07-0576-pr

To Be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-0576-pr

JOHNNY HAYGOOD, a.k.a. "New York",
Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Honorable Janet C. Hall, J.) had subject matter jurisdiction under 18 U.S.C. § 3231 and 28 U.S.C. § 2255. On January 23, 2007, the district court denied the petitioner's motion for relief under 28 U.S.C. § 2255. On February 6, 2007, the petitioner moved for reconsideration of that decision, and the district court denied the motion on the same date. Under Fed. R. App. P. 4(a), which provides for a sixty-day deadline from the entry of a civil judgment, the petitioner filed a timely notice of appeal on February 16, 2007 as to the district court's ruling denying his § 2255 petition. On April 4, 2007, the petitioner filed a motion for the issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(B), and on April 5, 2007, the district court granted that motion.

Statement of Issue Presented for Review

In pretrial suppression proceedings, petitioner's counsel unsuccessfully argued that a confidential informant relied upon by police officers to obtain a search warrant of his home did not exist. Did the district court properly deny petitioner's § 2255 motion, which rested on the erroneous premise that counsel had failed to advance such an argument?

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Preliminary Statement

On September 25, 2003, police officers with the Bridgeport Police Department's Tactical Narcotics Team arrested three individuals whom they had observed engaged in a narcotics transaction, including the petitioner, Johnny Haygood. In the course of arresting the petitioner, the police seized several small packages of crack cocaine from his jacket pocket. As a result of information already known about the petitioner, which included the fact that, on September 1, 2003, he had sold a quantity of crack

cocaine to a known and reliable confidential informant, and information learned during the course of the petitioner's arrest, the police secured a search warrant for his apartment at 275 Jefferson Street in Bridgeport. During the execution of the search warrant on September 26, 2003, the police discovered a loaded .38 caliber revolver, 40 rounds of .38 caliber ammunition, and approximately 13 grams of cocaine base. After the search, the petitioner waived his *Miranda* rights and executed a written statement admitting that he was a drug dealer and that he had knowingly possessed the revolver found in his apartment.

The petitioner was subsequently charged by Superseding Indictment in federal court with one count of being a felon in possession of a firearm and one count of possession with the intent to distribute five grams or more of cocaine base. He filed two separate motions to suppress the firearm and narcotics seized from his person and his residence based on claims that (1) the warrantless seizure of 28 baggies of crack cocaine from the jacket that he had been wearing at the time of his arrest violated the Fourth Amendment; (2) the search warrant was not supported by probable cause because it improperly included an un-Mirandized, involuntary admission; and (3) the search warrant affidavit contained material, false information because the confidential informant discussed therein did not exist. The petitioner also moved to compel the disclosure of the identity of the confidential informant. The district court denied all three motions. After jury selection, but prior to the start of trial, the petitioner pleaded guilty to the felon-in-possession count and

reserved his right to appeal the district court's denial of the motions to suppress and the motion to compel disclosure. He was then sentenced to 210 months' incarceration based, in part, on his stipulation that he had possessed the firearm at issue in connection with a controlled substance offense. After sentencing, the Government moved to dismiss the cocaine base distribution count.

On direct appeal, the petitioner challenged only the district court's denial of the motion to suppress based on the alleged *Miranda* violation. He claimed that his admission during the booking process that he resided at 275 Jefferson Street was an un-Mirandized and involuntary statement that should have been stricken from the search warrant affidavit, and that, without such statement, the search warrant was not supported by probable cause. This Court rejected that claim by summary order and affirmed the judgment of conviction.

The petitioner then filed a § 2255 petition raising four claims: (1) his conviction was obtained by plea of guilty that was "unlawfully induced" and not "made voluntarily" because, at the time of his guilty plea, his attorney did not explain the interstate commerce element to him; (2) his trial counsel was ineffective for failing to claim that the evidence against him was seized pursuant to a warrantless search; (3) the district court erred in refusing to order the Government to disclose the identity of the confidential informant, and his appellate counsel was ineffective for failing to challenge that ruling on appeal; and, (4) his conviction was obtained through the use of a "coerced

confession." After the Government filed its response, the petitioner amended his third claim to state that his trial counsel was ineffective for failing to argue that the petitioner was never involved in the September 1, 2003 controlled purchase discussed in the search warrant. The district court dismissed the petition, as amended, denied the petitioner's subsequently filed motion for reconsideration, and granted the petitioner's motion for a certificate of appealability.

Now, on appeal, the petitioner argues that the district court erred in concluding that his trial counsel was not constitutionally ineffective for failing to argue that the petitioner was never involved in the September 1, 2003 controlled purchase detailed in the warrant affidavit. This claim has no merit. First, contrary to the facts underlying the petitioner's argument, defense counsel did indeed claim that the September 1, 2003 transaction never occurred. Specifically, he argued that the police had lied about the existence of a confidential informant, that no such informant existed, and that no controlled purchase took place on September 1, 2003. The district court properly rejected this claim. Second, as the district court pointed out in its written ruling on the issue, even without any discussion of the September 1, 2003 controlled purchase, the search warrant affidavit still included enough information to establish probable cause that evidence of a narcotics violation would be found in the petitioner's apartment. Thus, the district court's decision denying the § 2255 petition should be affirmed.

