabrera, and Peguero-Cruz, pled guilty prior to trial. On March 12, 1998, after a three-day trial, a jury convicted Abreu on Counts One and Two. On September 9, 1998, the Court sentenced petitioner, *inter alia*, to concurrent terms of 63 months imprisonment on Counts One and Two, concurrent terms of four years supervised release, and a \$5,000 fine.

On September 18, 1998, Abreu appealed his conviction to the United States Court of Appeals for the Third Circuit. On August 5, 1999, the Court of Appeals affirmed the conviction.

III. EVIDENCE PRESENTED AT TRIAL

The case arises out of the attempted distribution of heroin found in Abreu's car on August 7, 1997. Abreu denies knowing anything about the heroin in his car. The evidence adduced at

trial with respect to Abreu's role in the attempted distribution of the heroin found in his car on August 7, 1997 was provided by two witnesses, Franklin Ferreiras and Nestora Salcedo. Their testimony is summarized below.

Franklin Ferreiras testified that Juan, a confidential informant, contacted him on July 26, 1997 about providing heroin and cocaine for Miguel, another confidential informant posing as a drug dealer located in Philadelphia. Trial Tr., Mar. 11, 1998, at 48-49. Several days later Ferreiras met Juan in New York City, Trial Tr., Mar. 10, 1998, at 95-97, and they then took a trip to Atlantic City during which they discussed a possible heroin deal. Id.

On Sunday, August 3, 1997, Ferreiras said he met Abreu, whom he knew from the Dominican Republic, by "happenstance" outside a supermarket located at 162nd Street and Broadway. Trial Tr., Mar. 11, 1998, at 57-59, 181. Upon learning from Ferreiras that he was involved in the drug business, Abreu asked to become Ferreiras' partner. Trial Tr., Mar. 11, 1998, at 65. Abreu then offered to give Ferreiras a ride home and hide in a secret compartment of his car \$3,000 or \$4,000 in cash that Ferreiras had on his person. Id. at 61-67. Ferreiras accepted the offer, id., and Abreu placed the cash in the secret compartment of his car and drove Ferreiras home. Id. at 84-85. Ferreiras testified that, although he saw Abreu place the cash in the secret compartment, Abreu did not show him how to open the compartment. Id. at 64.

According to Ferreiras, the following day, Monday, August 4, 1997, he and Abreu met with Juan and discussed obtaining heroin. Trial Tr., Mar. 10, 1998, at 98-101. Ferreiras told Juan that he and Abreu were taking a trip to Massachusetts so that he could obtain a driver's license. Id. at 99-101, 105. Abreu then left the meeting, and Ferreiras and Juan called Miguel. Id. at 100. During the telephone call, they arranged for distribution of drugs in the Philadelphia

area on August 7, 1997 – five kilograms of cocaine and 800 grams of heroin – to be supplied by Ferreiras. Id. at 112-13, 119-121. That evening, Abreu drove Ferreiras and Ferreiras’ nephew to New Hampshire. Id. at 121-23. The next day, August 5, 1997, Ferreiras took a driver’s test and obtained a New Hampshire driver’s license; the three men returned to New York City later that day. Id. at 120-23.

Nestora Salcedo, a government informant, and Ferreiras testified that on August 6, 1997, Abreu picked up Ferreiras, Salcedo, and Juan in his car around noon, drove them to a restaurant, left them at the restaurant and sought out a drug supplier, returned to the restaurant over an hour later, and announced that he had arranged to purchase the heroin. Trial Tr., Mar. 11, 1998, at 135-40, 152, 154-55, 184-85. That evening, according to Ferreiras, Abreu obtained the heroin and placed it in the hidden compartment of Abreu’s car. Trial Tr., Mar. 10, 1998, at 129-33.

Ferreiras and Salcedo testified that on Thursday, August 7, 1997, Abreu drove his car to 178th Street in New York City, where he met Ferreiras, Salcedo, Juan, Wilma Aurich Peguero-Cruz, and Ubaldo Victor Cabrera, a/k/a “Jochi,” Id. at 139-40; Trial Tr., Mar. 11, 1998, at 157-58. After Abreu arrived, the group departed for Philadelphia in two cars. Trial Tr., Mar. 11, 1998, at 159. Peguero-Cruz, a woman whom Abreu had never before met, drove Abreu’s car to Philadelphia and Abreu rode in the car driven by Salcedo. Id. at 159, 190-91. Ferreiras told Abreu that Peguero-Cruz should drive Abreu’s car “[s]o that the drugs wouldn’t be lost. So that no one would go to jail. This way Mr. Abreu wouldn’t go to jail, neither would myself.” Trial Tr., Mar. 10, 1998, at 136. According to Ferreiras, Abreu agreed to this plan. Id. at 136-37.

Salcedo testified that, at a rest stop during their drive to Philadelphia, Abreu commented to Salcedo that she “was going to be satisfied with the merchandise that his people had provided.

And we could make very good deals.” Trial Tr., Mar. 11, 1998, at 160, 191. Salcedo, who was driving the car in which Abreu rode, and Juan, who was riding in Abreu’s car, then directed the cars to the Marriott Hotel in Tredyffrin, Pennsylvania. Trial Tr., Mar. 10, 1998, at 141. Upon their arrival at the Marriott Hotel, Abreu was nervous because Miguel, the individual to whom the drugs were to be delivered, had not yet arrived at the meeting place. Trial Tr., Mar. 11, 1998, at 161. While waiting for Miguel to arrive, the group decided to eat breakfast, and Abreu suggested that the group eat at different tables to avoid stirring up suspicion. Id. at 162. Abreu ate at a table with Peguero-Cruz. Id.

