

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
<i>v.</i>)	Criminal No. 95-40-P-C
)	(Civil No. 98-78-P-C)
JACK CIOCCA,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

Jack Ciocca moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 188 months was imposed after he was found guilty by a jury of conspiracy to distribute and possession with intent to distribute in excess of 500 grams of cocaine, and aiding and abetting the same, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1) and 846. Judgment (Docket No. 62). Ciocca contends that he was deprived of the effective assistance of counsel at trial, at sentencing and on appeal.

A section 2255 motion may be dismissed without an evidentiary hearing if the “allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because ‘they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.’” *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted). In this instance, I find that each of Ciocca’s allegations meets one or more of these tests. Accordingly, I recommend that the motion be denied without an evidentiary hearing.

I. Background

As the First Circuit noted in its opinion on Ciocca's direct appeal:

Within a month of [their] initial meeting [in 1981], [Kevin] Caporino . . . met Ciocca in Connecticut. At the Connecticut meeting, Ciocca gave Caporino an eighth of a kilogram of cocaine, which Caporino tried to sell in Maine. Caporino continued to sell cocaine for Ciocca until 1983, when Caporino was involved in an automobile accident. This accident caused Caporino to suffer amnesia and led to extensive therapy intended to recover his memory.

In the spring of 1994, Ciocca and [co-defendant Harold] Nelson contacted Caporino and requested that he serve as a courier between Ciocca in Connecticut and Nelson in Maine. Caporino agreed. During the 1980s, Caporino had served Ciocca in a similar capacity, transporting cocaine between Connecticut and Maine up to ten times. Caporino's role was to retrieve money from Nelson, drive the money to Ciocca in Connecticut, wait for Ciocca to count the money, then transport a kilogram of cocaine from Ciocca's residence back to Nelson. For his role, Caporino was paid \$2,000 by Nelson for each delivery, although sometimes he was paid a pound of marijuana in lieu of the \$2,000. Caporino made six such trips prior to his arrest in May 1995.

* * *

[After Caporino was arrested and agreed to cooperate with law enforcement personnel] Ciocca participated in a controlled buy with Agent Durst, using Caporino as a conduit for the transactions. The buy was arranged by means of several electronically monitored telephone conversations between Ciocca and Caporino, during which Ciocca told Caporino that he would bring three and a half ounces of cocaine to a meeting place in Boston. . . . The buy was monitored by means of an electronic wire and a micro-tape recorder placed on Caporino.

* * *

Between May 11 and June 7, Caporino engaged in telephone and in-person conversations with Ciocca and Nelson, trying to determine when the next delivery between the two would occur. On June 7, Nelson informed Caporino that he had the money for the buy and had spoken with Ciocca, who had a kilogram of cocaine ready for purchase. That day, Nelson met with Caporino in Maine and transferred to him an envelope containing \$5,500.

* * *

Caporino then traveled . . . to Connecticut to pick up the kilogram of cocaine from Ciocca.

* * *

After being ushered into [Ciocca's] house by Ciocca, Caporino waited Ciocca and Caporino went to the master bathroom Ciocca retrieved a kilogram of cocaine from a closet in the bathroom and gave it to Caporino.

* * *

During the early morning of June 8, Nelson paged Caporino to transfer the cocaine. The two arranged to meet at a restaurant in Portland, Maine. . . . Nelson retrieved the kilogram of cocaine from the trunk of Caporino's car, after which drug enforcement agents arrested him.

Later that day, a search warrant executed at Ciocca's home turned up several firearms The agents also seized the \$5,500 that Nelson had transferred to Caporino the previous day from the medicine cabinet of Ciocca's master bathroom.

United States v. Ciocca, 106 F.3d 1079, 1081-82 (1st Cir. 1997).

The jury found Ciocca guilty of both charges on which he was indicted. Superseding Indictment (Docket No. 23); Jury Verdict Form (Docket No. 44). At sentencing, Ciocca's counsel successfully opposed the government's request that his offense level be enhanced for a leadership role in the offense. Procedural Order Scheduling Guideline Sentencing Hearing and Imposition of Sentence (Docket No. 58) at 2; Transcript of Sentencing Hearing ("Sentencing Tr.") (Docket No. 71) at 7-15, 24-25. The same counsel filed an appeal, in which he contended that the trial court erred in refusing to admit Caporino's psychiatric records and in admitting tapes of conversations involving Ciocca and Caporino, and that the evidence was insufficient to support the conspiracy conviction. *Ciocca*, 106 F.3d at 1081. The First Circuit upheld the conviction. *Id.* at 1085.