Statement of the Case

On September 25, 2003, the petitioner-appellant, Johnny Haygood, a/k/a "New York," was arrested by police officers with the Bridgeport Police Department's Tactical Narcotics Team near the intersection of Newfield Avenue and Revere Street in Bridgeport. The state charges were subsequently dismissed when a federal grand jury in Bridgeport, on March 3, 2004, returned a three-count indictment charging the petitioner with one count of being a previously convicted felon in knowing possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and one count of possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). JA4.[1] Counts One and Three were based on the contraband seized from the petitioner's residence on September 26, 2003, and Count Two was based on the contraband seized from the petitioner's jacket on September 25, 2003.

On October 19, 2004, the petitioner filed a motion to suppress the physical evidence seized from his jacket on September 25, 2003 and the physical evidence seized from his residence on September 26, 2003. GA1-GA2.[2] On

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[1] The Joint Appendix will be cited as "JA" followed by the page number.

[2] The Government's Appendix will be cited as "GA" (continued...)

November 9, 2004, the district court denied the motion. JA6-JA13. On November 17, 2004, the petitioner filed a motion to compel the disclosure of the identity of the confidential informant used in the search warrant affidavit, and on December 14, 2004, the petitioner filed a renewed motion to suppress based on his claim that no confidential informant existed. GA5-GA12. On December 28, 2004, the district court denied both motions. JA19-JA36.

On December 9, 2004, a federal grand jury in Bridgeport returned a Superseding Indictment against the petitioner which only charged Counts One and Three from the first Indictment, the counts based on the firearm and cocaine base seized from the petitioner's residence on September 26, 2003. JA14-JA17. The petitioner entered a plea of not guilty, and jury selection went forward on January 12, 2005. On January 14, 2005, the petitioner changed his plea to guilty as to Count One of the Superseding Indictment, and entered into a written plea agreement, under which he expressly reserved his right to challenge the district court's November 9, 2004 and December 28, 2004 rulings.

On May 2, 2005, the district court (Janet C. Hall, J.) sentenced the petitioner to 210 months' imprisonment and five years' supervised release. JA46. On May 4, 2005, the petitioner filed a timely notice of appeal. JA47. By unpublished decision, this Court affirmed the petitioner's

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[2] (...continued)
followed by the page number.

judgment of conviction. *See United States v. Haygood*, 157 Fed. Appx. 448, 449 (2d Cir. 2005).

On October 4, 2006, the petitioner filed with the district court a petition for relief pursuant to 28 U.S.C. § 2255. JA50-JA55. On January 23, 2007, the district court denied the petition, and on February 6, 2007, the district court denied the petitioner's motion for reconsideration. JA58-JA67; GA34-GA36. On February 16, 2007, the petitioner filed the notice of appeal. JA76. On April 4, 2007, the petitioner filed a motion for a certificate of appealability, and on April 5, 2007, the district court granted that motion. JA77-78; GA29-GA33.

Statement of Facts

A. Factual Basis

The following facts, which appear to be undisputed, were derived from the various transcripts and documents which were submitted as part of the parties' Joint Appendix on direct appeal.

In September, 2003, Bridgeport Police Officers Keith Ruffin and John Andrews, of the Tactical Narcotics Team ("TNT"), utilized a confidential informant ("CI")[3] who had proven to be truthful and reliable in the past to purchase a quantity of cocaine base from an individual identified by the CI as "John," with the street name of

[3] For simplicity, the CI will be referred to in the masculine gender.

"New York." Tr. 12/21/04 at 15. TNT had utilized the CI to engage in ten prior controlled purchases and to help secure four prior state search and seizure warrants. Tr. 12/21/04 at 17. On occasions when the CI provided information or engaged in a controlled purchase, TNT officers compensated him, usually in twenty-dollar payments; the CI did not have a pending criminal case against him. Tr. 12/21/04 at 12, 16-17.

The CI provided information that "John 'New York'" was selling ten-dollar bags of crack cocaine from his residence at 275 Jefferson Street, in Bridgeport. Tr. 12/21/04 at 14. On September 1, 2003, TNT officers directed the CI to attempt to make a purchase at John's residence. Tr. 12/21/04 at 14. Although the CI attempted to meet John at 275 Jefferson Street to conduct the transaction, John intercepted the CI before he reached the residence, and the transaction occurred out on the street and out of sight of the surveillance officers, who were positioned to observe 275 Jefferson Street. Tr. 12/21/04 at 51. TNT officers did not use the CI again to attempt to purchase narcotics from John or from 275 Jefferson Street. Tr. 12/21/04 at 52.

On September 25, 2003, at approximately 9:45 p.m., TNT officers operating in the area of Stratford Avenue moved in to arrest individuals whom they suspected had just engaged in a drug transaction. GA13. Officers had watched the transaction occur near the intersection of Stratford Avenue and Newfield Avenue. GA13. Specifically, they observed one individual (later identified as Cynthia Gill) purchase suspected narcotics from a

second individual (later identified as Eddie Davis), who then handed the suspected narcotics proceeds from the transaction to a third individual (later identified as the petitioner). GA13. When the officers moved in to make arrests, they detained Gill and Davis, but the petitioner ran away. GA14-GA15.

