

I. FACTS AND PROCEDURAL HISTORY

On February 10, 1995, the United States Customs Service ("Customs") at the Cyril E. King Airport on St. Thomas seized twenty-four kilograms of cocaine from a suitcase owned by Jennifer Lynch ("Lynch") who was on her way to Atlanta, Georgia. Lynch was arrested pursuant to a warrant when she arrived in Atlanta.

Lynch agreed to cooperate and informed the agents that Allan Petersen ("Petitioner") had directed her to: take the suitcase carrying the cocaine to Atlanta; check into a room at the Days Inn; call him at a Virgin Islands telephone number; leave the bag with the cocaine in the room; return the key to the front desk in an

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7. Opposition of the United States to Petitioner's Motion for Addendum ("Opp'n to Addendum");
 8. Petitioner's Objections and Traverse Against the Government's October 29, 1999 Response in Opposition to Petitioner's Motions of Addendum ("Second Objection to Opp'n");
 9. Petitioner's Motion to Include Supplement Pleadings Pursuant to Federal Rules of Civil Procedure, Rule 15(D) to Pending 28 U.S.C. § 2255 Motion ("Mot. to Include");
 10. Petitioner's Motion to Include Suppl[e]mental Pleadings Pursuant to Federal Rules of Civil Procedure, Rule 15(D) to Pending 28 U.S.C. § 2255 Motion ("Second Mot. to Include");
 11. Government's Response in Opposition to Successive Petitions Under 28 U.S.C. § 2255 ("Opp'n to Successive Pet."); and
 12. Petitioner's Response and Traverse Brief in Opposition to the Government's Response in Opposition to Successive Petitions Under 28 USC § 2255 ("Resp. and Traverse").

Petitioner filed two distinct motions for addendum on February 9, 1999 and June 11, 1999 respectively. The Magistrate Judge ordered that "Petitioner's Motion to file Addendum is **GRANTED**" and gave the government an opportunity to respond. (*Petersen v. United States*, Order dated September 17, 1999.) The Order did not specify whether one or both motions were granted. The government filed an opposition which responded only to the June 11th Motion for Addendum. In the interest of fairness, the Court will construe the Magistrate Judge's September 17, 1999 Order as granting both Petitioner's February 9, 1999 and June 11, 1999 motions for addendum.

envelope for "Melvin Smith" or "Cousin Melvin Smith"; leave the Days Inn; check into another hotel for the night; and return to St. Thomas the following day.

Lynch, accompanied and monitored by agents, checked into the Days Inn where she made a monitored telephone call to Petitioner and gave him the hotel room number.² As instructed by Petitioner, Lynch then left an envelope containing the room key at the front desk for "Cousin Melvin Smith." Customs officials left an empty suitcase in the hotel room and set up surveillance.

Melvin Thomas ("Thomas") went to the Days Inn, retrieved the envelope that Lynch had left for "Cousin Melvin Smith," and entered the room. Thomas was arrested when he exited the room. Thomas' pager had the same telephone number at which Lynch had called Petitioner from the hotel room. Petitioner's phone records also showed several calls to Thomas' home, pager and cellular phone on the day of his arrest.

Lynch pled guilty to conspiracy prior to trial. Petitioner and Thomas were tried together under an indictment that alleged, *inter alia*, that on or about February 3, 1995 to February 10, 1995, the defendants conspired to possess and distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Lynch testified on

² The Federal Bureau of Investigations ("FBI") recorded Lynch's telephone call to Petitioner, but the tape "lapped". (Tr. Vol. II at 65, 69, 71-73.)

behalf of the government and denied knowing Thomas. She maintained, however, that Petersen had offered to pay her to take the cocaine to Atlanta. Petersen took the stand in his own defense and denied involvement in the conspiracy.

Following a trial by jury from December 4-7, 1995, Petitioner was convicted of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846, and sentenced to 188 months imprisonment. Petersen appealed to the Court of Appeals for the Third Circuit ("Court of Appeals") (No. 96-7477).³ On the advice of counsel, Michael Joseph, Esq., Petersen gave his written consent to the dismissal of his appeal. The Court of Appeals dismissed the matter on May 20, 1997. Petitioner timely filed the instant *pro se* motion on March 27, 1998.⁴

II. Discussion

A. Issues and Applicable Standards

³ Thomas also appealed his conviction to the Court of Appeals for the Third Circuit. That Court found that there was insufficient evidence to sustain Thomas' conviction and remanded the matter for this Court to enter a judgment of acquittal. *United States v. Thomas*, 114 F.3d 403 (3d Cir. 1997). The appellate court took issue with the fact that: (1) there was no evidence that Thomas had any prior relationship with Lynch or Petersen; (2) Lynch and Petersen both denied knowing Thomas; (3) the record did not reflect the substance of the calls made to Thomas' home, cellular phone or pager; and lastly, (4) the government's evidence did not controvert what Thomas told the agents following his arrest about his reasons for going to the Days Inn. *Id.* at 405-06.

⁴ The Honorable Thomas K. Moore recused himself from this matter on October 29, 2002, and this matter was transferred to the undersigned.

Petitioner's § 2255 motion raises the following general issues as well as other related issues which will be discussed seriatim:

- 1) Whether the assistance rendered by retained trial counsel, Leonard B. Francis, Jr., Esq., fell below the level of effectiveness required by the Sixth Amendment, and resulted in substantial prejudice warranting mandatory reversal of Petitioner's conviction.
- 2) Whether the government violated the *Brady* rule, thereby warranting reversal of Petitioner's conviction.
- 3) Whether the actions of Michael Joseph, Esq. in filing and perfecting Petitioner's appeal were prejudicial and tantamount to ineffective assistance in violation of the Sixth Amendment.
- 4) Whether in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the indictment was defective in failing to charge essential elements of the offense, requiring that Petitioner's sentence be vacated.