II. Discussion

Ciocca contends that his trial and appeal counsel provided constitutionally defective

assistance in numerous ways: (i) failing to prepare for trial in a professional and competent manner; (ii) failing to meet sufficiently with Ciocca before trial; (iii) failing to challenge the search of Ciocca's residence; (iv) misstating facts to the jury in his opening statement; (v) failing to challenge or "make effective use of" the tape recordings of Caporino's conversations; (vi) causing prejudicial and otherwise inadmissible evidence to be introduced via his cross-examination of Caporino; (vii) failing to object to the admission of certain evidence and certain assertions of personal opinion by the prosecutor in closing argument and rebuttal; (viii) failing to challenge drug quantities used for sentencing purposes; (ix) breaching attorney-client privilege by disclosing fees paid to him and Ciocca's former defense counsel; (x) failing to make a factual argument for leniency at sentencing despite a request by the court for such information; (xi) waiving any challenge to the 188-month sentence on appeal; (xii) submitting a poorly conceived appellate brief "executed by a 'clerk;'" and (xiii) failing to file a petition for a writ of certiorari following the First Circuit's denial of the appeal. Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 USC § 2255 (Docket No. 75) at 2.

Strickland v. Washington, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. First, the defendant must show that his counsel's performance was deficient, i.e., that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the defendant must make a showing of prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. *Id.* at 697. In the First Circuit, courts "must indulge a strong presumption that

counsel's conduct [fell] 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.” *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996) (quoting *Strickland*) (internal quotation marks omitted).

The “prejudice” element of the *Strickland* test also presents the defendant with a high hurdle. He must show more than a possibility that counsel's errors had some conceivable effect on the outcome of the proceeding. He must affirmatively prove a reasonable probability that the result of the proceeding would have been different if not for counsel's errors. *Argencourt*, 78 F.3d at 16.

The only authority cited by Ciocca, who is represented by counsel in this proceeding, in support of his extensive arguments is *Strickland* and *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev'd* 117 S.Ct. 1673 (1997), in which the First Circuit upheld the dismissal of a section 2255 motion on the basis that unsworn allegations are insufficient and noted that, if it were to reach the merits, the defendant's claim of ineffective assistance of counsel by reason of an inaccurate prediction of the sentence likely to be imposed upon his plea of guilty would not succeed.

A. Pretrial Conduct

Ciocca's memorandum expands on the first claim in his motion (failing to prepare for trial in a professional and competent manner) to include the following specific actions or failures to act not otherwise separately identified in the motion: trial counsel “completely misread the evidence” when he stated in a letter dated August 14, 1995 that the tape recordings were not “significantly

incriminating;” he “encouraged Ciocca in false optimism” about Ciocca’s choice to proceed to trial rather than plead; the “positions taken” by trial counsel “led to the filing of an Information by the government alleging a prior conviction and thus increasing the minimum mandatory sentence that Ciocca faced from five to ten years;” he failed to discuss with Ciocca the fact that two proffers made by Ciocca’s previous lawyer during plea negotiations “eliminated his ability to testify in his own defense at trial;” and trial counsel failed to “internalize” information possessed by Ciocca about Caporino. Amended Memorandum in Support of Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 USC § 2255 (“Defendant’s Amended Memorandum”) (Docket No. 78) at 3-5.

Only two entries in this list have the potential of meeting the prejudice prong of the *Strickland* test and thus are the only two that will be discussed here. The first, the contention concerning the information filed by the government setting forth Ciocca’s prior convictions (Docket No. 36), fails to specify what positions taken by trial counsel led to the filing of the information or how they did so. The document itself reveals nothing about the source of the data it sets forth. Such conclusory allegations cannot provide the basis for relief under section 2255. *David v. United States*, 134 F.3d 470, 478 (1st Cir. 1998).