After they finished eating breakfast, Abreu went outside with Peguero-Cruz, while Salcedo, Ferreiras, Jochi, and confidential informants Juan and Miguel met inside the Marriott to discuss the drug transaction. Id. at 162-63. Ferreiras, Cabrera, and Peguero-Cruz then left the Marriott and joined Abreu in the parking lot, where they were all arrested. Trial Tr., Mar. 10, 1998, at 45-46. During a search of Abreu’s car, three black plastic packages containing heroin were discovered in a secret compartment in the dashboard. Id. at 47-55. Drug analysis of the packages revealed that the packages contained 348.9 grams of a mixture containing heroin. Trial Tr., Mar. 12, 1998, at 42.

IV. DISCUSSION

In his § 2255 motion, Abreu challenges his conviction on the grounds that specific conduct of his trial counsel constituted ineffective assistance of counsel and that his trial counsel had a conflict of interest in violation of his Sixth Amendment rights. For the reasons set forth below, the Court rejects these arguments and denies the § 2255 motion.

A. Ineffective Assistance of Counsel – Witnesses, Other Evidence, Failure to Assert Conscious Avoidance Defense

1. Standard

The standard for evaluation of an ineffective assistance of counsel claim was articulated by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective assistance of counsel under Strickland, petitioner must demonstrate that his counsel’s performance (1) “fell below an objective standard of reasonableness,” id. at 688, and (2) that counsel’s deficient performance prejudiced the defendant. Id. at 692. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686.

A court, in determining whether counsel’s performance fell below an objective standard of reasonableness, must evaluate “whether counsel’s assistance was reasonable considering all the circumstances.” Id. at 688. In applying the Strickland test to counsel’s performance, a court must be “highly deferential,” and “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. at 689. The Court must not use the benefit of hindsight to second-guess strategic decisions made by counsel unless they are unreasonable. Id. at 690.

If petitioner satisfies the first prong, he must then establish actual prejudice. To demonstrate actual prejudice, a “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.

2. Trial Counsel’s Conduct With Respect To Four Potential Witnesses Did Not Constitute Ineffective Assistance of Counsel

Abreu first claims that his trial counsel was ineffective in choosing not to investigate and call at trial four material witnesses – Yimmy Lazala, Jesus Fermin, Martha Abreu, and Eusebio Inoa – because the testimony of these witnesses could have established that, on several occasions between August 3, 1997 and August 7, 1997, Ferreiras was in sole possession of Abreu’s car and had the opportunity to place the heroin in Abreu’s car without Abreu’s consent or knowledge.

“In the context of defense counsel’s duty to investigate, ‘strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on the investigation.’” United States v. Gray, 878 F.2d 702, 710 (3d Cir. 1989) (quoting Strickland, 466 U.S. at 690-91). Ineffective assistance cases rarely succeed under this deferential standard where counsel conducts an investigation and decides to discontinue it and not to call a particular witness involved in the investigation, however, a total failure by counsel to investigate constitutes ineffective assistance of counsel. Id. at 711 (“Where the deficiencies in counsel’s performance are severe and cannot be characterized as the product of strategic judgment, ineffectiveness may be clear.”). Even if counsel is deficient in the decision not to conduct a pretrial investigation, a petitioner must show a reasonable likelihood that, but for the deficiency, the result of the proceeding would have been different. Lewis v. Mazurkiewicz, 915 F.2d 106,

115 (3d Cir. 1990).

In the context of trial decisions such as witness selection, “[t]here is general agreement in the case law and the rules of professional responsibility that the authority to make decisions regarding the conduct of the defense in a criminal case is split between criminal defendants and their attorneys.” Government of Virgin Islands v. Weatherwax, 77 F.3d 1425, 1433 (3d Cir. 1996). The American Bar Association Standards are a guide to use in determining whether counsel’s conduct was reasonable. Strickland, 466 U.S. at 688. Section 4-5.2 of the ABA Standard for Criminal Justice (3d ed. 1993), “Control and Direction of the Case,” dictates that the strategic decision of whether to call a witness is one for counsel to make after consultation with his client. ABA Standard 4-5.2(b). A decision that “falls within the realm of ‘strategic decisions’ to be made by the attorney [will] be deficient only if [the attorney] either failed completely to consult with his client or if the decision was inept or incapable of interpretation as sound.” U.S. v. Pungitore, 956 F. Supp. 666, 672 (E.D. Pa.), aff’d, 910 F.2d 1084 (3d Cir. 1998).

