

intentionally intruded into the attorney-client relationship by compelling Alan Heldon to disclose the contents of a report containing defendant's trial strategy; (2) that trial counsel was ineffective for failing to (a) conduct a pre-trial investigation that would have proven that Marc Cohen was not a co-conspirator; (b) interview seven potential witnesses; (c) object to Cohen's status as a co-conspirator; (d) object to or move to suppress certain evidence; (e) raise the issue of prosecutorial misconduct in the allegedly surreptitious recording of defendant's post-indictment conversations with a cooperating co-defendant; (f) object to or move to suppress the recorded conversations; (g) object to that portion of the jury charge stating that the conversations were properly recorded; and (h) prevent the jury from retiring with a factually inaccurate impression; and (3) that appellate counsel was ineffective for failing to raise the issues of (a) the government's refusal to stipulate to Fed. R. Evid. 404(b) evidence; (b) the admissibility of the recorded conversations; (c) prosecutorial misconduct regarding the recorded conversations; and (d) error in the jury charge's reference to the propriety of the recordings.

The above-listed grounds for relief are rejected for the following reasons:

1. Intentional intrusion into the attorney-client relationship – Defendant claims that the government improperly learned his trial strategy – that the seized chemicals could be used to manufacture legal substances – by compelling Alan Heldon,

"a member of the defense team," to reveal the contents of a report Heldon prepared for defendant's then-attorney Francis Recchuiti,³ petition, at 1.

The sixth amendment is . . . violated when the government (1) intentionally plants an informer in the defense camp; (2) when confidential defense strategy information is disclosed to the prosecution by the government informer; or (3) when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant.

United States v. Costanzo, 740 F.2d 251, 254 (3d Cir. 1984), cert. denied, 472 U.S. 1017, 105 S. Ct. 3477, 87 L. Ed.2d 613 (1985).

Here, it does not appear that Heldon was a government informer. Rather, Heldon was a potential government witness – a fact defendant was aware of as early as September 15, 1993, government's response, appendix [app.], at 664a, 673a, 681a – as well as a potential defense witness, id. at 666a, 679a. Nor does it appear that the government "intentionally plant[ed]" Heldon in "the defense camp." According to Heldon's affidavit, he prepared the report at Mr. Recchuiti's request on November 22, 1993. Heldon aff., at 1. The government did not approach Heldon until "December of 1993 or early 1994." Id.

³ On December 22, 1993 Francis Recchuiti, on the government's motion, was disqualified as defendant's attorney because of his representation of two government witnesses. See memorandum and order dated December 22, 1993, ¶ 4. Defendant also retained Mr. Recchuiti to defend Alan Heldon in Montgomery County, Pennsylvania, on charges involving the manufacture of aminorex. Id. ¶ 7.

Also, at the time of the alleged intrusion, defendant's trial strategy was not confidential. On September 15, 1993 – some two and a half months before the government asked Heldon about the report and six months before trial – Mr. Recchuiti noted during the proceedings resulting in his disqualification as defense counsel that defendant's possession of the seized chemicals was not illegal. Response, app., at 696a. On December 7, 1993 defendant's memorandum in opposition the government's motion in limine stated that defendant intended to manufacture "legal substances." Id. at 888a (emphasis in original).

Finally, defendant can not point to any prejudice arising from the government's knowledge of the contents of the report. At trial, the government agreed that the seized chemicals could be used to manufacture legal substances, id. at 545a. The issue at trial was whether defendant intended to manufacture aminorex from chemicals that admittedly could also be used to manufacture uncontrolled substances.⁴

2. Ineffective Assistance of Trial Counsel

a. Failure to conduct pre-trial investigation –

An ineffective assistance claim requires –

⁴ United States v. Levy, 577 F.2d 200 (3d Cir. 1978) and United States v. Morrison, 602 F.2d 529 (3d Cir. 1979), rev'd, 499 U.S. 361. 101 S. Ct. 665, 66 L. Ed.2d 564 (1981) are not helpful. In Levy, the government placed an informer in defense strategy meetings, 577 F.2d at 204-05; in Morrison, the government communicated with defendant without the knowledge or permission of her attorney, 602 F.2d at 530. Neither situation occurred here.

First, the petitioner must show that his or her counsel's performance was deficient — that, under all the circumstances, the attorney's representation fell below an objective standard of reasonableness. . . . Claimants must identify specific errors by counsel, and we must indulge a strong presumption that counsel's conduct was reasonable.

Second, the petitioner must show prejudice. . . . [A] petitioner must demonstrate a reasonable probability that, but for the unprofessional errors, the result would have been different.

Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992), cert. denied, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed.2d 746 (1993).

Petitioner has not shown that counsel's representation was deficient. The petition states that a more thorough pre-trial investigation "would have revealed that Marc Cohen was not a co-conspirator." Petition, at 2. Petitioner points to no evidence, however, to undermine the evidence adduced at trial. Count I of the superceding indictment charged that "[f]rom in or about June, 1993, to on or about August 2, 1993 . . . defendants Samuel Allen, Mark [sic] Cohen, Daniel Heath, Jerrold Berkes and Steven Martino⁵ did knowingly and willfully conspire . . . to manufacture . . . aminorex." The superceding indictment also stated that, on July 14, 1993, Cohen placed an order for and had a driver unwittingly transport cyanogen bromide. Superceding indictment, at 2, ¶ 2. Cohen admitted this in his testimony at trial, and the driver provided corroborative testimony. Response, app., at 207a, 380a-382a. Cohen's cooperation did not begin until after federal agents

⁵ Cohen, Heath, Berkes, and Martino all pleaded guilty and testified for the government at Allen's trial.

had stopped the driver. Id. at 382a, 211a. Cohen, therefore, participated in the charged conspiracy, and counsel's failure to argue otherwise was not objectively unreasonable.

b. Failure to interview seven potential witnesses – The petition states that counsel should have interviewed “Pat Mozanti, Walter Kauger, Sid Cohen, Mike Walker, Phil (last name unknown), Montreal Collins, and Alan Heldon” as potential witnesses to impeach Marc Cohen's testimony and to suggest that the seized chemicals could be used to manufacture legal substances. Petition, at 2-4.