Several officers gave chase, including Officer Ruffin, who was able to reach the petitioner and grab him by his jacket, which displayed the team color, logo and markings of the Philadelphia 76ers. GA13-GA14; Tr. 12/21/04 at 18. The petitioner, however, was able to slip out of his jacket near the intersection of Newfield Avenue and Revere Street and run through the backyards of several residences south and east of that intersection. GA14; Tr. 12/21/04 at 18. Police officers, who were wearing clothing with clearly identifiable police insignia and were yelling for the petitioner to stop, apprehended him moments later in the vicinity of 18 Revere Street. GA14; Tr. 11/5/04 at 13. Officers found a crumpled up ten-dollar bill in his front left pants pocket. GA14.

During the course of the foot pursuit, which lasted only moments, TNT Officer Sean Ronan had positioned himself near the intersection of Newfield Avenue and Revere Street. Tr. 11/5/04 at 14. Just as the petitioner was apprehended, Officer Ronan observed another individual (later identified as Terrence Police) stand in the middle of the intersection, pick up the petitioner's discarded jacket, and begin turning the sleeves inside out. Tr. 11/5/04 at 16. Officer Ronan immediately walked over to Police, took the jacket from him and detained him. Tr. 11/5/04 at 16.

Inside one of the jacket's pockets, Officer Ronan found a leather pouch containing 28 small ziplock bags, each containing suspected crack cocaine and each having an orange basketball emblem on it. Tr. 11/5/04 at 17; GA14.

While Officer Ruffin was still at the scene, and after the petitioner had been arrested, the CI from the September 1, 2003 controlled purchase approached him with information. Tr. 12/21/04 at 19-20. At the time of the incident, there were numerous people out on the street, as Newfield Avenue is a well-trafficked area. Tr. 12/21/04 at 20. Officer Ruffin met with the CI around the corner and out of sight of the pedestrian onlookers. Tr. 12/21/04 at 20. The CI advised Officer Ruffin that the petitioner whom he had just arrested was "John 'New York'" about whom he had previously given information. Tr. 12/21/04 at 20-22; GA23, ¶ 8. The CI advised that he had spoken with the petitioner that day, and that the petitioner had advised the CI that he had just gone to New York and "re-upped" (a common term for the purchase of a supply of narcotics). Tr. 12/21/04 at 21; GA23, ¶ 8. The petitioner had also told the CI that he had the narcotics in his apartment, which was on the second floor of 275 Jefferson Street. GA23, ¶ 8. Lastly, the CI pointed to a four-door, burgundy, Mitsubishi Galant bearing registration CT 294-RPK and stated that it belonged to the petitioner. GA23, ¶ 8.

Back at the police station, the petitioner was asked several pedigree questions as part of the booking procedure and prior to the administration of *Miranda* warnings. GA24, ¶ 9. With respect to his address, the

petitioner first stated that he was homeless. GA24, ¶ 9. He was then asked where he had stayed the night before the arrest, and he responded, "New York." GA24, ¶ 9. When asked for an address in New York, the petitioner responded that he did not live in New York, but had been staying there for the night. GA24, ¶ 9. At that point, the police told the petitioner that he was required to provide an address, and the petitioner responded that he stayed at "275 Jefferson Street, second floor, left." GA24, ¶ 9. The police also asked the petitioner about the four door, burgundy, Mitsubishi Galant that they had removed from the scene, and he confirmed that he had been borrowing the car from his uncle. GA24, ¶ 9.

Later that same evening, officers went to 275 Jefferson Street to confirm the location of the petitioner's apartment. GA24, ¶ 11. Once inside, the officers spoke to a tenant, who gave them the exact location of the petitioner's apartment (second floor, far left hand side apartment). GA24, ¶ 11. The officers noted that the second floor was similar to a rooming house, with several different single-room apartments and a common kitchen area and bathroom. GA24, ¶ 11. The tenant explained that, as one faced the petitioner's room from the kitchen area, it was the far left hand side apartment, and pointed out the petitioner's room to the officers. GA24, ¶ 11. The tenant identified him/herself, but asked not to be identified in the police report. GA24, ¶ 11. The officers knocked on the door identified as the petitioner's, and no one answered. GA24, ¶ 11.

Officer Ruffin also reviewed the police report related to the CI's September 1, 2003 controlled purchase from "John 'New York'" GA24, ¶ 10. From that report, he learned that the crack cocaine that the CI purchased from John was packaged in ziplock baggies with a similar orange emblem as the 28 ziplock baggies found in the petitioner's jacket. GA24, ¶ 10.