The Court considers Abreu’s arguments with respect to each witness in turn.

a. Yimmy Lazala

Petitioner first claims that counsel was ineffective in deciding not to continue investigating and call Yimmy Lazala to testify as a witness at trial. Yimmy Lazala was an attendant at the parking lot in which Abreu kept his car in August 1997, who, according to petitioner, would have testified that he observed Ferreiras in sole possession of Abreu’s car on

August 5, 1997 and August 6, 1997.¹

At the request of petitioner, trial counsel interviewed Lazala by telephone. Hr’g Tr. at 91. During this conversation, according to trial counsel, Lazala gave an account similar to that in his affidavit. By the end of this conversation, however, trial counsel “determined that ... it would have been disadvantageous for [Lazala] to testify.” *Id.* Trial counsel explained, through his testimony at the hearing, that he formed the opinion that Lazala’s testimony “would have been difficult [for the jury] to believe,” *id.* at 92, and thus trial counsel made a tactical decision that further investigation of Lazala was unnecessary and not to call Lazala as a witness at trial. Abreu testified at the hearing that he and his counsel discussed the decision not to call Lazala at trial.²

¹ Lazala did not testify at the hearing. He did, however, provide an affidavit which states, in relevant part, as follows:

1. I witnessed Franklin Ferreiras drive Rafael Abreu’s car on August 5, 1997, to the garage/parking lot located on 165th and 166th Streets and Anderson Avenue (Bronx, New York). In fact on the aforesaid evening I took the keys from Mr. Ferreiras when the Abreu vehicle as [sic] returned that evening at approximately 11:45 pm. [sic]

2. The following evening I had occasion to see Franklin Ferreiras personally at the parking lot area once again, at approximately 11:30 pm. [sic] when he returned the Abreu vehicle once again; specifically, your affiant recalls the date as being August 6, 1997.

3. Early that evening, I witnessed Ferreiras driving Rafael Abreu’s car on the corner of 181st [sic] Street and Amsterdam Avenue, New York (Manhattan). Inside of the vehicle was another male, whom I can not [sic] state who it was because I am unfamiliar with aforementioned person.

² The Court notes that petitioner does not charge trial counsel with failing to consult with him about counsel’s decision not to call Lazala at trial. *Weatherwax*, 77 F.3d at 1436 (explaining that witness selection “should be made only after a lawyer consults with his client.”) (citing ABA Standards § 4-5.2(b); *Strickland*, 466 U.S. at 688).

In his motion, petitioner challenges the reasonableness of counsel's decisions with respect to Lazala, arguing that, before drawing conclusions as to Lazala's credibility, counsel should have interviewed him in person "in a pointed and profound manner" id. at 156, and taken steps to verify Lazala's account, including whether he was in fact employed at the garage in which Abreu kept his car. Id. at 126. According to petitioner, had counsel taken these steps, counsel would have found Lazala credible and called him to testify at trial.

The Court rejects petitioner's arguments; trial counsel's conduct with respect to Yimmy Lazala does not amount to deficient performance. To the contrary, counsel's decisions were the product of counsel's strategic judgment, after adequate investigation, that Lazala lacked credibility and would not make a good witness.

The Court finds that trial counsel has articulated sufficiently detailed and sound reasons for concluding that Lazala's statements regarding his observations of Ferreiras were not believable. See id. at 92, 129. At the hearing, counsel testified that, in describing to counsel what he had allegedly witnessed on August 5th and 6th, Lazala had "difficulty ... remembering certain events surrounding August 5th and the specific incident," id. at 91, or "anything about the night before August 5th or the night after August 6th, 1997 ... [or] what he did a week ago." Id. at 92. Lazala, who, as a parking garage attendant, would have seen numerous cars entering and exiting the garage every day, could not explain to counsel why, during an interview months later, he remembered that at "a certain night at 11:45 ... that Ferreiras dropped Abreu's car off as opposed to Abreu?" Id. at 91. Counsel testified,

[Lazala] couldn't state, for instance: well, I had a conversation with this gentleman and I said why are you driving this car? This is not your car—or some words to that effect that would make it stand out

in his mind . . . Nothing of that nature did he ever convey to me that would make it sound as though he was able to remember and actually articulate this night, this date, this time, this incident months later.

Id. at 92-93. It was on this basis that trial counsel drew the objectively reasonable conclusion that Lazala's statements regarding his observations of Ferreiras were simply "insufficient to establish that [Lazala] had actual knowledge and belief that he saw Ferreiras there at that time."

Id. at 92. The Court's conclusion is not altered by the fact that, at the hearing, counsel did not produce notes of the telephone interview with Lazala because the Court found trial counsel to have a clear recollection of his interview of Lazala.

Moreover, in reviewing Lazala's affidavit, the Court observes that Lazala does not explain why he remembers these events or even how he knew that the individual he allegedly saw driving the car was Franklin Ferreiras. In fact, Abreu presented no evidence to the Court that Lazala even knew Ferreiras.

In light of counsel's determination that Lazala's statements regarding his observations of Ferreiras were not credible and would not hold up at trial, the Court concludes that counsel was reasonable in his decision to not continue his investigation of Lazala and call him as a witness at trial; counsel was not ineffective for this conduct. The Court need not address the issue of prejudice with respect to this witness because petitioner failed to satisfy the reasonableness prong of Strickland.

b. Martha Abreu

Petitioner next claims that counsel was ineffective in not calling his wife, Martha Abreu, to testify as a fact witness at trial.³ In support of his habeas motion, Abreu submitted Martha Abreu's affidavit, the relevant portions of which are as follows:

2. Prior to the commencement of the trial proceedings, I explained to defense counsel ... that my husband and I discussed facts intimate to the criminal action prior to the beginning of the trial. More simply stated, I explained to [trial counsel] that on several occasions I discussed with my husband various discussions he and Franklin Ferreiras had.
3. In the first instance, on August 4, 1997, my husband explained to me that he had met with Franklin Ferreiras and was advised by this person that he would introduce us [my husband and I] to a wholesale distributor in New Hampshire that was reputable and extremely affordable. According to Mr. Ferreiras, my husband would save money and be able to achieve the expansion of our bedega⁴ [sic] that we sought to do for quite some time.
4. The following day, August 5, 1997, my husband, Franklin Ferreiras and his nephew, Ito, drove to New Hampshire so that Franklin could take the road test and further introduce my husband to the wholesale distributor. This fact was made clear to me the previous evening by my husband during a discussion we had, and manifested the following day when my husband left the metropolitan New York City area.
5. My husband returned from New Hampshire on the evening of August 5, 1997, and was extremely frustrated, but explained to me that he intended to return to New Hampshire in "a day or so" to meet the whole [sic] distributor and to purchase some items for the store. My husband further explained to me that he was successful with having been introduced to Ferreiras' employer in New Hampshire, but nothing more.
6. My husband further advised me that Franklin Ferreiras offered him the sum of \$200.00 (two hundred dollars) for the trip to New Hampshire, but my husband declined the gesture but thanked him for his hospitality.

³ At trial, counsel presented the testimony of Martha Abreu as a character witness.

⁴ Bodega is defined as "a shop selling wine." 1 The New Shorter Oxford English Dictionary on Historical Principles 252 (Lesley Brown, ed., Clarendon Press 1993).

7. On August 6, 1997, my husband told me that he was going to Pennsylvania to purchase a new van so that the items we purchased from the wholesale distributor would not only fit, but would ensure that future purchases would not exceed the capacity [sic] of the smaller delapidated [sic] vehicle we owned at the time ...
8. The evening of August 6, 1997, my husband explained to me that Franklin Ferreiras had offered an additional one hundred dollars (\$100.00) for his efforts to take him to Philadelphia so that a van could be purchased. Once again my husband told me that he declined the gesture.

...

12. Keeping in perspective the facts that I was advised by my husband, I must further attest that to the fact that my husband explained to me [sic] that the reason Mr. Franklin Ferreiras offered the one hundred dollars as [sic] a gesture for the second time, was in respect to the fact that Ferreiras claimed that a friend owed him five thousand dollars (\$5,000.00) from gambling in Atlantic City, New Jersey. Therefore, the trip to Philadelphia, Pennsylvania had two purposes: (1) to retrieve the sum of five thousand dollars from a friend; and (2) to assist my husband with the purchase of a van.

Aff. of Martha Abreu, at ¶¶ 2-8, 12.

Without addressing the question required by the first prong of Strickland – whether trial counsel’s representation fell below an objective standard of reasonableness because he did not call her to testify at trial – it is clear that defendant has not satisfied the second part of the Strickland test, that of prejudice. All of Martha Abreu’s proposed testimony is inadmissible hearsay and thus, would have been inadmissible at petitioner’s trial. Federal Rule of Evidence 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Martha Abreu’s affidavit simply recounts what her husband told her about his trips with Ferreiras and related matters. Her proposed testimony is not based on her personal knowledge. Under Federal

Rule of Evidence 802, hearsay statements are inadmissible at trial unless another rule provides otherwise. Petitioner has not identified any rule under which the statements are admissible, and the Court has found none. The Court thus concludes that petitioner was not prejudiced by trial counsel's decision to not call Martha Abreu as a witness because her proposed testimony as to what she was told by her husband would not have been admissible at trial.

At the hearing, petitioner testified that, if his wife had been called as a fact witness at trial, she would have testified beyond what is contained in her affidavit – that she observed her husband give the keys to his car to Ferreiras on Wednesday, August 6, 1997. Martha Abreu did not testify at the hearing.

In presenting evidence of what a proposed witness would have testified to at trial, Abreu was not limited to the presentation of live testimony at a hearing. Abreu was permitted to offer such evidence in the form of affidavits, and he did so. The Court has considered Martha Abreu's affidavit but, because the proffered evidence regarding observation of Abreu giving the keys to the car to Ferreiras on August 6, 1997 was not included in the affidavit, the Court considers it to be unreliable. Such evidence will not be considered by the Court in deciding the habeas motion. See Gray, 878 F.2d at 712 (citation omitted) (in establishing prejudice, petitioner's "showing may not be based on mere speculation about what the witnesses [his attorney] failed to locate might have said ... 'Under usual circumstances, we would expect that ... information [obtainable through adequate investigation] would be presented to the habeas court through the testimony of the potential witness.'").

Moreover, assuming, arguendo, that Martha Abreu would testify that she observed her husband give the keys to his car to Ferreiras on August 6, 1997, such evidence does not, in the

judgment of the Court, raise a reasonable probability that the result of the proceeding would have been different. Thus, petitioner has failed to establish prejudice with respect to the proposed testimony of Martha Abreu.

c. Jesus Fermin and Eusebio Inoa

Finally, petitioner challenges trial counsel's conduct with respect to Jesus Fermin and Eusebio Inoa on the grounds that trial counsel was ineffective in failing to interview and call Fermin at trial and in deciding not to call Inoa as a fact witness at trial.

1) *Reasonableness Inquiry*

There was inconsistent testimony at the hearing as to whether Abreu ever informed counsel that Jesus Fermin possessed knowledge relating to petitioner's defense. Compare Hr'g Tr. at 100 with Hr'g Tr. at 25, 29. Counsel, in support of his argument that he was not ineffective, testified, "I don't recall ever meeting Mr. Fermin ... nor do I recall ever being told of a Mr. Fermin." Id. at 100. Abreu, however, contends that he told counsel Fermin was available to testify "[t]hat he was there when I gave [Ferreiras] the car on Wednesday," id. at 25, but counsel did not interview him. Id. at 29. Fermin's testimony sheds no light on this conflict. His testimony only confirms that counsel never interviewed him, id. at 68, and that he never visited counsel's office. Id. at 67.