The second contention that raises the possibility of prejudice on its face is the allegation that trial counsel failed to discuss with Ciocca the fact that the proffers made during plea negotiations prevented him from testifying at trial. Ciocca fails to explain why Fed. R. Civ. P. 11(e)(6) and Fed. R. Evid. 410, each of which prohibits the use of statements made during plea negotiations, would not have applied at his trial. Even if Ciocca had signed an agreement in the course of plea negotiations allowing the government to use statements made in the proffers to impeach his inconsistent testimony at trial — a necessary factual underpinning to Ciocca’s claim that is missing

from the record here — all that he would lose thereby would be the ability to testify falsely at trial, a possibility that does not deserve legal protection. *United States v. Goodapple*, 958 F.2d 1402, 1408-09 (7th Cir. 1992). On this claim, Ciocca could not meet either prong of the *Strickland* test.

Ciocca's next argument is that his trial counsel's performance was constitutionally ineffective because he met with Ciocca only three times before trial. The brevity of time spent by the lawyer in consultation with his client, without more, does not establish that counsel was ineffective. *Jones v. Estelle*, 622 F.2d 124, 127 (5th Cir. 1980) (only one meeting before trial). *See also United States v. Reed*, 756 F.2d 654, 657 (8th Cir. 1985) (only two-hour meeting on day before trial). Like the defendant in *Reed*, Ciocca does not indicate what he was unable to do at trial which additional preparation would have allowed, nor does he state how the lack of time spent with his trial counsel resulted in prejudice, *id.*, beyond suggesting that his trial counsel did not learn everything that Ciocca knew about Caporino. As discussed below, the cross-examination of Caporino was adequate, and providing the additional information about Caporino's background listed by Ciocca, Affidavit [of Jack Ciocca] ("Defendant's Aff.") (Docket No. 80) ¶ 3, to the jury, assuming that it would have been admitted, would not have made it reasonably probable that Ciocca would have been acquitted.

The next challenge to his trial counsel's actions raised by Ciocca involves the assertion that he failed to challenge the search of Ciocca's residence. No basis for challenging the validity of this search is suggested by Ciocca. That fact alone justifies denial of his request for relief on this ground. *Therrien v. Vose*, 782 F.2d 1, 3 (1st Cir. 1986). Even if that were not the case, the decision to file a motion to exclude evidence is within the realm of strategic tactical decisions to be made by the attorney under the relevant American Bar Association Standard for Criminal Justice, which the Supreme Court noted in *Strickland* may be referred to as a guideline in such matters. *United States*

v. Ciancaglini, 945 F. Supp. 813, 817, 819 (E.D.Pa. 1996). Here, Ciocca’s trial counsel emphasized to the jury the fact that the search revealed nothing but Ciocca’s wife and child and some antique weapons; the searchers never found the cocaine Caporino said would be there, or any other drugs or drug paraphernalia. Transcript of Opening Statement (Docket No. 73) at 2-3; Transcript of Closings and Instructions (Docket No. 70) at 19, 36-37. This is a classic strategic choice by trial counsel that the courts will not second-guess. *United States v. McGill*, 11 F.3d 223, 227-28 (1st Cir. 1993). It does not provide a basis for section 2255 relief.

B. Trial Conduct

Ciocca begins his attack on the actions of his counsel at trial with the assertion that his counsel told the jury in his opening statement that Ciocca would testify, and that Ciocca was prejudiced by this statement because he did not testify. The statement by counsel at issue is:

Mr. Ciocca is not, as [the prosecutor] has pointed him out to be. We submit he is wrongfully pointing him out as a kilogram cocaine seller. He is a victim of Caporino’s delusions which he will talk to you about at length, ladies and gentlemen.