The government's case against defendant consisted of (1) the testimony of defendant's four co-conspirators – Cohen, Heath, Berkes, and Martino; (2) photographic surveillance of defendant, response, app., at 378a-379a; (3) defendant's recorded statements to Cohen pre-arrest, id. at 213a-230a, 619a-626a, 631a-645a, and to Heath post-arrest, id. at 421a-425a, 646a-652a; (4) aminorex seized from the Quakertown, Pennsylvania, manufacturing site, id. at 40a, 144a, 372a-374a, 389a-390a; (5) precursor chemicals seized from defendant, id. at 379a; and (6) DEA expert testimony,⁶ id. at 536a. The testimony of each co-conspirator implicated defendant in the manufacture of aminorex, see, e.g., id.

⁶ Defendant attempted to counter the DEA expert testimony with an expert who stated that defendant could have been manufacturing legal substances, but, on cross-examination, the expert admitted that several other chemicals – ones not included on defendant's ingredient list and never mentioned by defendant or any of the co-conspirators – would have been necessary to produce the legal substances. Response, app., at 608a-610a.

at 18a-29a, 35a, 38a, 43a (Martino); 125a, 133a (Berkes); 192a-195a (Cohen); 404a-405a, 414a (Heath), and corroborated the testimony of the other co-conspirators. The physical evidence, in turn, corroborated the co-conspirators' testimony. In short, the evidence against defendant was overwhelming.

As noted above, the government did not contest that legal substances could be manufactured from the seized chemicals. Even assuming the seven above-listed individuals would have testified as defendant suggests, he can not show – given the evidence adduced at trial – that he was prejudiced by the lack of their testimony. See Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S. Ct. 838, 842, 122 L. Ed.2d 180 (1993) (no Sixth Amendment violation without a showing that counsel's errors undermined the reliability of the verdict); cf. United States v. Wong, 78 F.3d 73, 82 (2d Cir. 1996) (cumulative impeachment evidence that does not undermine confidence in verdict is insufficient to warrant new trial); United States v. Kozak, 438 F.2d 1062, 1067 (3d Cir.) (same), cert. denied sub nom. Shopa v. United States, 402 U.S. 996, 91 S. Ct. 2180, 29 L. Ed.2d 162 (1971).

c. Failure to object to Marc Cohen's status as a co-conspirator – See supra ¶ 3. It is not ineffective assistance to fail to make a frivolous objection.

d. Failure to object to or move to suppress evidence – The petition asserts that counsel should have objected to or moved to suppress evidence seized from the St. Peters, Pennsylvania, laboratory site on the ground that co-conspirator Heath had rented

the property as defendant's agent. However, there is no "co-conspirator" exception to Fourth Amendment standing rules, see United States v. Padilla, 508 U.S. 77, 82, 113 S. Ct. 1936, 1939, 123 L. Ed.2d 635 (1993), and defendant can not base a claimed violation of his own Fourth Amendment rights on an alleged violation of Heath's.⁷ Moreover, this physical evidence merely corroborated the testimony of the co-conspirators as to the St. Peters laboratory. Counsel's failure to object here did not constitute objectively ineffective assistance; nor was it prejudicial to defendant.

e. Failure to raise the issue of prosecutorial misconduct regarding post-indictment recordings – It was stipulated at trial that defendant was aware of and consented to having his telephone calls recorded. Response, app., at 421a-422a. As the government's response notes, the conversations were consistent with the "legal substance" defense offered at trial. Id. at 15; app., at 646a-652a.

f. Failure to object to or move to suppress recorded conversations – See supra ¶ 6. Moreover, given the evidence adduced at trial, the suppression of this evidence would not undermine the reliability of the verdict, see supra ¶ 3. See Lockhart v. Fretwell, 506 U.S. at 369, 113 S. Ct. at 842.

⁷ The assertion in defendant's reply brief that a typographical error resulted in the statements that Heath was the tenant of the St. Peters property and defendant's agent, reply, at 27 n.3, is rejected as frivolous.

g. Failure to object to jury charge that conversations were properly recorded – See supra ¶ 6-7.

h. Failure to prevent jury from retiring with a “factually inaccurate impression,” petition, at 7 – This argument – a reformulation of the contention that defendant could have been manufacturing legal substances – was rejected by the jury.

3. Ineffective Assistance of Appellate Counsel

a. Government’s refusal to stipulate to Fed. R. Evid. 404(b) evidence – Defendant has presented no authority for the contention, petition, at 9, that it was improper for the government to present evidence by live testimony rather than by stipulation. It was not objectively unreasonable to fail to make this frivolous argument on appeal.

b. Admission into evidence of recorded conversations – See supra ¶¶ 3, 6-7.

c. Prosecutorial misconduct regarding recorded conversations – See supra ¶ 6-7.

d. Jury charge regarding propriety of recorded conversations – See supra ¶¶ 6-7.

Accordingly, the petition must be rejected.⁸

⁸ On August 9, 1998 defendant moved to amend the petition in light of United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998). Singleton, however, is not the law in this Circuit and is no longer the law in the Tenth Circuit. On July 10, 1998 the Tenth Circuit granted rehearing en banc and vacated the opinion. The opinion is, in any event, both factually and legally distinguishable.

Edmund V. Ludwig, J.