Section 2255 permits a court to afford relief "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." 28 U.S.C. § 2255. To prevail on this § 2255 motion alleging constitutional error, Petitioner must establish an error of constitutional magnitude which had a substantial and injurious effect or influence on the proceedings. See *United States v. Goode*, 143 F. Supp. 2d. 817, 820 (E.D.Mich. 2001) (citation omitted). Even an error that may justify a reversal on

direct appeal will not necessarily sustain a collateral attack. See *United States v. Addonizio*, 442 U.S. 178, 184-85, 99 S.Ct. 2235, 2239-40 (1979). A § 2255 motion simply is not a substitute for a direct appeal. See *United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 1594 (1982).

When alleging ineffective assistance of counsel, Petitioner must satisfy the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). First, Petitioner must show that, considering the facts of the case, his counsel's challenged actions were unreasonable. *Id.* at 690. The Court must review Petitioner's claim under the "strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance; that is, [Petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 688. Second, Petitioner must show that he was prejudiced by counsel's conduct in that there is a "reasonable probability" that deficient assistance of counsel affected the outcome of the proceeding at issue. *Id.* at 694-95. This Court is mindful of the fact that

given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial.

United States v. Hasting, 461 U.S. 499, 508-09 (1983).

Where the record is sufficient to allow a determination of ineffective assistance of counsel, an evidentiary hearing to develop the facts is not needed. See Rules Governing Section 2255 Proceedings, Rule 8; *United States v. Headley*, 923 F.2d 1079, 1083 (3d Cir. 1991). In this case, however, an evidentiary hearing was needed to develop facts not in the record.⁵ Accordingly, the Court appointed Eric S. Chancellor, Esq. to represent Petitioner at the hearing scheduled for October 10, 2003. See *United States v. Iasiello*, 166 F.3d 212, 213 (3d Cir. 1999); 18 U.S.C. § 3006A(g).

B. Assistance of Trial Counsel, Leonard B. Francis, Jr., Esq.

1. Trial counsel did not err in failing to disclose and seek the removal of a juror, Tilford Penn, who was Petitioner's "distant relative".

To give some background on this issue, Petitioner explained that he had an extramarital affair and child with Guarina Mendez ("Mendez") the stepdaughter of his distant cousin, juror Tilford Penn ("Penn"). Petitioner advised his counsel, Leonard B. Francis, Jr., Esq. ("Att'y Francis"), of his distant relationship with Penn and allegedly made "subtle attempts" to have Att'y Francis move for Penn's removal. (Mot. to Vacate at 3.) According to Petitioner, Att'y Francis advised him that Penn's presence on the jury could be

⁵ The October 10, 2003 evidentiary hearing developed facts related to: (1) the relationship, if any, of Leonard B. Francis, Esq. to the government's witness, Jennifer Lynch; and (2) Michael Joseph, Esq.'s representation of Petitioner on appeal.

beneficial.

Petitioner admits that he did not inform Att'y Francis of the extent of his relationship with Penn, or that they were "not on good terms." (*Id.*) Petitioner candidly states that he was reluctant to disclose the relationship with Penn for fear of public embarrassment, and not wanting his wife to find out about his affair and newborn baby with Mendez.

Petitioner alleges that Penn was in an "emotional state to seek retribution," (*id.* at 7), and was intent on not "discharg[ing] his duty as a juror with honesty and integrity." (*Id.* at 8.) Interestingly, Petitioner later suggests that Penn had wanted to find him not guilty, but was convinced to vote guilty by other jurors. (Mot. to Supplement at 17 and Ex. E.)

Without question, Att'y Francis knew of Petitioner's distant relationship with Penn as evidenced by his letter to Petitioner after trial:

In our discussion on January 11, 1995, you outlined the fact that a distance [sic] cousin, was on the jury that rendered a verdict of guilty of conspiracy against you. The same jury failed to decide on Counts II and Count III.

The fact is your tardy disclosure may have compromise any success in the matter.

While this motion appeared to have a ray of success, initially it is very doubtful and credible that you only saw or recognize him at that moment. . . .

I remind you that I knew that Mr. Penn was distantly related and that he was one of the jurors [sic] that we wanted.

(*Id.* at Ex. A) (emphasis added).⁶

Att'y Francis made a strategic decision not to seek Penn's removal. The record before this Court supports a finding, however, that Petitioner disclosed the "venomous" nature of his relationship with Penn after his conviction. Now Petitioner seeks to use information that he knowingly withheld during trial as a basis upon which to vacate his conviction. Relying on *United States v. Gootee*, 34 F.3d 475, 479 (7th Cir. 1994), the government argues that Petitioner cannot remain silent gambling on a favorable verdict, and then complain in a post-trial motion that he was denied his Constitutional right to an unbiased jury. (Gov't Resp. at 3.) The Court agrees.

While it is clear that Penn knew Petitioner, there is no *per se* implied bias. Merely knowing a defendant does not, standing alone, constitute a sufficient showing of bias requiring excusal for cause.⁷ The trial judge instructed the jury panel as follows:

⁶ While the January 29, 1996 letter from Att'y Francis makes reference to a discussion on January 11, 1995, that date appears to be a typographical error, and should read 1996. The Court notes from the content of the letter that it was written after the December 1995 jury trial and resulting guilty verdict.

⁷ See, e.g., *United States v. Kelton*, 518 F.2d 531, 533 (8th Cir.) (One of the jurors was acquainted with the defendant's family. "Standing alone, the attenuated relationship claimed here will not support the required finding of actual prejudice."), *cert. denied*, 423 U.S. 1021, 96 S.Ct. 460, 46

The basic criteria for a jury to be able to participate in a particular trial is whether or not that jury, individually and, of course, collectively, all 12, are able to listen to the evidence and the law as I will instruct the jury and make a determination, in this case we're asking for a determination of guilty or not guilty, since it's a criminal case, and make that determination based solely on the evidence irrespective of any other kinds of consideration, such as friendship with a defendant or witness, or a family relationship, or strong feelings about drug laws, either for or against, those kinds of things. And that's what we're endeavoring to do.