Transcript of Opening Statement at 6. It is not at all clear that the “he” who “will talk to you about” Caporino’s “delusions” is Ciocca in the final sentence quoted above; it could be Caporino or even the prosecutor. In addition, while Ciocca does state that his trial counsel did not discuss with him his constitutional right to testify, Defendant’s Affidavit ¶ 2, he does not state that he told his trial counsel before trial, or that it was otherwise decided, that he would not testify, or that he fully intended to testify but was somehow thwarted by his counsel. In any event, even if Ciocca’s trial counsel had clearly stated in his opening, made before the government presented any evidence, that Ciocca would testify and subsequently changed his strategy and did not offer Ciocca’s testimony,

such activity would not fall below an objective standard of reasonableness. *United States v. Washington*, 887 F. Supp. 1019, 1027 (N.D.Ill. 1995). In fact, testimony concerning Caporino's alleged "delusions" was elicited on cross-examination of Caporino. *E.g.*, Transcript of Proceedings, Volume II ("Tr. II") (Docket No. 50) at 39-41, 57-60, 78, 98-100, 104-05, 115-16, 131-34. More evidence on this point from Ciocca, who would then be subject to cross-examination himself, was not likely to change the outcome in this case, so the prejudice prong of *Strickland* is also unsatisfied as to this claim.

Ciocca next asserts that his trial counsel failed to challenge or make effective use of the tape recordings of Caporino's conversations. Ciocca's motion and supporting memoranda do not specify how the tapes should have been challenged or on what basis, merely repeating that each introduction of a tape recording or a portion of a tape recording at trial by the government was without objection, and mentioning once that counsel did not seek to exclude "irrelevant and prejudicial information." Defendant's Amended Memorandum at 4. Conclusory allegations are insufficient to justify a hearing on a section 2255 motion. *Dziurgot*, 897 F.2d at 1225. As far as any objections to the admission of the tape recordings, Ciocca has offered only conclusory allegations and is not entitled to relief.¹ In connection with the second portion of this claim, Ciocca identifies one tape recording that was not played in its entirety and one tape recording that was not offered into evidence at all as the only specific instances in which trial counsel failed to make effective use of the tape recordings.

The tape not played in its entirety involved the deal for three and a half ounces of cocaine that

¹ In addition, defendant's trial counsel used the tapes that were admitted in his closing argument. Transcript of Closings and Instructions at 25-34. This is a strategic decision that this court will not second-guess. *See Barrett v. United States*, 965 F.2d 1184, 1193-94 (1st Cir. 1992) (strategic choice not resulting from neglect or ignorance insulated from collateral challenge under § 2255).

was carried out in Boston. Ciocca lists two statements recorded on the tape but not played at the trial that could have been used to impeach Caporino's testimony regarding this deal. Defendant's Amended Memorandum at 7-8. Of course, Ciocca's counsel devoted most of his cross-examination to attempts to impeach Caporino. "Whether and how to conduct cross-examinations are tactical decisions that fall squarely within the domain of the attorney." *Ciancaglini*, 945 F. Supp. at 822. *See also United States v. Atherton*, 846 F. Supp. 170, 173 (D. Conn. 1994) (counsel's decision not to use transcripts of tapes at issue prepared by defense, which differed from government transcripts, in cross-examination is tactical choice not subject to review on ineffective assistance claim); *Mills v. Armontrout*, 926 F.2d 773, 774 (8th Cir. 1991) (failure to impeach a witness is trial tactic not cognizable in federal habeas corpus proceeding). In addition, the unplayed portions of the tape to which Ciocca refers, Defendant's Amended Memorandum at 8, would have impeached only Caporino's trial testimony that the bathroom in which the transaction took place was empty when he and Ciocca entered it. This challenge to Caporino's credibility, particularly given the extensive cross-examination that trial counsel did undertake, is not reasonably likely to have affected the outcome of the trial.

The tape recording not offered at trial to which this portion of Ciocca's motion refers is one which records a telephone conversation on May 17, 1995 in which "the only topic discussed was Ciocca's telephone card business and the efforts that Caporino should be making in order to more effectively distribute these cards." *Id.* at 10. Ciocca apparently contends that this tape should have been offered by his trial counsel to impeach Caporino's testimony that a reference in a taped telephone conversation from May 26, 1995 to "cards" was a reference to half a kilogram of cocaine. Tr. II at 13. This point was pursued by trial counsel on cross-examination of Caporino, Tr. II at 89-

90, and he argued to the jury that the cards mentioned on the admitted tape were telephone cards rather than cocaine, Transcript of Closings and Instructions at 35. Not only would the evidence supplied by the unused tape be cumulative and therefore insufficient to establish ineffective assistance of counsel in the decision not to present it, *see Barrett*, 965 F.2d at 1196, but this is also an instance of a strategic decision by trial counsel concerning cross-examination that will not be second-guessed on collateral attack, *McGill*, 11 F.3d at 227-28.