The Court concludes that trial counsel did not render ineffective assistance of counsel by failing to interview Jesus Fermin. The Court accepts trial counsel's testimony that petitioner did not inform him that Fermin possessed knowledge relating to petitioner's defense and, as petitioner's testimony conflicts with that of trial counsel on this point, the Court finds defendant's testimony was not credible. In making decisions about whether to interview a

witness, counsel may rely on what his client tells him (or does not tell him). See Levan v. United States, 128 F. Supp. 2d 270, 280 (E.D. Pa. 2001) (citing Lewis, 915 F.2d at 111). “Depending on the defendant’s statements to counsel, the need for further investigation may be considerably diminished or eliminated all together.” Id. (citing Strickland, 466 U.S. at 691). Moreover, as discussed below, petitioner’s argument with respect Fermin fails because petitioner has not shown that he was prejudiced by trial counsel’s failure to interview and call Fermin as a witness. Lewis, 915 F.2d at 115.

With respect to Eusebio Inoa, petitioner asserts that counsel’s decision not to use Inoa as a witness was not based on tactical considerations, but on counsel’s unreasonable belief that the jury would not find Inoa credible because Inoa does not speak English. See Memo. in Support of 28 U.S.C. § 2255 Petition, at 7. Counsel denies this accusation. Hr’g Tr. at 95. The Court rejects petitioner’s argument for several reasons. First, counsel called Inoa at trial as a character witness. That dramatically undercuts petitioner’s argument that counsel did not call him as a fact witness because he believed that the jury would find a non-English speaking witness not credible. Second, the government’s fact witnesses – Ferreiras and Salcedo – testified in Spanish. Finally, petitioner has presented no evidence on this issue beyond his bare assertion that counsel’s decision not to call Inoa resulted from the idea that the jury would find a non-English speaking witness not credible.

2) *Prejudice Inquiry*

The second prong of Strickland requires a petitioner to “establish a reasonable probability – one sufficient to undermine [the Court’s] confidence in the outcome – that the jury’s verdict would have been different if not for counsel’s errors.” Gray, 878 F.2d at 712 (citing Strickland,

466 U.S. at 695). At the hearing, petitioner presented the testimony of Fermin and Inoa in an effort to establish that the defense was prejudiced by the failure to call them as witnesses.

Fermin testified at the hearing that on August 6, 1997 he arrived at the bodega at 3:00 p.m., Hr’g Tr. at 69, and petitioner left the bodega some time after Fermin arrived. Id. at 70. Between 9:30 p.m. and 10 p.m. that evening, Fermin observed petitioner return to the bodega with Ferreiras. Id. at 69-70. Fermin said he witnessed Abreu give Ferreiras keys, which Fermin maintains were the keys to Abreu’s car, and Ferreiras left the bodega alone. Id. at 70-71.

Inoa testified at the hearing that between 9 p.m. and 10 p.m. on August 6, 1997 Ferreiras arrived alone at Abreu’s bodega and spoke with Abreu “about going to buy a van in a better condition than the one they had because the one that we had was a little bit destroyed. And ... Ferreiras said that he knew where to find one for less and better condition and cheaper.” Hr’g Tr. at 54-55, 59. Inoa testified that Abreu was already at the bodega when Ferreiras arrived. Id. at 60.

Viewing the Fermin-Inoa evidence in relation to the record as a whole, the Court concludes that there is not a reasonable probability that but for counsel’s alleged errors with respect to the two of them, the result of the proceeding would have been different.

First, the Court finds that neither witness’ account of the events on August 6, 1997 is credible. Fermin’s hearing testimony regarding the events on August 6, 1997 is contradicted by his own affidavit. He attested in his affidavit that “[o]n August 6, 1997, your affiant witnessed Franklin Ferreiras speaking with Eusebio Inoa, Marta Abreu and petitioner in front of the bodega ... After the discussion, which appeared to be friendly, concluded I witnessed Ferreiras drive away from the bodega in my employer’s car at approximately 10:00 pm [sic].” Aff. of Jesus

Fermin, at ¶¶ 2, 3. At the hearing, however, Fermin admitted on cross-examination that he never saw Abreu’s car on the evening of August 6, 1997.⁵ Hr’g Tr. at 71. Fermin thus could not have witnessed Ferreiras drive away from Abreu’s bodega on the evening of August 6, 1997, as attested to in his affidavit. This contradiction completely undermines Fermin’s credibility because the question of whether Ferreiras was ever in sole possession of Abreu’s car is at the heart of petitioner’s claim that counsel’s performance was deficient.

More importantly, Inoa’s hearing testimony (that Ferreiras and Abreu discussed a non-criminal purpose for their trip to Philadelphia at Abreu’s bodega on the *evening* of August 6, 1997) and Fermin’s hearing testimony (that Abreu gave the keys to his car to Ferreiras at Abreu’s bodega on the *evening* of August 6, 1997) are *directly contradicted* by petitioner’s unequivocal testimony at the hearing that after Ferreiras picked up Abreu’s car on the *morning* of August 6, 1997, Ferreiras did not return to Abreu’s bodega for the rest of the day.⁶ Compare Hr’g Tr. at 46-48 with Hr’g Tr. at 54-55, 59, 70-71.