So, the mere fact that you know one of the defendants, or I will also ask whether or not you know anything about the case, or whether or not you know or are related to any of the potential witnesses, is not in and of itself sufficient for you to be excused.

(Trial Transcript ("TT"), Vol. 1 at 10-11 (emphasis added).)

Had Petitioner disclosed the extent of his relationship with Penn, the trial judge could have examined whether the juror held a particular belief or opinion that would "prevent or substantially impair performance of his duties as a juror in accordance with his instructions and his oath." *United States v. Murray*, 103 F.3d 310, 323 (3d Cir. 1997) (quoting *Kirk v. Raymark Indus., Inc.*, 61 F.3d

L.Ed.2d 394 (1975); see also *Johnson v. State*, 252 Ark. 325, 327, 478 S.W.2d 876, 878 (1972) ("[T]he mere fact that [the defendant] was known by [the juror], or that they had worked together, would not disqualify the latter."); *Mills v. State*, 462 So.2d 1075, 1079 (Fla. 1985) (per curiam) ("The prospective juror's distant relationship to the victim's family and his acquaintance with [the defendant] and his family did not negate his declarations of impartiality [and therefore excusal for cause was not required]."), cert. denied, 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985); *State v. Ford*, 81 N.M. 556, 558, 469 P.2d 535, 537 (N.M.Ct.App. 1970) (mere fact that defendant had known one of the defendants for fifteen years did not require excusal for cause); *C.R. Owens Trucking Corp. v. Stewart*, 29 Utah 2d 353, 354, 509 P.2d 821, 822 (1973) (mere fact of acquaintance did not require excusal for cause).

147, 153 (3d Cir.1995)). The Court finds that Att'y Francis' limited knowledge of a distant relationship, and his decision not to seek Penn's removal does not fall below an objective standard of reasonableness, thus Petitioner did not satisfy the first prong of *Strickland*. See *Marshall v. Hendricks*, 307 F.3d 36, 105-07 (3d Cir. 2002) ("The United States Supreme Court has counseled that in order to assess counsel's performance objectively, reviewing courts must resist the temptation of hindsight, instead determining whether, given the specific factual setting, and counsel's perspective at the time, his strategic choices were objectively unreasonable.").

2. Trial counsel did not render ineffective assistance by not hiring experts in the fields of handwriting and fingerprint analyses.

Petitioner alleges that he had a note, written by Lynch, which exculpated him and proved that his only role was to "provide the service of notifying a man in Atlanta of [Lynch's] pending arrival there," a task for which he said Lynch agreed to reimburse him for his long distance telephone charges. (Mot. to Vacate at 9; Objection to Opp'n at 14.) That undated note was intended to prove that Lynch was a "manager and organizer of smuggling activities" that had no link to Petitioner. (Mot. to Vacate at 13.) Att'y Francis, Petitioner contends was ineffective in not offering the note into evidence, and should have obtained a handwriting expert

to authenticate Lynch's signature.

At trial, the government focused on the daily planner (Gov't Ex. 1) retrieved from Lynch after her arrest to argue that Petitioner had written the name of Lynch's Atlanta contact, Melvin Smith, in her planner. Lynch denied writing the name in her planner, and testified that Petitioner had done so. Lynch only admitted to writing "Cousin Melvin Smith" on the envelope she left at the Days Inn counter.

Charles Haywood ("Haywood"), the government's handwriting expert, compared Petitioner's writing on documents prepared during the course of his employment as a fireman to the planner containing the words "Cousin Melvin Smith." (Mot. to Supplement at 8; see Tr. Vol. II at 208-40.) Haywood concluded that Petitioner had definitely written the word "Cousin" and probably wrote the words "Melvin Smith". (Tr. at 216-227.) Haywood further testified that when asked to provide handwriting exemplars for analysis, Petitioner tried to disguise his handwriting.

With regard to fingerprint evidence, the government's witness (Agent Dubois) testified that the Federal Bureau of Investigations ("FBI") laboratory had been "unable to find any identifiable prints" on the Wet Ones (baby wipes) box in which Petitioner is alleged to have given Lynch money. (Mot. to Vacate, Ex. H at 452.) Petitioner argues that his counsel was ineffective in failing to

obtain a fingerprint expert to determine if there were in fact no identifiable prints, and whether that conclusion meant that there were no identifiable prints that matched Petitioner's.

The decision whether or not to call a particular expert witness is generally a matter of trial tactics within the range of a reasonable attorney's performance. *See United States v. Kirsh*, 54 F.3d 1062, 1072 (2d Cir. 1995) (whether to use a fingerprint expert is a tactical decision, and failure to do so does not constitute ineffective assistance of counsel.) In applying *Strickland*, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Moreover, the trial process contains a myriad of tactical decisions that seem like sound strategies when made, but may appear unsound with the benefit of hindsight. *U.S. v. Davis*, 306 F.3d 398, 422 (6th Cir. 2002); *see also Marshall*, 307 F.3d at 90. For this reason, a defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Davis*, 306 F.3d at 422 (citation omitted). Petitioner must also show prejudice from his attorney's errors, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability

means a probability "sufficient to undermine confidence in the outcome." *Id.*

Att'y Francis made what this Court views as an objectively reasonable strategic decision in not hiring a handwriting expert. Instead, he relied on his cross-examination of Haywood. (Tr. at 228-34, 237-39.) In so doing, Att'y Francis attempted to create doubt about the reliability of Haywood's conclusions based upon the methods and tools employed in reaching his conclusions. Att'y Francis asked pertinent questions, and Petitioner has failed to convince the Court that his counsel rendered assistance that fell outside the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). The Court, having fully reviewed the evidence, finds that Petitioner failed to overcome the presumption that Att'y Francis' decision not to call handwriting and fingerprint experts constituted a sound trial strategy. See, e.g., *United States v. Richardson*, No. CIV.A 98-5548, 1999 WL 262435, at *5-6 (E.D.Pa. May 3, 1999) (holding that where counsel decided not to hire a fingerprint expert to prove that defendant's fingerprints were not on the firearm, defendant failed to show any error which either fell below a standard of reasonableness or resulted in any prejudice whatsoever. Moreover, none of defendant's claims of ineffective assistance of counsel

undermine the reliability of the verdict, which was supported by substantial and credible evidence.) Here, Attorney Francis likely realized the legal benefit to Petitioner from the government's inability to find his fingerprints on the Wet Ones box, and made the reasonable decision not to hire a fingerprint expert to rehash testimony of the government's witness.