At approximately 8:00 a.m. on September 26, 2003, Connecticut Superior Court Judge Owens signed a search warrant for the petitioner's room at 275 Jefferson Street. GA16. Shortly thereafter, the officers, after knocking again and receiving no answer, entered the room using keys taken from the petitioner's person during his arrest. GA16. No one was inside. GA16. The room itself was approximately nine-and-one-half feet by seven feet and was furnished with a bed, dresser, and television. GA16. On the dresser, the officers found a dinner plate containing approximately 14 grams of crack cocaine. GA16. Also on the dresser, officers found a cotton swab box containing numerous empty ziplock baggies with a Superman logo, and two ziplock baggies with an orange basketball logo containing crack cocaine. GA17. The orange basketball logo was similar to the logos on the baggies seized from the petitioner's jacket on September 25, 2003 and purchased from the petitioner by the CI on September 1, 2003. GA17. In one of the dresser drawers, officers found a small hand scale and in another dresser drawer, they found a fully loaded Defender, H & R Arms .38 caliber revolver bearing serial number 493, and 40 rounds of Winchester-Western .38 caliber ammunition. GA17. Finally, the officers found $1400 in cash on the floor and

numerous mail and items of identification in the petitioner's name. GA17-GA18.

After the discovery of the contraband, the petitioner was interviewed by Bridgeport Police Detectives Santiago Llanos and Sanford Dowling. The petitioner executed a written waiver of his *Miranda* rights, and signed a written statement regarding the firearm seized from his residence. Exs. 6 and 7.[4] Specifically, the petitioner stated, "I had a pistol in my House For protection From a guy" called Marvin because "Marvin Had pulled out a pistol on me and stated He didn't want me around" where he sold drugs, "which is on Re[vere] and Newfield Ave." Ex. 7.

B. Motions to Suppress

In the petitioner's October 19, 2004 motion to suppress he raised two claims. First, he argued that the crack cocaine found in his jacket pocket at the time of his arrest was not his, and that, therefore, the arrest which preceded the issuance of the search warrant was not supported by probable cause. GA1-GA4. Second, he claimed that the statement that he made regarding his place of residence was taken in violation of his Fifth and Sixth Amendment rights and should not have been used in the search warrant affidavit for his residence. GA1-GA4.

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[4] At the November 5, 2004 suppression hearing, the Government submitted as full exhibits the petitioner's September 26, 2003 waiver of rights form (exhibit 6) and the petitioner's September 26, 2003 written statement (exhibit 7).

At the suppression hearing on November 5, 2004, the Government relied upon several investigative reports and the testimony of Bridgeport Police Officer Sean Ronan, who had seized and subsequently searched the petitioner's jacket. Tr. 11/5/04 at 8-31. The petitioner testified on his own behalf. He stated that the officers never explained the reason for his arrest and simply started asking him questions when they arrived at the police department. Tr. 11/5/04 at 52. In response to a question about his address, the petitioner recounted that he had told the officers that he was homeless. Tr. 11/5/04 at 52. At that point, they had asked him where he had slept the previous night, and he had responded, "I spent the night at my cousin's house in New York." Tr. 11/5/04 at 53. Another officer then came over and told him that he had to give an address, and he "told him the address where I was at." Tr. 11/5/04 at 54.

The petitioner also discussed the events preceding his arrest. Tr. 11/5/04 at 54. He admitted to having received ten dollars from Eddie Davis, whom he characterized as a friend, but claimed that it had not been part of a drug deal, but had been money that Davis had owed to the petitioner. Tr. 11/5/04 at 54-55. As to the police pursuit, he claimed that he had not known that the police had been chasing him and had run because he had been scared of whomever had been chasing him. Tr. 11/5/04 at 55. As to the jacket, the petitioner claimed that he had not had any drugs inside it and had not known about the narcotics seized from the jacket. Tr. 11/5/04 at 56, 59. Finally, the petitioner said that he had been in New York the night before his arrest,

but denied having purchased any narcotics there. Tr. 11/5/04 at 58.

During cross-examination, the petitioner admitted that much of the narcotics taken from his apartment on September 26, 2003 belonged to him. He claimed, however, that any narcotics found in his jacket must have belonged to Mr. Police, who had picked up the jacket after the petitioner had slipped out of it. Tr. 11/5/04 at 63. He also testified that, on the night of his arrest, he was not conducting any narcotics transactions at this intersection. Tr. 11/5/04 at 73-75.

The district court denied the petitioner's motion to suppress in an oral ruling. On the issue related to the seizure of the petitioner's jacket and his subsequent arrest, the court found that, based on the police officers' observations that night, they had probable cause to arrest the petitioner. JA7-JA8. The court further stated, "Even if I'm wrong about that, they certainly had a reasonable suspicion to stop him and to approach him and to inquire of him based upon the circumstances and when he fled and/or that created I believe sufficient additional cause to pursue him and to arrest him." JA8. As to the jacket, the court found that it was properly searched and seized either as abandoned property or as incident to the arrest of Mr. Police. JA9.