Further undermining the credibility of Fermin and Inoa is the fact that they contradicted each other at the hearing. Fermin testified at the hearing that Abreu and Ferreiras arrived at Abreu’s bodega on the evening of August 6, 1997, while Inoa testified that Abreu was already at the bodega when Ferreiras arrived at the bodega on the evening of August 6, 1997. Compare Hr’g Tr. at 69-71 with Hr’g Tr. at 59-60. With these contradictions, the Court concludes that such testimony—that of Inoa and Fermin – could not have affected the outcome of the trial.

⁵ Q: “Did you ever see the car that evening [August 6, 1997]? [Fermin]: No.” Hr’g Tr. at 71.

⁶ The Court notes that petitioner did not testify at trial.

Alternatively, even if credible, neither Fermin's nor Inoa's proposed trial testimony casts doubt on the reliability of the guilty verdict. Fermin's proposed testimony, at best, establishes that Ferreiras had possession of Abreu's car after 9 p.m. or 10 p.m. on August 6, 1997. The Court rejects petitioner's contention that this testimony would have changed the outcome of the trial in light of the uncontradicted and direct evidence of Abreu's guilt produced by the government at trial: (1) on the afternoon of August 6, 1997 Abreu sought out and located a source for the heroin; (2) on the evening of August 6, 1997 Abreu obtained and hid heroin in the compartment of his car; and (3) Abreu knew the purpose of the trip to Philadelphia on August 7, 1997 was to distribute the heroin hidden in his car.

Inoa's proposed testimony (that he overheard Ferreiras and Abreu discuss a non-criminal purpose for their trip to Philadelphia at Abreu's bodega on the evening of August 6, 1997), as conceded by petitioner's counsel at the hearing, is admissible, if at all, as a prior inconsistent statement pursuant to Federal Rule of Evidence 613 for the limited purpose of impeaching Ferreiras' credibility. Any such testimony would not have been admissible to establish the truth of what was allegedly said – that Ferreiras told Abreu they were traveling to Philadelphia for the purpose of purchasing a van. Moreover, it is clear from the record that, quite apart from Inoa's proposed testimony, trial counsel vigorously cross examined Ferreiras on credibility issues.

3. Trial Counsel Was Not Ineffective In Deciding Not To Subpoena Franklin Ferreiras' New Hampshire Driving Records

Abreu next contends that his counsel was ineffective in failing to subpoena Ferreiras' New Hampshire driving records because his counsel could have used the records to discredit Ferreiras. The Court disagrees. The trial record establishes that the government introduced

Ferreiras' New Hampshire driver's license at trial. Trial Tr., Mar. 10, 1998, at 122-23 & Gov.'s Ex. 10. Trial counsel had the opportunity to use the records on his cross-examination of Ferreira. In light of the availability of these records at trial, the Court concludes petitioner suffered no actual prejudice as a result of trial counsel's conduct in not subpoenaing the records.

4. Trial Counsel Was Not Ineffective In Choosing Not To Request Documents Evidencing Government Payments To Franklin Ferreira

Abreu also claims that counsel's decision not to request expenditure reports concerning government payments to Ferreira for his testimony at petitioner's trial constituted ineffective assistance of counsel. Petitioner alleges that trial counsel could have used the records to confront Ferreira on cross-examination about his true motive for testifying and cast doubt on his truthfulness.

This argument is without merit because Ferreira was not a confidential informant and there is no evidence that the government paid him any money. To the contrary the trial evidence established that Ferreira testified pursuant to a plea agreement, not as a confidential informant. Trial Tr., Mar. 10, 1998, 169-71 & Gov.'s Ex. 9. Moreover, from the testimony of DEA Agent Adams and the confidential informants, it is clear that Ferreira was the primary target of the DEA operation that resulted in Abreu's arrest on August 7, 1997, not an informant. The Court also notes that the government did, in fact, provide counsel with all information regarding payments made by the government to all confidential informants. In fact, petitioner's counsel made use of the payment information during his cross-examination of confidential informant Nestora Salcedo.

5. Trial Counsel's Decision Not to Employ a Conscious Avoidance Defense Did Not Constitute Ineffective Assistance of Counsel

Finally, Abreu argues that his trial counsel was ineffective in not employing a conscious avoidance defense or requesting a conscious avoidance charge. The Court rejects this claim because the defense of conscious avoidance is inapplicable to petitioner's case; no reasonable defense attorney would have employed a conscious avoidance defense under the circumstances presented.

Petitioner appears to misinterpret the legal definition of conscious avoidance as meaning a lack of knowledge. In giving a conscious avoidance instruction, the jury is told that it "can infer knowledge by defendant of a particular fact if defendant intentionally decides to avoid knowledge of that fact." U.S. v. Adeniji, 31 F.3d 58, 62 (2d Cir. 1994) (citing United States v. Rodriguez, 983 F.2d 455, 457-58 (2d Cir. 1993)). At trial, the government alleged that Abreu had direct knowledge of the heroin stored in his car, but did not charge that Abreu deliberately ignored the possibility that drugs were stored in his car. It would have been unreasonable for a defense attorney to employ a conscious avoidance defense under such circumstances because such an argument would only serve to lower the government's burden by permitting the jury to find that Abreu met the mens rea element of the offense charged if he either had actual knowledge or deliberately ignored the possibility that heroin was hidden in his car. Use of a conscious avoidance charge, which implies knowledge, is also completely inconsistent with Abreu's claim that he lacked knowledge of the drugs in his car.