The jury was charged with the duty of weighing the evidence which included Petitioner's own testimony denying involvement in the conspiracy, and drawing reasonable inferences therefrom. This Court finds that even if counsel for Petitioner had put forth the expert handwriting and fingerprint testimony, there is no reasonable probability that the outcome of Petitioner's trial would have been different.

3. Attorney Francis' representation of potential witness Dale Rhymer in an unrelated civil matter in 1992 did not constitute a conflict of interest which resulted in ineffective assistance to Petitioner.

Petitioner alleges that during the pretrial stage, he advised Att'y Francis that Dale Rhymer ("Rhymer"), Petitioner's cousin, had been subpoenaed by the government and questioned regarding his connection with Lynch's smuggling activities. Rhymer, if called as a defense witness, would have testified that he had made a smuggling trip to Atlanta on January 20, 1995 for Lynch. (Mot. to Vacate at 24.) Petitioner alleges ineffective assistance because

Att'y Francis allegedly advised him that he could not use Rhymer in the case because of an existing attorney-client relationship with Rhymer in another matter.⁸ It is, therefore, alleged that trial counsel "devalued the need and importance of Rhymer's testimony." (*Id.* at 12.) In a nutshell, Petitioner argues that Rhymer's testimony should have been used by the defense to impeach Lynch and prove that she managed and organized "smuggling activities" that did not involve Petitioner. (*Id.* at 13.) Trial counsel's conflict of interest with Rhymer and personal relationship with Lynch, Petitioner contends, made him unwilling to both impeach Lynch and "show her capacity to commit the instant offense" without Petitioner. (*Id.* at 17, 19.) The alleged Sixth Amendment violation is that Att'y Francis did not advance the Rhymer defense because to do so would have been adverse to Rhymer and Lynch.

A defendant claiming ineffective assistance of counsel based on counsel's alleged conflict of interest need not demonstrate prejudice in order to obtain relief. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). At the same time, a conflict of interest does not trigger a "per se rule of prejudice." *Strickland*, 466 U.S. at 692. "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that

⁸ Att'y Francis represented Rhymer who was the plaintiff in a 1992 employment suit against Federal Express.

'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler*, 446 U.S. at 348, 350 (footnote omitted)).

The Court finds no merit in petitioner's arguments on this issue. Even if Lynch was a smuggler prior to February 1995 as Rhymer would have testified, that fact would not, in and of itself, militate against evidence proving that on or about February 3-10, 1995, Lynch was involved in a conspiracy to distribute cocaine with Petitioner. The Court further finds that Att'y Francis made a professionally sound decision not to have Rhymer testify to evidence that was not material to the offenses charged at trial.

As the Court of Appeals for the Third Circuit makes clear:

In order to establish an actual conflict the petitioner must show two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

Clearly, a defendant who establishes that his attorney rejected a plausible defense because it conflicted with the interests of another client establishes not only an actual conflict but the adverse effects of it. Consequently, the test set forth in *United States v. Fahey* includes both the actual conflict and adverse effects prongs of the conflict of interest analysis. On the other hand, there is no conflict of interest adversely affecting the attorney's performance if an attorney at trial does not raise a defense on behalf of his client because to do so is not in that

client's interest even though it is also in the interest of another client that it not be raised. To the contrary, that is a coincidence of interests.

United States v. Gambino, 864 F.2d 1064, 1070-71 (3d Cir. 1988).

Rhymer was not called as a witness for the prosecution, and Petitioner has failed to show an actual conflict of interest that affected Att'y Francis' performance. *Cf. Lace v. United States*, 736 F.2d 48, 50 (2d Cir. 1984) (holding that Attorney who was representing a prosecution witness against defendant had a conflict of interest that precluded his representation of defendant, unless defendant, upon full explanation of the facts and implications of the conflict, explicitly asserted the right to proceed with him as his counsel.)

4. No Brady or Jencks Act Violations

Also related to this issue is Petitioner's argument that he was denied exculpatory evidence which the Government should have produced pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The government, Petitioner alleges: (1) suppressed facts surrounding Rhymer's January 20, 1995 trip which was allegedly made under Lynch's direction; and (2) suppressed statements made by Rhymer during his questioning by federal agents.

The Government argues, on the other hand that: (1) Rhymer was not a witness at trial, therefore, Petitioner would not be entitled

to his statements under the Jencks Act;⁹ and (2) Rhymer did not provide any impeachment or *Brady* material during the interview, thus there was no *Brady* violation. (Gov't Resp. at 4-5; Opposition of the United States to Petitioner's Motion for Order to Produce at 1-2.)

The principles enunciated in *Brady* protect a defendant's right to due process of law under the Fifth Amendment by requiring that a prosecutor disclose material exculpatory evidence to the defense. *Marshall v. Hendricks*, 307 F.3d at 52. As the U.S. Supreme Court states:

[The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in

⁹ The Jencks Act provides in pertinent part that:

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena [sic], discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. at 53 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985))). Again, the gravamen of Petitioner's argument is that the government possessed information which would impeach Lynch and establish that she was capable of committing the offense charged on her own; and also establish that Lynch had the propensity to falsely accuse Petitioner.