As to the petitioner's admission regarding his residence, the district court resolved the issue without determining whether there was a *Miranda* violation or whether the statement at issue was voluntary. JA10. The

court noted that, under *United States v. Patane*, 542 U.S. 630 (2004), the petitioner would have "great difficulty" sustaining his argument that the un-Mirandized statement had to be removed from the search warrant, but ultimately stated, "I don't think I have to reach that issue because I think if you remove from the search warrant completely any reference to information provided by Mr. Haygood, that the search warrant is still more than sufficient for a finding of probable cause that this address, in particular, this part of the apartment on the second floor is the residence or location where Mr. Haygood sleeps and maintains items of his own or possesses items." JA10-JA11. In reaching this conclusion, the court relied on (1) the fact that the officers had a CI who had purchased crack cocaine from the petitioner in the past and had connected him to 275 Jefferson Street both at the time of the purchase on September 1, 2003 and at the time of the petitioner's arrest on September 25, 2003; and (2) the fact that the officers went to 275 Jefferson Street, spoke to an identified tenant with an identified address and confirmed the CI's information by having that tenant point out the petitioner's particular room within the boarding house. JA11-JA12. "So based upon, as I say, eliminating Mr. Haygood's statement at the police station completely, the court finds that there's still more than adequate probable cause on the face of the [search] warrant to justify the issuance of the search warrant and obviously, therefore, the seizure of the items pursuant to the execution of that search warrant." JA12.

Prior to jury selection, the petitioner filed a motion to compel the disclosure of the identity of the confidential

informant used in the search warrant. GA5-GA8. In support of the motion, the petitioner claimed in an affidavit that there was no such confidential informant, that he had never sold narcotics to anyone "while on foot," and that he had not gone to New York to "re-up" prior to his arrest. GA9. The petitioner also filed a renewed motion to suppress based on this same claim that no confidential informant existed. GA11. At a suppression hearing on December 21, 2004, the Government relied on the testimony of Bridgeport Police Officers Keith Ruffin and John Andrews to establish that the CI referenced in the search warrant affidavit was a paid informant who had been used in ten controlled purchases and to secure four search warrants prior to his use in the petitioner's case. Tr. 12/21/04 at 11, 17, 49-50.

On December 28, 2004, the district court denied the petitioner's motion in an oral ruling. JA19. The court found the testimony of the officers to be credible and explained that, according to the officers, the confidential informant used in this case had been used on ten prior occasions, resulting in the issuance of search warrants, the seizure of narcotics and the arrest of several individuals. JA21. According to the officers, the confidential informant was a reliable source of information. JA21. The court found "that both police officers' testimony was credible with respect to this confidential informant. By saying that, the court means to state that the court credits the testimony that there is a confidential informant." JA22. The court explained that it reached "this conclusion by observing the officers as they testified, in particular Officer Ruffin. The Court found that he did not overreach

in his testimony. He did not try to fill in the gaps. And he struck the Court as a direct and honest person." JA22.

As to the motion to suppress the warrant based on the claim that there was not probable cause to support its issuance, the court rejected the argument as follows:

> I find that there was probable cause that includes the confidential informant's information of a prior buy from Defendant Haygood of a drug in a particular packaging which packaging and drugs – types of drugs were found in the pocket of Mr. Haygood's jacket the night of his arrest when he fled the scene of the buy which was observed by police officers. . . . [A]nd based upon the police officers' observations, they reasonably concluded he was involved in that buy. Further, information available to the police officers . . . was [that] 275 Jefferson Street . . . was an address they knew associated with the defendant from the confidential informant, [and] of course, from Mr. Haygood. . . . Taking all of that information together, there clearly was probably cause to support the warrant and so I believe that addresses the motion to suppress which was based upon an argument that the informant didn't exist . . . .

JA24-JA25.

On the issue of whether the petitioner was entitled to disclosure of the identity of the confidential informant, the court denied the motion to compel based on its conclusion

that, although the informant provided the core of the justification for the search warrant, his information was corroborated. As the court stated:

> First of all, we have police officers observing a buy. Now, as I have said in my earlier rulings with respect to that, I understand Mr. Haygood's position that he was not involved in that buy. However, the facts are that what the police officers observed, again remember we're at a probable cause standard here, was an actual buy occurring, they saw that between a man and a woman . . . with Mr. Haygood off to the side. Immediately upon completion of the exchange of what the officers reasonably assumed was drugs for money, the man turned and went to Mr. Haygood and handed Mr. Haygood something. When Mr. Haygood was finally tracked down after he fled the scene . . . , he had crumpled up money in his pocket as well as drugs in the jacket that he had either dropped or had taken off as he fled and it was grabbed by the police officer. . . . [F]urther evidence is the fact that the defendant fled the scene when approached by the police officers. Further as to the drugs found in the jacket, the packaging matches the packaging of the drugs purchased by the confidential informant in the early September buy from the defendant. Now again the defendant disclaims any involvement in the sale on the street. However, I have already made a finding that the officers reasonably credited the . . . confidential informant's information.