Ciocca next contends that his trial counsel's cross-examination of Caporino resulted in the presentation of prejudicial and inadmissible evidence to the jury. Ciocca is understandably dismayed that his trial counsel's cross-examination of Caporino elicited the following testimony that had not been placed before the jury by the government: (i) over a period of a year and a half in 1983 and 1984 Caporino made ten trips between Connecticut and Maine to transport cocaine that Caporino got from Ciocca, Tr. II at 55-57; (ii) in 1984 or 1985 Ciocca gave Caporino three kilograms of cocaine, *id.* at 74; (iii) Ciocca told Caporino that he was involved in selling cocaine the second time they met, in 1981, *id.* at 97-98; (iv) Caporino earned \$30,000 every two weeks only after meeting Ciocca, *id.* at 101; (v) Caporino started making good money selling cocaine for Ciocca in 1981, *id.* at 108-09; (vi) Caporino owed Ciocca \$91,000 for cocaine before his 1983 accident, *id.* at 119; (vii) Michael Underwood took over Caporino's business selling cocaine for Ciocca while Caporino was in the hospital after his accident, *id.* at 116-20; (viii) Ciocca gave Caporino three kilograms of cocaine immediately after his accident without requiring payment, *id.* at 190-91;² and (ix) Ciocca

² Ciocca's interpretation of the government's redirect examination of Caporino on this point, Defendant's Amended Memorandum at 12, as "coherently, concisely, and effectively laying out for the jury how a helpless, bedridden coma patient became indoctrinated back into trafficking in cocaine by Ciocca fronting it to him, seemingly while he was still seriously mentally disabled," is (continued...)

wore gloves during the Boston Garden transaction, *id.* at 171, supposedly eliminating a defense argument based on the lack of fingerprints on the cocaine taken from Ciocca's home, which was the basis for the criminal charges at issue, Defendant's Amended Memorandum at 13. Ciocca terms his trial counsel's strategy in cross-examining Caporino "absurd." *Id.* at 12.

The government does not respond to this argument, except to contend that some of the questions asked on cross-examination demonstrate that Ciocca's trial counsel was adequately prepared for trial. Testimony that is elicited on cross-examination may simultaneously impeach the witness and be unfavorable to the defendant. *E.g., Hunt v. Nuth*, 57 F.3d 1327, 1332-33 (4th Cir. 1995). Even trial tactics "readily assailable" in hindsight are within the realm of reasonable assistance of counsel. *Id.* at 1333 ("Although [the defendant] persuasively argues that he did not receive the *best* possible representation at trial, *Strickland* only requires adequate counsel judged by a standard of reasonableness in light of the prevailing norms of practice."). Very close on its facts is the case of *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987), in which the defendant argued on appeal that he received ineffective assistance of counsel because his trial counsel's cross-examination of a witness "opened the door" to damaging information which the government elicited on redirect examination. The Eleventh Circuit, stating that trial counsel's attempted defense in this regard "may not have been a wise strategy" under the circumstances, nevertheless held that "his strategy was not so unreasonable that no competent attorney would have chosen it" and denied the appeal. *Id.* Trial counsel here was obviously attempting to impeach Caporino's testimony. Some of his questions were certainly unwise. However, a defense decision must be completely

²(...continued)
inconsistent with the cited testimony, Tr. II at 189-91.

unreasonable and not merely wrong, “so that it bears no relationship to a possible defense strategy,” before further review of trial counsel’s competence is required under section 2255. *United States v. Ortiz Oliveras*, 717 F.2d 1, 4 (1st Cir. 1983). The cross-examination of Caporino in this case did not fall to that level.³