In *United States v. Zimmerman*, No. 02-3831, 2003 WL 21401746 (3d Cir. June 16, 2003), with analogous circumstances, a defendant argued that he was prejudiced by the government's failure to disclose that a Secret Service agent interviewed two store employees, who were not called to testify, because the employees described having seen two men buying the fraudulently procured computers, whose descriptions did not match defendant. The Court of Appeals held this argument as lacking in merit because the fact that two employees noticed two men who did not look like Zimmerman did not undermine the Court's confidence in the jury's finding that Zimmerman was also participating. (*Id.* at *2).

Similarly, because this Court finds no *Brady* or Jencks Act violations where Rhymer's testimony would not exculpate Petitioner

or undermine this Court's confidence in the jury's verdict, the Court finds no ineffective assistance of counsel in Att'y Francis' decision not to call Rhymer.

5. Trial counsel provided effective assistance by adequately cross-examining Lynch.

a. Attorney Francis' alleged relationship with Lynch

Petitioner first argues that Att'y Francis' service was rendered ineffective by a bias in favor of Lynch because they were friends and from the same neighborhood in St. Thomas. Petitioner baldly asserts that Att'y Francis calculated that if Petitioner was convicted, Lynch would be granted a lesser sentence. (Mot. to Supplement at 12.) Petitioner subsequently argues that there was more than a "friendship" between Att'y Francis and Lynch, and that he learned of their "affair" after his conviction. To support his claim, Petitioner submitted an affidavit from Floyd Francis, the brother of Att'y Francis, wherein he states that he was "a witness to the knowledge of the friendship which [A]ttorney Leonard Francis and Jennifer Lynch shared before the December 1995 jury trial of Mr. Allen Petersen" (Affidavit of Floyd Francis dated July 31, 1999). Then in August 2003, Petitioner produced a second affidavit from his cousin, Rhymer, stating that he was aware of a relationship between Att'y Francis and Lynch. Because the facts before this Court were insufficient to resolve this issue, the

Court scheduled an evidentiary hearing to develop the record.

Although subpoenaed, Floyd Francis failed to appear to testify. Rhymer, Petitioner's cousin and Lynch's brother-in-law, testified that he had known both Att'y Francis and Lynch in excess of fifteen (15) years. Rhymer further testified that he had knowledge of Francis and Lynch living together in Smith Bay.

On Rhymer's cross-examination by the government, the following colloquy took place:

Q Alright. Now, do you know whether or not Attorney Leonard Francis and Attorney--and Miss Jennifer Lynch have any type of relationship?

A And so well, I know they had some type of relationship. I have seen them together in Smith Bay area, and that's the extent of, you know, what I know about them, seeing them, you know, just together over there.

. . . .
Q And when you saw them, what were they doing?

A Standing, talking, just more or less standing, talking, you know, with each other.

Q Do you know what the relationship is between them, or was?

A No, I don't.

(Tr. of 10/10/03 Evidentiary Hearing at -.) The government also argued that despite Rhymer's knowledge of the alleged relationship between Att'y Francis and Lynch, he only made these allegations for the first time this year in his August 2003 affidavit.

Rhymer made no mention of the alleged relationship between Lynch and Att'y Francis in his earlier affidavit dated April 23, 1998. Additionally, both Att'y Francis and Lynch testified at the

evidentiary hearing, and both vehemently denied having any type of relationship. Having had an opportunity to weigh the credibility of the parties, Petitioner has failed to convince this Court that there was a relationship or affair between Att'y Francis and Lynch. Petitioner has also failed to prove that Francis' cross-examination of Lynch at trial fell below an objective standard of reasonableness.

b. Attorney Francis did not err in not addressing statements made by Lynch to her counsel, Stephen Bruschi, Esq., regarding Rudolph "Rudy" Clarke.

Petitioner alleges that Att'y Francis did not investigate Lynch's statements made to her counsel, Stephen Bruschi, Esq. ("Att'y Bruschi"), allegedly implicating Rudy Clarke ("Clarke"). Petitioner argues that Att'y Francis failed to cross-examine Lynch about her alleged relationship with Clarke because Att'y Francis was having an affair with Clarke's sister. Petitioner does not attempt to explain: 1) how Lynch "implicated" Clarke in her discussions with her counsel; 2) how it is believed that, if true, Clarke's involvement with Lynch would have helped to impeach Lynch or exculpate Petitioner; or 3) how Clarke's arrest on cocaine possession in March 1999 is new evidence which would provide Petitioner relief from his conviction. The Court finds that Petitioner has failed to demonstrate how Att'y Francis' strategic decision not to focus on Clarke at trial falls below an objective

standard of reasonableness.

c. Attorney Francis was not ineffective in failing to argue that Lynch had been promised something of value by the government in exchange for her testimony against Petitioner.

Petitioner argues that the government acted in violation of 18 U.S.C. 201(c)(2) which provides in relevant part that whoever

directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom . . . shall be fined under this title or imprisoned for not more than two years, or both.

Petitioner relies on the language of Lynch's plea agreement (which was admitted into evidence at trial) to argue that the government promised Lynch something of value, "including advising the sentencing court of the nature and extent of the witnesses' cooperation" which encouraged Lynch to falsify and exaggerate her testimony to curry favor with the government. (Addendum at 1.)

Having reviewed Lynch's boilerplate plea agreement, the Court finds no violations of either 18 U.S.C. 201(c)(2) or FED. R. CRIM. P. 11¹⁰. In addition, Lynch took the stand and disclosed the full

¹⁰ The Federal Rules of Criminal Procedure provide that a plea agreement may specify that the government will:
(A) not bring, or will move to dismiss, other charges;
(B) recommend, or agree not to oppose the defendant's

extent of her plea agreement to the jury. (Tr. Vol. II at 29-33.)
Accordingly, Att'y Francis gave competent and effective assistance
in not raising this issue.