JA27-JA28. The court further pointed out that the officers had confirmed the apartment at 275 Jefferson Street where the petitioner was living at the time. JA28. Although the court recognized that the CI's presence at the scene of the petitioner's arrest was a coincidence, it was "not a coincidence that the court is skeptical of." JA28-JA29. In making this finding, the court pointed out that the CI's earlier purchase from the petitioner had been within three blocks from the location of the petitioner's arrest. JA29. Finally, the court pointed out that the Government was not intending to rely on the CI as a witness. In fact, by proceeding with the more limited charges in the superseding indictment, the Government was not planning to introduce evidence regarding the September 1, 2003 controlled purchase or the September 25, 2003 narcotics transaction and subsequent seizure of crack cocaine from the petitioner's jacket. JA31-JA32. "There is nothing that will be involved in the trial of this case that would be advanced from the defendant's point of view by knowing the identity of the confidential informant." JA35.

C. § 2255 Proceedings

On October 4, 2006, the petitioner filed with the district court a petition for relief pursuant to 28 U.S.C. § 2255. JA50-JA55. He raised four claims in that petition: (1) his conviction was obtained by plea of guilty that was "unlawfully induced" and not "made voluntarily" because, at the time of his guilty plea, his attorney did not explain the interstate commerce element to him; (2) his trial counsel was ineffective for failing to claim that the evidence against him was seized pursuant to a warrantless

search; (3) the district court erred in refusing to order the Government to disclose the identity of the CI, and his appellate counsel was ineffective for failing to challenge that ruling on appeal; and, (4) his conviction was obtained through the use of a "coerced confession." JA53-JA54. He later amended his third claim for relief to state that his trial counsel was ineffective for failing to claim that the petitioner was not involved in the alleged September 1, 2003 controlled purchase. JA64-JA65.

The district court rejected all four claims. JA58-JA67. As to the first claim, the court found that the petitioner had signed a plea agreement which listed the interstate commerce element and that he had been advised of the element during the plea canvass. JA63. In addition, because 18 U.S.C. § 922(g)(1) does not require that the petitioner know the firearm had previously been transported in interstate commerce, any alleged failure to explain the element "seems of little moment," so that the petitioner could not show any prejudice from the alleged ineffective assistance. JA63-JA64.

As to the second claim, the district court found that the petitioner "has not presented a factual basis for the claim" because the evidence in the record established that the police searched the petitioner's residence only after obtaining a search warrant. JA64.

As to the third claim, which was amended to allege that trial counsel was ineffective for failing to claim that the September 1, 2003 controlled purchase never occurred, the district court did not make a finding as to the effectiveness

of trial counsel and instead concluded that any alleged ineffectiveness did not result in any prejudice to the petitioner. The court disagreed with the petitioner's allegation that the CI's identification of the petitioner as the person who had sold drugs to him on September 1, 2003 was "indispensable to the finding of probable cause . . . . " JA65. The court explained:

> Even without the CI's identification of Haygood as "John" from the September 1, 2003 incident, the CI still identified the specific location of Haygood's residence as the second floor of 275 Jefferson Street. A tenant from the same apartment verified this location as Haygood's residence, as well as the fact that Haygood's apartment on the second floor was to the far left. The CI also identified the Mitsubishi Galant that Haygood admitted to having borrowed from his uncle. Further, the CI stated that Haygood admitted to selling drugs in his home and had just gone to New York for additional drugs. Also, Ruffin's review of the police report from September 1, 2003 revealed that the baggies sold to the CI had orange emblems similar to the orange emblems found on the 28 baggies obtained from Haygood's coat during the course of his arrest on September 25, 2003. While Terrence Police was holding Haygood's jacket at the time Officer Ronan seized it, Ronan watched Mr. Police pick up the jacket and had ample opportunity to observe that Mr. Police did not drop the 28 baggies into Haygood's jacket.

> Based on these facts, there was ample evidence to justify the issuance of a search warrant for Haygood's residence, even if one assumes the CI lied or was mistaken when he identified Haygood as "John" from [the] September 1, 2003 controlled purchase.

JA65. The court did not address whether the petitioner's "theory" of suppression was different or superior to trial counsel's argument that the CI did not exist at all. JA66.

As to the last claim, the court found that it had already been addressed and rejected by this Court:

> To the extent that Haygood claims that his statements were taken in violation of his *Miranda* rights, the Court of Appeals has already ruled against Haygood on this issue . . . and Haygood raises nothing new here. To the extent that Haygood is attempting to establish that his statements were involuntary, the Court of Appeals has already ruled that, even if Haygood's statements were removed from the warrant application, there would still have been enough information available to sustain probable cause.

JA66.

On February 6, 2007, the petitioner filed a motion to "alter or amend judgment," which the district court construed as a motion for reconsideration. JA68, GA34. In that motion, the petitioner claimed that the court

overlooked his argument that the September 1, 2003 controlled purchase never happened. JA69. The district court denied the motion and found that the petitioner had "not come forward with any facts that the court overlooked in its ruling." GA35. "To the contrary, the court explicitly dealt with the issue here raised by Haygood in concluding that, even assuming the CI lied, Haygood has not presented a viable Fourth Amendment claim." GA35.

On April 4, 2007, the petitioner filed a motion for a certificate of appealability. GA29. In that motion, the petitioner relied exclusively on the third issue, as amended, which claimed that his trial counsel was ineffective for failing to challenge that the September 1, 2003 transaction occurred at all. GA30. On April 5, 2007, the district court issued a written ruling granting a certificate of appealability. JA77. The court stated:

> In its original ruling, the court found that Haygood could not demonstrate prejudice . . . because Haygood did not present a viable Fourth Amendment claim. . . . Though the court does not believe that it erred in denying Haygood's motions to vacate or Haygood's motion for reconsideration, . . . reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.