With respect to this issue, the Court need not address the prejudice prong under Strickland because it concludes that trial counsel's conduct was reasonable. Trial counsel was

not ineffective for not raising the conscious avoidance defense.

B. Ineffective Assistance of Counsel – Conflict of Interest and Bias

In his pro se petition, Abreu argues that trial counsel was ineffective because he labored under a conflict of interest that arose from (1) trial counsel’s alleged request and acceptance of an \$11,000 retainer from petitioner notwithstanding his appointment by the Court as counsel under the CJA and (2) trial counsel’s breach of his duty of loyalty to his client as a result of trial counsel’s bias and mistrust of Abreu and his witnesses and belief in Abreu’s guilt.⁷ Memo. In Support of 28 U.S.C. § 2255, at 11. At the hearing, petitioner acknowledged that counsel’s acceptance of the \$11,000 retainer did not create a conflict of interest. Hr’g Tr. at 164-65. Thus, the Court need only consider petitioner’s allegations that trial counsel breached his duty of loyalty to petitioner as a result of trial counsel’s bias and mistrust of Abreu and his witnesses and belief in Abreu’s guilt.

“The Sixth Amendment guarantees a criminal defendant counsel’s ‘undivided loyalty free of conflict of interest.’” Hess v. Mazurkiewicz, 135 F.3d 905, 910 (3d Cir. 1998) (quoting Government of Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984)). An attorney, whose representation is corrupted by conflicting interests, “breaches the duty of loyalty, perhaps the most basic of counsel’s duties.” Strickland, 466 U.S. at 692.

“[C]ounsel is ineffective if he or she ‘actively represented conflicting interests and an actual conflict of interest adversely affected the lawyer’s performance.’” Hess, 135 F.3d at 910

⁷ Although not addressed by petitioner’s counsel at the hearing, petitioner raises, in his pro se brief, the issue of this Court’s duty to inquire into the alleged conflicts of interest. The Court notes that it was not advised of these alleged conflicts of interest prior to or at trial or prior to or at sentencing.

(quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)). If petitioner succeeds in proving that an actual conflict tainted counsel's performance, we will presume prejudice. Id. If he can only establish the existence of potential conflict, prejudice must be proved. Id.

“An actual conflict of interest ‘is evidenced if, during the course of the representation, the defendant[’s] interests diverge with respect to a material factual or legal issue or to a course of action.’” United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988) (quoting Sullivan v. Cuyler, 723 F.2d 1077, 1086 (3d Cir. 1983)). A petitioner can establish the existence of an actual conflict of interest by “... identify[ing] a plausible defense strategy that could have been pursued, and show[ing] that this alternative strategy inherently conflicted with, or was rejected due to, [trial counsel’s] other loyalties or interests.” Hess, 135 F.3d at 910 (citing Gambino, 864 F.2d at 1070).

A conflict of interest also arises where “[a] defense attorney ... abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction ... [because s]uch an attorney, unlike unwanted counsel, ‘represents the defendant only through a tenuous and unacceptable legal fiction.’” Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988) (quoting Faretta v. California, 422 U.S. 806 (1975)); see also United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) (holding that an attorney who abandons his duty of loyalty to his client may by so doing create a conflict of interest).

As discussed previously, Abreu argues that his attorney should have advanced the defense theory that, on several occasions between August 3, 1997, and August 7, 1997, Ferreiras was in sole possession of Abreu's car and had the opportunity to place the heroin in Abreu's car without Abreu's consent or knowledge. Even assuming that satisfies the first prong of Gambino – a

plausible defense strategy that could have been pursued – Abreu must, in order to establish an actual conflict of interest, also prove that the failure to advance the alternative defense “... [was] inherently [in] conflict[] with, or was rejected due to, [trial counsel’s] other loyalties or interests.” Hess, 135 F.3d at 910 (citing Gambino, 864 F.2d at 1070).

There is no evidence of any such “other loyalties or interests” in this case. Abreu’s purported evidence of such a conflict of interest falls far short of meeting the burden imposed on him under the foregoing authority.

To satisfy the second prong of the Gambino test, Abreu, in his pro se brief, claims that counsel told him “that things would be done [trial counsel’s] way [with respect to which material witnesses would be called to testify at trial,]” and “you’re guilty ... I’ll convince the jury ... but don’t try to bring me witnesses because I believe the evidence against you ...” and, on the final day of the trial, “I personally believe you knew about the drugs ... so don’t ask me to perform a miracle.” Memo. in Support of 28 U.S.C. § 2255 Petition, at 11. He further alleges that, prior to trial, trial counsel “utilized expletives” to express his distaste for petitioner. Id. Abreu also testified at the hearing that he asked counsel to allow him to testify at trial, and in response counsel said “[y]ou have to follow what I’m telling you because I’m the one who knows, because you know [in] the back of your mind that all Hispanics and blacks come to this country to sell drugs.”⁸ Hr’g Tr. at 30. As a result of that statement, Abreu says he did not take the witness stand at trial. Id.