**d. Attorney Francis not ineffective in his handling of
the introduction of Federal Rules of Evidence, Rule
404(b) evidence.**

The Federal Rules of Evidence provide that:

[e]vidence of other crimes, wrongs, or acts is not
admissible to prove the character of a person in order to
show action in conformity therewith. It may, however, be
admissible for other purposes, such as proof of motive,
opportunity, intent, preparation, plan, knowledge,
identity, or absence of mistake or accident, provided
that upon request by the accused, the prosecution in a
criminal case shall provide reasonable notice in advance
of trial or during trial if the court excuses pretrial
notice on good cause shown, of the general nature of any
such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).¹¹ Petitioner alleges that the government
"hindered, tricked, and caused" defense counsel to be ineffective

request, that a particular sentence or sentencing range is
appropriate or that a particular provision of the Sentencing
Guidelines, or policy statement, or sentencing factor does or does
not apply (such a recommendation or request does not bind the
court); or

(C) agree that a specific sentence or sentencing range is
the appropriate disposition of the case, or that a particular
provision of the Sentencing Guidelines, or policy statement, or
sentencing factor does or does not apply (such a recommendation or
request binds the court once the court accepts the plea
agreement).

FED. R. CRIM. P. 11(c)(1).

¹¹ Evidence of other crimes or acts is admissible under Rule 404(b)
if (1) it serves a proper evidentiary purpose, such as proof of motive; (2) it
is relevant under Fed. R. Evid. 402; (3) its probative value outweighs its
prejudicial effect under Fed. R. Evid. 403; and (4) the court provides a
limiting instruction concerning the purpose for which it may be used. *United
States v. Mastrangelo*, 172 F.3d 288, 294-95 (3d Cir. 1999) (citing *Huddleston
v. United States*, 485 U.S. 681, 691-92 (1988)).

by introducing Rule 404(b) evidence at trial after previously stating that it would not introduce such evidence. (Mot. to Supplement at 2.)

As a preliminary matter, the Court notes that on the eve of trial (December 4, 1995) the government did in fact file and deliver to defense counsel a Notice of Intent to Offer 404(b) Evidence. That same day, Att'y Francis filed a proposed cautionary jury instruction on Rule 404(b) evidence. That said, to the extent Petitioner's Motion to Supplement argues that the trial judge erred in allowing 404(b) evidence regarding prior smuggling trips Lynch allegedly made for Petitioner, this Court will not review that issue. It is well-settled that motions under 28 U.S.C. § 2255 "will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178 (1947). "For this reason, nonconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings." *Stone v. Powell*, 428 U.S. 465, 477 n.10 (1976).

Insofar as Petitioner argues ineffective assistance of counsel in the introduction of 404(b) evidence, the Court will review that issue. When the government sought to introduce 404(b) evidence, Att'y Francis objected to the introduction of that evidence on grounds that it would be too prejudicial, stating:

MR. FRANCIS: It is too prejudicial, number one, your

Honor, to[o] prejudicial, in the fact that he is charged from the conspiracy from the 3rd to the 10th, to bring in any other situations would tend to give prejudice to Mr. Petersen with respect to his similarities of acts--not similarities, but his--the word I'm trying to find is --

THE COURT: Tendency?

MR. FRANCIS: --tendency to, in fact, do these types of situation.

In other words, these two offenses that he's talking about are technically uncharged offenses in which the government is trying to suggest that this is a course of conduct that he's been doing for years, and on that basis, that's why I state my objection.

(Mot. to Supplement at Ex. B; Tr. Vol. II at 35-36.) Petitioner has failed to prove that Att'y Francis' performance fell below the threshold established in *Strickland*.

On a related note, the Court finds no evidence to support Petitioner's claim (which he admits is an assumption) that Att'y Francis removed all 404(b) evidence from Petitioner's file in an attempt to bar Petitioner and his new counsel, Michael Joseph, Esq. from formulating an accurate defense.

6. Attorney Francis provided effective assistance in his handling of a Rule 29 motion for judgment of acquittal.

Petitioner argues that his counsel not only conceded that the government had proven a conspiracy between Petitioner and Lynch, but also "intentionally ignored and/or failed to produce evidence that clearly establishe[d] that the evidence presented by the government was insufficient, unreliable and the product of perjured

testimony." (Mot. to Vacate at 20.) After counsel for co-defendant Melvin Thomas had stated the basis for his Rule 29 motion, Attorney Francis stated:

MR. FRANCIS: Your Honor, I believe that there's - considering all of the facts, I do not believe that I would have, based on the evidence that has come in so far, that I would have any basis for making an argument on that motion at this time, because basically considering the facts in the light most favorable to the government, not even considering the credibility of the witnesses, all the testimony gears to a conspiracy between Jennifer Lynch and Allan Petersen.

The one thing that I noticed in Count 1, however, with respect to the conspiracy and the only issue I think I can raise to the Court is whether or not Count 1 gives sufficient factual allegations with respect to a conspiracy.

It says, in essence, intentionally to conspire, confer and agree together with each other, and with other persons to the grand jury known and unknown, to commit the following offense against the United States: that is, to knowingly and intentionally possess with intent to distribute cocaine. It doesn't necessarily, as Counts 2 and 3, talk about the quantity of cocaine.

Now, that may be a distinction without a difference, but that is the only thing that I can see that I can actually stand up here and suggest to the Court that may be a basis. But we have no basis at this particular time to argue this motion, in view of it being a legal issue.

THE COURT: Just based on credibility, right?

MR. FRANCIS: That is correct, your Honor.

(*Id.*, Ex. C1 at 513-15.)

The Government argues that "[e]ven assuming that the failure to argue a Rule 29 motion may be objectively unreasonable, the

second prong of the *Strickland* test requires that Petersen demonstrate prejudice and that his trial was unfair." (Gov't Resp. at 5.) The Court agrees, and further finds that Att'y Francis did in fact put forth a Rule 29 motion on grounds that Count I of the indictment failed to state a quantity of drugs.