The final aspect of trial counsel’s work at trial offered by Ciocca as evidence of ineffective assistance is the failure to object to any and all evidence concerning the Boston Garden transaction, which Ciocca asserts was outside the scope of the conspiracy charged, although he acknowledges that the government could have attempted to introduce this evidence under Fed. R. Evid 404(b). Defendant’s Amended Memorandum at 10. The government responds that the incident “involved Ciocca with cocaine during the period of time of the conspiracy charged in the indictment.” Government’s Response to Motion to Vacate, Set Aside or Correct Sentence Filed Pursuant to Title 28, U.S.C., Section 2255 (Docket No. 83) at 48. Rule 404(b) provides, in relevant part:

Evidence 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

Here, evidence of the Boston Garden transaction appears admissible under the rule for proof of knowledge and intent, at least. *United States v. Manning*, 79 F.3d 212, 217 (1st Cir. 1996) (First Circuit has often upheld admission of evidence of prior narcotics involvement when charges of drug

³ This is also true of trial counsel’s use of Caporino’s grand jury testimony during the cross-examination which Ciocca assails as demonstrating “Caporino’s apparently effective memory.” Defendant’s Amended Memorandum at 11. That was simply a strategic effort to demonstrate that Caporino’s trial testimony had been carefully prepared. Tr. II at 98-99. It is not possible to tell from the transcript, without observing Caporino’s demeanor, whether the attempt succeeded. Even if it did not, the tactical decision is not one to be second-guessed on a collateral attack. *McGill*, 11 F.3d at 227-28.

trafficking are involved). The failure to object to the admission of evidence concerning this incident did not constitute ineffective assistance of counsel.

C. Post-Trial Conduct

Ciocca begins his litany of his trial counsel's alleged post-trial errors of constitutional dimension with the failure to object to certain statements which he contends were improper assertions of personal opinion by the prosecutor in closing argument and rebuttal. He lists the following statements as the ones to which his counsel should have objected: (i) "Unless you believe in the tooth fairy, ladies and gentlemen, Kevin Caporino got that kilo from Jack Ciocca," Transcript of Closings and Instructions at 14; (ii) "[T]here was an agreement to transfer this kilo just as sure as I'm standing here," *id.* at 16; (iii) "Jack Ciocca conspired with Harold Nelson and others to possess and distribute cocaine. You bet he did. And you bet the government has proven that beyond a reasonable doubt," *id.* at 17; and (iv) "Don't be so quick to think that because Neal [Weinstein] is a lawyer he is telling the truth because he isn't," *id.* at 43.

"[I]t is wrong for a prosecuting attorney to inject his personal beliefs into his summation." *United States v. Mejia-Lozano*, 829 F.2d 268, 273 (1st Cir. 1987). Improper vouching occurs when "the prosecution . . . place[s] the prestige of the government behind the witnesses [] by making explicit personal assurances of the witness' veracity." *United States v. Grant*, 971 F.2d 799, 811 n.22 (1st Cir. 1992) (internal quotation marks and citation omitted). Reviewed in context in the trial transcript, the first three statements challenged by Ciocca do not fit within the definition of vouching or improper assertion of personal beliefs. The final remark, however, does appear to place the prestige of the government against the witness, a vouching in reverse. The government argues that,

even if this is the case, Ciocca suffered no prejudice by virtue of his counsel's failure to object to it. I agree that there is no reasonable probability that, but for counsel's failure to object, the prosecutor's statement that a defense witness offered on a peripheral point was not telling the truth would have induced the jury to reach a different result. *Snell v. Lockhart*, 14 F.3d 1289, 1300 (8th Cir. 1994). As was the case in *Snell*, the court here instructed the jury that the closing arguments were not evidence and they were to consider only the evidence, Transcript of Closings and Instructions at 1, 46, 80-81, and the evidence overwhelmingly supports the jury's decision, *Snell*, 14 F.3d at 1301. This argument for relief under section 2255 must fail.