The foregoing statements were denied by counsel, id. at 105-08, and the Court finds

⁸ Abreu makes a similar allegation in his brief – that trial counsel told him “that spanish [sic] and blacks sell dope and cocaine.” Memo. in Support of 28 U.S.C. § 2255 Petition, at 11.

counsel to be credible. Moreover, the first three statements – the “that things would be done [trial counsel’s] way” statement, the “you’re guilty ... I will convince the jury ...” statement, and the “... I personally believe you knew about the drugs ... so don’t ask me to perform a miracle” statement – even if true, at best for Abreu, show nothing more than counsel told Abreu the evidence against him was strong, but that counsel would do his best to convince the jury of Abreu’s innocence, with credible evidence, but not evidence counsel did not believe to be credible or advantageous to Abreu’s case. This conclusion is supported by trial counsel’s testimony at the hearing that, prior to trial, in response to his request for documents corroborating Abreu’s version of the events at issue, Abreu presented him with doctored documents – documents that “looked to [trial counsel] like they were made up.” Hr’g Tr. at 89. Trial counsel responded by throwing the documents in the trash; Abreu did not object to that decision. According to trial counsel, “... there was no way I way going to get involved in that area that would seem to me highly suspect with regards to those documents.” Id.

Nor do trial counsel’s alleged use of expletives evidencing a dislike for petitioner demonstrate an actual conflict of interest. An allegation, if proven true, that trial counsel “did not like [petitioner] or did not trust him does not rise to the level of a conflict of interest. Personality conflicts are not conflicts of interest.” Hale v. Gibson, 227 F.3d 1298, 1313 (10th Cir. 2000) (citing Morris v. Slappy, 461 U.S. 1, 13 (1983)); see also United States v. Porter, 924 F.2d 395, 398 (1st Cir. 1991) (“... a personality conflict, in and of itself, [does not] show ineffective assistance.”).

Finally, Abreu argues that the last statement – in response to his request to testify at trial, trial counsel told him “[y]ou have to follow what I’m telling you because I’m the one who

knows, because you know [in] the back of your mind that all Hispanics and blacks come to this country to sell drugs”— was evidence of bias against Hispanic and Blacks and caused him to not testify at trial. Based on this statement Abreu asks the Court to rule that trial counsel was so biased against him during the trial that even absent specific incidents of ineffectiveness, the Court must presume that the bias resulted in prejudice. Whether petitioner’s bias argument is construed as one arguing that trial counsel’s alleged bias constituted a conflict of interest that adversely affected trial counsel’s performance, Cuyler v. Sullivan, 446 U.S. at 350, or one seeking application of the per se presumption of prejudice under United States v. Cronin, 466 U.S. 648, 658-59 (1984) on the ground that trial counsel constructively denied counsel to his client, the argument fails because this case does not present either situation.

In advancing his bias argument, Abreu relies on Frazer v. United States, 18 F.3d 778, 784 (9th Cir. 1994), a case in which an indigent defendant alleged that his appointed counsel called his client a “stupid nigger son-of-a-bitch, and said he hope[d his client] get[s] life. And if [his client] continue[d] to insist on going to trial [his client would] find him to be very ineffective.” Id. at 780. In short, counsel in Frazer told defendant he was not going to defend him. Those allegations in Frazier led the Ninth Circuit to remand for the purpose of conducting an evidentiary hearing, and properly pointed out that the allegations, if proven, would “render so defective the relationship inherent in the right to counsel guaranteed by the Sixth Amendment that [defendant] would be entitled to a new trial with a different attorney.” Id. at 784. The Court rejects Abreu’s argument based on Frazer.

The facts in this case are not even remotely similar to the facts presented to the court in Frazer. In this case the Court conducted an evidentiary hearing and concluded that counsel’s

denial that he made the alleged statements was credible. Moreover, contrary to the allegations in Frazer, trial counsel vigorously defended this case and, as discussed above, made pretrial investigation and witness selection decisions based on tactical considerations. See United States v. Taylor, 139 F.3d 924, 930 (D.C. Cir. 1998) (quoting United States v. Bruce, 89 F.3d 886, 893 (D.C. Cir. 1996) (citations omitted)) (Courts “generally [have] been reluctant to allow defendants to ‘force their ineffective assistance claims into the actual conflict of interest framework ... and thereby supplant the strict Strickland standard with the far more lenient Cuyler test.’”). There is no evidence of any conflict of interest – no evidence that trial counsel represented conflicting interests or that an actual conflict of interest adversely affected his performance – and no evidence of bias such as was before the court in Frazer.

With respect to the reasons for defendant deciding not to testify, the trial record is clear and does not support Abreu’s argument. Abreu testified, during a colloquy out of the presence of the jury, that he understood he had a right not to testify, and that he had discussed the case and his decision to testify or not to testify with trial counsel, and that he decided not to testify. Trial Tr., Mar. 12, 1998, at 87. He also testified at that time that no one threatened him, promised him, or forced him to give up his right to testify, and that he was giving up the right to testify at his own free will. Id. On this basis, the Court rejects Abreu’s argument with respect to counsel’s advice that he should not testify.

V. CONCLUSION

For the foregoing reasons, the Court denies Rafael Abreu’s Motion under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.

An appropriate order follows.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 97-423-02
vs.	:	
	:	CIVIL ACTION
RAFAEL ABREU, a/k/a "ITO"	:	NO. 00-3964

ORDER

AND NOW, this 5th day of September, 2002, upon consideration of petitioner Rafael Abreu's Motion under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Document No. 170, filed August 7, 2000), petitioner's Memorandum in Support of 28 U.S.C. § 2255 Petition (Document No. 173, filed October 4, 2000), the Government's Response to Defendant's Section 2255 Petition (Document No. 177, filed January 12, 2001), and the evidentiary hearing held by the Court on September 20, 2001, **IT IS ORDERED** that petitioner's Motion under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is **DENIED**.

BY THE COURT:

JAN E. DUBOIS, J.