JA78 (internal quotation marks omitted).

In this appeal, the petitioner raises only one claim, the third claim from his amended petition, i.e., that his trial counsel was ineffective for failing to argue that the September 1, 2003 controlled transaction with the CI never occurred.

Summary of Argument

The petitioner's claim on appeal lacks merit for two reasons. First, his trial counsel did, in fact, claim that the September 1, 2003 transaction never occurred, and the district court rejected that claim by crediting the testimony of the police officers that the transaction did occur and that the CI had identified the petitioner as the participant in that transaction. Second, as the district court concluded, the petitioner could not establish prejudice because the search warrant affidavit established probable cause even without the information that the petitioner was the individual who had sold drugs to the CI on September 1, 2003.

Argument

I. The district court properly rejected the petitioner's claim that his counsel was ineffective for failing to challenge the existence of a controlled purchase discussed in the search warrant application

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

To obtain collateral relief under 28 U.S.C. § 2255, the petitioner must show that his "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. Section 2255 essentially codifies the common-law writ of habeas corpus in relation to federal criminal offenses. Habeas corpus relief is an extraordinary remedy and should only be granted where it is necessary to redress errors which, were they left intact, would "inherently result in a complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428 (1962). The strictness of this standard embodies the recognition that collateral attack upon criminal convictions is "in tension with society's strong interest in [their] finality." *Ciak v. United States*, 59 F.3d 296, 301 (2d Cir. 1995); *see also Strickland v. Washington*, 466 U.S. 668, 693-94 (1983) (recognizing the "profound importance of finality in criminal proceedings").

Although, in general, a writ of habeas corpus will not be allowed to do service for an appeal, *see Reed v. Farley*, 512 U.S. 339, 354 (1994), "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massaro v. United States*, 538 U.S. 500, 509 (2003). A person challenging his conviction on the basis of ineffective assistance of counsel bears a heavy burden. "[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. The ultimate goal of the inquiry is not to

second-guess decisions made by defense counsel; it is to ensure that the judicial proceeding is still worthy of confidence despite any potential imperfections, as "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

In *Strickland*, the Supreme Court held that a defendant who challenges his lawyer's effectiveness must establish (1) that his counsel's performance "fell below an objective standard of reasonableness" and (2) that counsel's unprofessional errors actually prejudiced the defense. *Id.* at 688.

> To satisfy the first, or "performance," prong, the defendant must show that counsel's performance was "outside the wide range of professionally competent assistance," [*Strickland*, 466 U.S.] at 690, and to satisfy the second, or "prejudice," prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Brown v. Artuz, 124 F.3d 73, 79-80 (2d Cir. 1997). A defendant must meet both requirements of the *Strickland* test to demonstrate ineffective assistance of counsel. If the defendant fails to satisfy one prong, the Court need not consider the other. *Strickland*, 466 U.S. at 697. "The *Strickland* standard is rigorous, and the great majority of

habeas petitions that allege constitutionally ineffective counsel founder on that standard." *Linstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001).

"A court of appeals reviews a district court's denial of a 28 U.S.C. § 2255 petition *de novo*." *Fountain v. United States*, 357 F.3d 250, 254 (2d Cir. 2004); *Coleman v. United States*, 329 F.3d 77, 81 (2d Cir. 2003). "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*, 466 U.S. at 698; *see also United States v. Monzon*, 359 F.3d 110, 119 (2d Cir. 2004); *United States v. Schwarz*, 283 F.3d 76, 90-91 (2d Cir. 2002). Findings of historical fact are upheld unless clearly erroneous, while conclusions of law are reviewed *de novo*. *See Monzon*, 359 F.3d at 119; *United States v. Gordon*, 156 F.3d 376, 379 (2d Cir. 1998) (per curiam).

C. Discussion

1. Trial counsel was not ineffective because he filed a motion to suppress asserting the same argument that petitioner now claims was not raised

The petitioner's only claim on appeal is that his trial counsel was ineffective for failing to assert the claim that the September 1, 2003 controlled transaction with the CI never occurred. Specifically, he alleges, "In a case where so much rides on the tip give to the police by the [CI], and where the petitioner advised his defense attorney that there was no sale on September 1, 2003 . . . , the defendant's

attorney should have insisted that the identity of the informant be revealed." Pet.'s Brief at 9. He further points out that if trial counsel had "taken the insistence of the petitioner that the CI did not exist, [he] could have challenged the existence of that informer and asked for further facts from him to support this contention, which could well have led to the invalidation of the search warrant." *Id.*