Ciocca next argues that his trial counsel's assistance was constitutionally deficient because he failed to challenge the drug quantities used for sentencing purposes. This claim is based on the assertion that only a one kilogram transaction "was corroborated by any independent evidence whatsoever," Defendant's Amended Memorandum at 14, yet 6 kilograms were used to determine the base offense level. Ciocca maintains that he asked his trial counsel to challenge the quantity because "it was based on nothing more than Caporino's unsubstantiated, uncorroborated testimony." *Id.* at 15. He also asserts that his trial counsel "either incompetently or deceitfully represented in writing to [him] that the drug quantity could not be challenged because in the superseding Indictment the Government had lengthened the term of the alleged conspiracy." *Id.*

It is not necessary that the evidence used to establish drug quantities for sentencing purposes be corroborated or substantiated, or that it be presented by the testimony of more than one witness. The accuracy of the information presented by the government on this issue need only be verified by a preponderance of the evidence. *United States v. Mocchiola*, 891 F.2d 13, 16 (1st Cir. 1989). Ciocca does not suggest that evidence contradicting Caporino's testimony concerning the amounts of

cocaine he had transported for Ciocca was available, nor does he specify what further impeachment of Caporino's testimony should have been undertaken by his trial counsel. "The problem with [the defendant's] argument is that he has not suggested that there is any factual basis upon which counsel could have relied in mounting such a challenge." *United States v. Lawson*, 947 F.2d 849, 853 (7th Cir. 1991). Even if counsel had challenged the amounts, there is not a reasonable probability that the result of the sentencing hearing would have been significantly different. *Id.* at 853-54 (testimony as to part of total quantity from one witness held sufficient to uphold that amount; no entitlement to hearing on claim of ineffective assistance of counsel). Ciocca is not entitled to relief on the basis of this claim.

Ciocca next assails his trial counsel's informing the court at the sentencing hearing about the amounts Ciocca had agreed to pay his former and current counsel as ineffective assistance, stating that "[h]ow [revealing this confidential information without Ciocca's consent] is damaging to Ciocca is self-evident." Defendant's Amended Memorandum at 18. To the contrary, the alleged damage to Ciocca arising out of this revelation is anything but self-evident. Ciocca's presentation of this issue is precisely the type of conclusory presentation that is unacceptable under *Dziurgot*.⁴

Ciocca also finds the sentencing hearing flawed due to his trial counsel's failure to argue for leniency. He asserts that the court asked, "seemingly in exasperation," whether there was a basis to exercise leniency in his favor. Defendant's Amended Memorandum at 17. The sentencing transcript does not support this characterization of the court's colloquy with Ciocca's counsel, Sentencing Tr. at 19-20, but in any event the fact is that Ciocca's trial counsel did argue for a term at the low end

⁴ Ciocca's current counsel apparently has no qualms about revealing to the court how much Ciocca paid an additional lawyer he retained to review the appellate brief to be submitted by his trial counsel. Defendant's Amended Memorandum at 19.

of the available sentencing range in consideration of Ciocca's cooperative attitude before trial and his decision to go to trial only to protect the safety of his family, *id.* at 17-19. Ciocca does not offer any basis upon which his trial counsel should have argued for leniency other than a "positive pronouncement concerning the life and character of Jack Ciocca." Defendant's Amended Memorandum at 17. Assuming *arguendo* that this statement is sufficient under *Dziurgot*, but see *Bush v. United States*, 765 F.2d 683, 685 (7th Cir. 1985) (criticizing failure to state what counsel could have said in arguing for leniency or on what basis such a claim could have been asserted in motion under section 2255), it cannot seriously be contended that the defendant would have been sentenced at the low end of the sentencing guideline range if counsel had so argued. See *Silano v. United States*, 621 F. Supp. 1103, 1104 (E.D.N.Y. 1985) (failure to file motion to reduce sentence not ineffective assistance under section 2255 for this reason). Indeed, given the court's statement of its reasons for imposing a sentence at the high end of the applicable range, Sentencing Tr. at 30, it is highly unlikely that any plea for leniency based on Ciocca's asserted good character or worthwhile life would have had any effect at all. There is no showing of prejudice under *Strickland* on this issue.