In *United States v. Goode*, the defendant in his § 2255 motion, raised the issue that trial counsel was ineffective for failing to move for a judgment of acquittal at the end of the government's case with respect to the conspiracy charge. There, the court held that

viewing the evidence in a light most favorable to the Government, as the Court would have been required to do on a motion for directed verdict, the Court would have denied any motion for acquittal because the evidence presented at trial was sufficient to support a jury finding, beyond a reasonable doubt, that the Defendant was guilty

Goode, 143 F. Supp. 2d at 821. In this case, the evidence presented at trial was sufficient to support the jury's guilty verdict, and Att'y Francis rendered effective assistance.

7. Sufficiency of the Evidence to Sustain a Conviction

Petitioner generally argues the quantity of drugs was never established for Count I and the trial judge erred in instructing the jury that a specific quantity need not be established. Therefore, the government need only prove that there was a measurable amount of cocaine. (Mot. to Include at 15.) The Court

will not consider the sufficiency of the evidence which was appropriate for review on direct appeal, and not properly raised for the first time in a § 2255 motion. See, e.g., *United States v. Ramsey*, 297 F.2d 503, 505 (1962).

C. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) does not apply retroactively.

In *Apprendi*, the United States Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. 530 U.S. at 490. Petitioner, therefore, argues that because Count I of the indictment did not specifically state the quantity of cocaine which constituted a crime, as noted by Att'y Francis in his Rule 29 motion, the government failed to prove its case beyond a reasonable doubt. As such, he contends that his conviction and sentence should be vacated.

The government argues that Petitioner's *Apprendi* claim is barred as a second or successive petition under 28 U.S.C. §§ 2255 and 2244(b). The government further contends that Petitioner has failed to excuse the untimeliness of this motion or show actual prejudice. Lastly, the government argues that even if *Apprendi* were to apply, Petitioner's motion should fail on the merits because his sentence falls within the applicable statutory maximum (twenty years). See *United States v. Williams*, 235 F.3d 858, 862-

64 (3d Cir. 2000).

Petitioner counters that his *Apprendi* claims are not second or successive petitions; *Apprendi* applies retroactively to cases on collateral review; his sentence exceeds the statutory maximum of one year under 21 U.S.C. § 844(a); and argues for the first time that the trial court committed reversible error in removing Lynch's name from the indictment returned from the grand jury without creating a superceding indictment (Resp. and Traverse at 19-22).

The government is correct in arguing that Petitioner's *Apprendi* claim is untimely and should be barred as a second or successive petition. However, on February 7, 2001, Magistrate Judge Geoffrey W. Barnard granted Petitioner leave to supplement his § 2255 motion to include this argument. As such, the Court will examine Petitioner's *Apprendi* claims.

The Court of Appeals for the Third Circuit recently considered the issue whether *Apprendi* applies retroactively to cases on collateral review, and concluded that it does not so apply. *United States v. Enigwe*, No. 02-3343, 2003 WL 21664304, at *1 (3d Cir. July 15, 2003) (citing *United States v. Swinton*, 2003 WL 21436809 (3d Cir. June 23, 2003); see also *United States v. Jenkins*, 2003 WL 21398812 (3d Cir. June 18, 2003)). Moreover, because Petitioner's sentence (188 months) does not exceed the statutory maximum, *Apprendi* does not apply here. *Williams*, 235 F.3d at 863 (citing

United States v. Cepero, 224 F.3d 256, 267 n.5 (3d Cir. 2000).

Additionally, an information charging violations of 21 U.S.C. §§ 841 and 846 must state a quantity if the government wishes to seek penalties in excess of those applicable by virtue of the elements of the offense alone based on progressively higher quantities of drugs specified in subsections 841(b)(1)(A) or (B). *See, e.g., United States v. Lafayette*, Nos. 01-3067 & 01-3099, 2003 WL 21766619, at *5 (D.C. Cir. Aug. 1, 2003). Then, the government must charge the facts giving rise to the increased sentence in the indictment, and must prove those facts to the jury beyond a reasonable doubt. *Id.*

In this case, however, petitioner was charged under § 841(a)(1) which does not require that the government state the drug quantity in the indictment. *See, e.g., United States v. Cross*, 916 F.2d 622, 623 (11th Cir. 1990) (holding that the government would not be required to prove quantity as an essential element of the charge under § 841(a)(1) because quantity is not included as an element in the definition of the offense under that subsection) (citation omitted).

D. Assistance of Michael Joseph, Esq.¹²

¹² The Court notes for the record that Petitioner instituted civil actions in the Division of St. Croix against Michael Joseph, Esq. (CV. 2003/0001) and Leonard B. Francis, Esq. (CV. 2003/0058) arising from the allegations of ineffective assistance made in this § 2255 motion.

Petitioner retained Michael Joseph, Esq. ("Att'y Joseph") to represent him at sentencing and on appeal, and paid him \$6,000 of a \$10,000 retainer fee. (Mot. to Vacate, Ex. M). Att'y Joseph filed an appeal on Petitioner's behalf, but failed to prosecute within the time set forth by the Court of Appeals. As a result, the Court of Appeals issued an order to show cause why Att'y Joseph should not be sanctioned for failure to prosecute the appeal. Thereafter, on August 30, 1996, this Court ordered that Att'y Joseph represent Petitioner on appeal with compensation under the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A.

In his September 1996 Response to Order to Show Cause, Att'y Joseph stated that he had been unable to obtain trial transcripts due to the exorbitant cost, and it wasn't until this Court's grant of *in forma pauperis* status to Petitioner, and his appointment under the CJA, that the financial impediments were removed. Att'y Joseph also stated that he and Petitioner had been exploring the possibility of waiving a direct appeal and proceeding with a § 2255 motion.