The petitioner is simply not correct. As discussed above, his trial counsel did challenge the existence of the CI, did claim that the September 1, 2003 transaction never occurred and did demand disclosure of the CI's identity. Specifically, on November 17, 2004, trial counsel filed a motion to compel the disclosure of the identity of the CI, and on December 14, 2004, the petitioner filed a renewed motion to suppress based on his claim that the CI did not exist. In support of the motions, trial counsel submitted an affidavit by the petitioner in which the petitioner stated that the CI did not exist, that the petitioner had never sold narcotics to anyone "while on foot," and that the petitioner had not gone to New York to "re-up" prior to his arrest. GA9. In rejecting this claim, the district court specifically found that the CI did exist and, in doing so, credited the police officers' testimony that the CI was a known, reliable informant who had participated in several prior controlled purchases and whose information had led to the arrest of numerous individuals. In other words, faced with the claim that the officers had lied about the existence of the CI and the petitioner's alleged participation in a prior narcotics transaction with that CI on September 1, 2003, the district court credited the officers' testimony and

rejected the claim. The district court also specifically found that the officers had acted reasonably in crediting the CI's information that the petitioner had been the one to sell him narcotics on the street, in the vicinity of 275 Jefferson Street, on September 1, 2003. JA22, JA28. Thus, trial counsel raised the argument that petitioner now claims that he failed to raise, and the district court properly rejected that argument.

In addressing the petition, the district court did not reach the issue of counsel's effectiveness and instead resolved the claim based on its finding that the petitioner had not established actual prejudice as a result of the claimed ineffectiveness. In describing the claim, the district court seemed to distinguish between the trial counsel's allegation that the CI never existed, and the petitioner's claim that he was not the individual involved in the September 1, 2003 sale. JA66. It appears, however, that trial counsel asserted both claims. In the petitioner's affidavit submitted in support of the motions to suppress and to compel disclosure of the identity of the confidential informant, he specifically asserted that the CI did not exist and that he was not the individual who had allegedly sold the CI drugs on September 1, 2003. GA9. In rejecting this claim, the district court specifically concluded that the CI did exist and that the officers were reasonable in their belief that the CI was telling the truth when he stated that the petitioner had been involved in the September 1st sale.

Moreover, even if the claim that trial counsel raised was slightly different from the claim now asserted by the petitioner, trial counsel's performance was not defective.

See Oats v. Singletary, 141 F.3d 1018, 1026 (11th Cir. 1998) (holding that trial counsel was not ineffective for moving to suppress confession based on theory that it was wrongfully induced, and not theory that he lacked capacity to waive *Miranda* rights). As discussed above, trial counsel filed two separate motions to suppress and one motion to compel disclosure of the CI's identity. Based on the filing of these motions, the district court held two separate suppression hearings and heard testimony from the defendant himself and several different police officers. A plain review of the record reveals that trial counsel effectively challenged the search warrant and attempted through a variety of different claims, to convince the court to suppress the fruits of the search warrant. The fact that counsel was unsuccessful in his efforts reflects, not his own ineffectiveness, but instead the propriety of the officers' actions in investigating this case.

2. The district court correctly concluded that the petitioner failed to establish prejudice

Even if the petitioner is correct that trial counsel failed to challenge his participation in the September 1, 2003 controlled purchase and that such a failure constituted ineffective assistance, he has failed to show that he was prejudiced by such conduct. "Since counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, when a habeas corpus petitioner . . . claims that his lawyer's failure to make a motion to suppress was ineffective, he must prove the motion would have been meritorious." *Thompson v. Battaglia*, 458 F.3d

614, 620 (7th Cir. 2006) (internal quotation marks and brackets omitted). Trial counsel's failure to file a motion to suppress will not prejudice a petitioner where the motion had little chance of success. *See United States v. Cruz*, 785 F.2d 399, 405-406 (2d Cir. 1986).

As the district court concluded, the CI's identification of the petitioner as the person who had sold drugs to him on September 1, 2003 was not necessary to the probable cause determination underlying the issuance of the search warrant. On September 25, 2003, the police had observed the petitioner participate in an apparent narcotics transaction, after which he was found in possession of the drug proceeds from the transaction and 28 baggies of crack cocaine. According to the CI, who was present at the time of the arrest, on that same date, the petitioner had admitted to the CI that he possessed narcotics in his apartment and that he had just gone to New York to purchase additional drugs. Moreover, a review of the police report from September 1, 2003 revealed that the baggies sold to the CI on that day had orange emblems similar to the orange emblems found on the 28 baggies obtained from the petitioner's coat during the course of his arrest on September 25, 2003. Finally, both the CI and a tenant in the petitioner's building had identified the specific location of the petitioner's residence. The petitioner himself had provided his address during the booking process. Thus, even without the information in the warrant about the petitioner's participation in the September 1, 2003 sale, the warrant application contained sufficient information to establish probable cause. *See Christian v. McKaskle*, 731 F.2d 1196, 1200-01 (5th Cir.

1984) (holding that, because affidavit based on informant's tip was supported by probable cause, petitioner was not prejudiced by counsel's failure to file motion to suppress).

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 21, 2008

Respectfully submitted,

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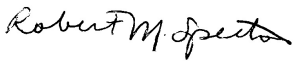

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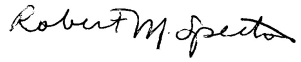
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,258 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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