Ciocca moves on to his counsel's actions on appeal, first asserting that his assistance was constitutionally deficient in that he failed to challenge the 188-month sentence on appeal. The government does not respond to this argument. Ciocca does not identify any basis upon which the sentence should have been appealed, nor does he assert that he requested that his trial counsel appeal the sentence. See, e.g., *Morales v. United States*, 143 F.3d 94, 97 (2d Cir. 1998) (counsel is ineffective only when ignoring defendant's explicit request to file appeal); *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) (same). It is significant that Ciocca's counsel did file an

appeal of his conviction. For that reason, case law concerning failure of trial counsel to file an appeal at all is inapplicable. The case law of value in considering the specific claim asserted by Ciocca here is that involving failure to raise a given issue on appeal. In that situation, the court presented with a section 2255 motion alleging ineffective assistance of counsel examines the merits of the omitted issue. *United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995). By failing to identify the issue or issues upon which an appeal of his sentence should have been undertaken, Ciocca makes such an examination impossible.⁵ *See also Shraiar v. United States*, 736 F.2d 817, 818-19 (1st Cir. 1984) (failure to file motion to reduce sentence could not fall below standard of effective assistance of counsel where only ground for such motion asserted in section 2255 motion is to take advantage of possible change in sentencing judge's psychology).

The next ground presented by Ciocca to support his request for relief is his assertion that his trial counsel submitted an appellate brief of poor quality that was prepared by a law clerk. He also complains that his trial counsel was so late in preparing the brief that an additional lawyer whom Ciocca had hired to review it prior to submission was unable to do so. Specifically, Ciocca contends that the brief waived a "key challenge" to the admission of "statements of co-conspirator Nelson with Caporino." Defendant's Amended Memorandum at 20. Ciocca cites no authority to support his contention that preparation of an appellate brief by a law clerk or the preparation of that brief too close to the deadline to allow for its review by a second lawyer, alone or together, constitute

⁵ If Ciocca and his counsel in this action intend the court to assume that the issues concerning the sentence that should have been raised on appeal are those concerning the drug quantity used to establish the base range under the sentencing guidelines and the possibility of leniency through exercise of the sentencing court's discretion, neither issue was likely to succeed on appeal, for reasons already stated, and trial counsel cannot be found to have fallen below the constitutionally required level of representation by failing to raise futile issues on appeal. *Carter v. Johnson*, 110 F.3d 1098, 1111 (5th Cir.), *vacated on other grounds* 118 S.Ct. 409 (1997).

constitutionally defective assistance of counsel. Neither could possibly rise to that level. A general allegation that the appellate brief was of poor quality is not sufficiently specific to require review under section 2255.⁶

The substantive attack on the appellate brief does not specify the basis upon which the challenge to the admission of the statements should have been made. Ciocca does not base his challenge on the “clearly hearsay statement of Caporino” to which he refers early in his memorandum in support of his motion, *id.* at 6, because that statement arises out of a conversation between Ciocca and Caporino, Transcript of Proceedings Volume I (“Tr. I”) (Docket No. 55) at 15. Even in his reply memorandum, Ciocca does not identify the “statements between the informant and co-defendant Nelson” the admission of which should have been challenged on appeal. Reply Memorandum to Government’s Response to Support of Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 USC § 2255 (Docket No. 84) at 3-4. In the absence of that basic information, this court is unable to determine whether inclusion of that issue on appeal would have been reasonably probable to result in a different outcome.

The final issue raised in Ciocca’s motion is the alleged failure of his counsel to file a petition for a writ of certiorari following denial of his appeal by the First Circuit. The Fifth Circuit has found such a claim in a section 2255 proceeding to be “totally devoid of merit” on its face. *United States v. Lauga*, 762 F.2d 1288, 1291 (5th Cir. 1985). There is no constitutional right to counsel after the first appeal as of right. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). In the absence of a

⁶ Ciocca’s memorandum does assert that one of three issues raised in the brief was “of no significance” and irrelevant. Defendant’s Amended Memorandum at 19. Ciocca does not discuss how he was prejudiced by the presentation of such an issue, and no prejudice is readily apparent. The outcome of his appeal would not have been affected by discussion of an issue that the appellate court would not address.

constitutional right to counsel to pursue discretionary review in the Supreme Court, a defendant cannot claim constitutionally ineffective assistance of counsel based on the failure to file a petition for a writ of certiorari. *United States v. Brown*, 973 F. Supp. 530, 532 (D. Md. 1997).

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 7th day of August, 1998.

*David M. Cohen
United States Magistrate Judge*