With no subsequent action, the Court of Appeals issued a second Show Cause Order. In a twelve-page Response to Order to Show Cause and Motion for Voluntary Dismissal of the Within Appeal dated April 3, 1997 ("Resp. to Show Cause"), Att'y Joseph stated that he had explained to Petitioner that a challenge to counsel's

performance at trial is normally reviewed, not on direct appeal, but on collateral attack. (Gov't Resp.-Ex. 1, Resp. to Show Cause at 1). Att'y Joseph further stated that:

After thoroughly reviewing the trial record in it's [sic] entirety, and having consulted with Allan D. Smith, Esq., trial counsel for co-defendant Melvin Marvin Thomas (who has filed a[n] appeal in this Court, case no. 96-7476), and Leonard B. Francis, Esq., trial counsel, the undersigned cannot find any arguable issues which might result in the reversal of Appellant's conviction. However, the undersigned has discovered in the trial record, good grounds for filing a motion for an evidentiary hearing pursuant to 28 U.S.C. § 2255 on grounds of ineffective assistance of counsel.

(*Id.* at 1-2.) Att'y Joseph proceeded in his response to highlight what he perceived to be instances of ineffective representation on the part of trial counsel. Then, in a letter dated April 14, 1997, Att'y Joseph advised Petitioner that he had not been "properly represented" by trial counsel and stated:

[Y]our consent to have the appeal dismissed followed immediately by a Section 2255 Motion in the District Court is, based on my extensive appellate experience, the best approach in your attempt to obtain justice in your case.

(Mot. to vacate, Ex. N.) Petitioner consented in writing to the dismissal of his appeal, and that matter was dismissed on May 20, 1997.

Then, in January 1998, Petitioner wrote two letters to the Court stating that he no longer wished to have Att'y Joseph as his counsel, and requested that the Court order Att'y Joseph to send

him his file. On February 17, 1998, in response to Petitioner's letters, Judge Barnard informed Petitioner as follows:

Upon review of the documents filed by defendant, it appears that the defendant has dismissed his appeal to the Third Circuit Court of Appeals. In such a case, defendant is no longer represented by counsel and does not need him to file a 2255 motion since he has indicated that he intends to file it pro se. Second, the Court cannot extend the time period for filing of the writ of habeas corpus. Lastly, regarding the request for files from counsel; the request for withdrawal; and the Court's lack of knowledge regarding the stage of defendant's appeal, if any, the Court will require that counsel respond to the defendant's letters.

(*United States v. Petersen*, Crim. No. 1995/0073, Order Requiring Defense Counsel to Respond at 1-2.) Att'y Joseph complied with the Court's Order and promptly delivered Petitioner's file to him.

Petitioner timely filed this *pro se* § 2255 motion on March 27, 1998, relying largely upon the instances of ineffective assistance of trial counsel highlighted by Att'y Joseph. (Resp. to Show Cause at 2-10.) Petitioner also raised additional claims in subsequent amendments to his § 2255 motion.

This Court has jurisdiction to review claims of ineffective assistance of appellate counsel raised in a § 2255 motion. See, e.g., *Edwards v. Carpenter*, 529 U.S. 446, 450 (2000); *Jones v. Barnes*, 463 U.S. 745, 749 (1983); *United States v. Cross*, 308 F.3d 308, 314 (3d Cir. 2002). Petitioner correctly argues that a § 2255 motion is not a substitute for a direct appeal, see *Government of*

the Virgin Islands v. Nicholas, 759 F.2d 1073, 1074-75 (3d Cir. 1985), and Att'y Joseph correctly recognized that claims of ineffective assistance of counsel are usually not addressed on direct appeal, but in a motion under 28 U.S.C. § 2255. *United States v. Givan*, 320 F.3d 452, 464-65 (3d Cir. 2003); *United States v. Sandini*, 888 F.2d 300, 312 (3d Cir. 1989), *cert. denied*, 494 U.S. 1089 (1990). "[A] narrow exception to the rule that defendants cannot attack the efficacy of their counsel on direct appeal" exists "[w]here the record is sufficient to allow determination of ineffective assistance of counsel." *United States v. Jones*, No. 01-4435, 2003 WL 21640794, at *6 (3d Cir. Jul. 14, 2003) (citing *United States v. Headley*, 923 F.2d 1079, 1083 (3d Cir. 1991)); *United States v. Rico-Nunez*, 53 Fed. Appx. 634 (3d Cir. 2002).

After reviewing the record, the Court scheduled an evidentiary hearing to develop facts with regard to Att'y Joseph's representation of Petitioner on appeal. Having done so with the benefit of hindsight, the Court finds that Att'y Joseph's assistance on appeal, although dilatory, did not fall below an objective standard of reasonableness. He thoroughly reviewed the trial transcript and informed Petitioner of what, in his professional opinion, was the proper course of action. In addition, Petitioner, an obviously intelligent man, timely filed

his § 2255 motion and was subsequently allowed to file several amendments and supplements thereto.

The Court also reviewed Petitioner's allegation that Att'y Joseph was paid not only by Petitioner's parents, but by the Court under the CJA. Such is not the case. Att'y Joseph informed Petitioner that he should file an application to proceed *in forma pauperis* because the high cost of the transcripts. In fact, this Court's financial records indicate that the only monies paid under the CJA were to the court reporter (under a CJA-24) for the production of transcripts. Att'y Joseph never submitted a CJA-20 to this Court seeking payment for his legal services.

III. CONCLUSION

For the reasons stated, the Court finds: (1) that Att'y Francis provided the level of assistance required by *Strickland*, and which was within the range of competence demanded of attorneys in criminal cases; (2) after weighing the credibility of the witnesses, that the evidence was insufficient to support finding that there was a relationship between Att'y Francis and Jennifer Lynch; (3) that there were no *Brady* or Jencks Act violations; (4) that *Apprendi* does not apply here; and lastly (5) that Att'y Joseph's representation of Petitioner on direct appeal did not run afoul of *Strickland*.

DATED this 24 day of November 2003.

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A T T E S T:
Wilfredo F. Morales
Clerk of the Court

/s/

By: Deputy Clerk

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