EXHIBIT 2

Government's Opposition to Defendant's Motion to Vacate Sentence, Set Aside in Conviction and Order a New Trial, filed in United States v. Melvyn Johnson, Jr., Crim. No. F-9926-89, in the Superior Court for the District of Columbia, Criminal Division-Felony Branch on July 29, 1991

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division - Felony Branch

JUL 23 1991

UNITED STATES OF AMERICA	)	
	)	Crim. No. F-9926-89
v.	)	(J. Wertheim)
	)	(Closed Case)
MELVYN JOHNSON, JR.	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION
TO VACATE SENTENCE, SET ASIDE CONVICTION AND ORDER A NEW TRIAL

The United States of America, through its attorney, the United States Attorney for the District of Columbia, hereby opposes defendant's motion to vacate sentence, set aside conviction and order a new trial. The United States submits the following supporting points and authorities.

Summary

Defendant seeks a retrial alleging he has uncovered "new evidence" since his first (bench) trial and that he then received ineffective assistance of counsel. Armed with the recently written affidavits of three fellow Lorton inmates in part corroborating his trial testimony and with a copy of discharge summary from the Veterans Administration Hospital that quantifies his drug habit in 1985, the defendant simultaneously seeks accreditation of these submissions as "new evidence" and discreditation of his counsel's performance for having failed to present them at his first trial.1/

1/ Specifically, defendant claims his counsel failed (1) adequately to investigate pretrial (2) to call specific witnesses to testify at trial (3) to object to portions of the government's drug expert's testimony that allegedly fell outside his "proffered" qualifications (4) to repeat her objection to the Court's considering the defendant's sure receipt of a mandatory minimum sentence when assessing his credibility as a witness (5)
(continued...)

Defendant's "evidence" is neither "new" nor credible and his ineffective assistance claims are either inaccurate, frivolous or wholly unbelievable. The record conclusively demonstrates that the defendant is entitled to nothing and his motion should be denied summarily.

Statement of the Case

On August 28, 1989, the grand jury indicted the defendant on one count each of possession with the intent to distribute heroin and possession of cocaine (D.C. Code § 33-541). A bench trial before Judge Ronald Wertheim began and ended on February 26, 1990, when the Court returned guilty verdicts on both counts. On May 9, 1990, Judge Wertheim sentenced the defendant to a ten-to-thirty year term of incarceration for the possession with the intent to distribute heroin count, followed by one year's incarceration for cocaine possession.

The Trial

The Government's Evidence

At 7:00 p.m., on August 22, 1989, Detective Gary O'Neal -- an eighteen year veteran of the Metropolitan Police Department's First District and a member of its drug enforcement section -- was walking west in an alley behind 146 L Street, S.E., (a "block" known as one of the most prodigious "open air drug distribution centers within the first district") when he observed the defendant

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1/(...continued)
to file a suppression motion and (6) explicitly to request that the Court consider the lesser included offense of heroin possession.

with an unidentified black female in the alley walkway (Tr. 5-7, 9).2/ As he approached them, Detective O'Neal saw several blue-tinted glassine plastic packets containing white powder protruding from the defendant's outstretched open right hand (Tr. 5-6, 8). As the female -- carrying a shoulderbag -- reached her hand to one inch of the defendant's, Detective O'Neal (from five or six feet away) interrupted them by identifying himself and demanding that they emerge from the walkway (Tr. 6-7, 18-21, 24). Quickly, the defendant dropped his hand to his side and the woman "snatched" her hand back and fled (Tr. 6-7, 47).

Detective O'Neal and the defendant struggled (Tr. 6). Eventually, the detective retrieved nine small blue-tinted packets of white powder from the defendant's right hand (Tr. 6-7). He led the defendant to the mouth of the alley to the 1000 block of Second Street (Tr. 7). Officer Kemper Agee -- also with the First District -- searched the defendant and found an off white rock-like substance and $74 in currency inside a small, zippered, black bicycle pouch strapped around the his waist (Tr. 7, 29-30). The powder was heroin, the rock, crack cocaine (Tr. 55).

Officer David Stroud, an expert in the street trafficking and packaging of illicit drugs in the District of Columbia, told the Court that the nine small blue-tinted glassine bags of heroin, ordinarily sold for twenty dollars apiece on the street, were of an amount, percentage purity, weight and packaging consistent with

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2/ "Tr." refers to the 114-page transcript of the trial proceedings held on February 26, 1990.

street distribution, not personal use (Tr. 54-56). Addicts do not purchase nine individually wrapped bags of heroin for $180 because they can buy the same amount (perhaps of better quality) in bulk for only $60, he elaborated (Tr. 57). Besides saving money, Officer Stroud explained that addicts also buy in bulk or buy at most one or two bags at a time (employing a "use as you go" method) as opposed to multiple individual bags to reduce the risk of getting a "burn" bag -- i.e, a ziplock containing "baking soda or a plain cutting agent" -- instead of heroin (Tr. 54-59). Moreover, he explained, heroin addicts do not "stockpile" their supply (Tr. 59).

In Officer Stroud's experience, the most heroin addict would use in a one day period was "six bags" (Tr. 58). Even the rare addict (i.e., one who had a six-bag-a-day habit) "wouldn't buy six bags at a time" but would "sell or do a little bit of running" to support his habit (Tr. 58).3/ Typically, he continued, "they'll work for somebody who actually is holding the heroin and for every ten bags they sell they're allowed to keep, like, one out of that ten. And once that's done they'll take the bag, ingest it, go off in a corner somewhere and nod off for a few hours" (Tr. 58-59). He added that drug dealers often store their stash in pouches (including bicycle pouches), whereas users likely would "have [their] works or [their] paraphernalia" in the pouch with "maybe

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3/ Officer Stroud clarified during cross-examination that his "knowledge" of the amount of heroin an addict would use in a one day period was drawn solely from his conversations with addicts who had been arrested, and not personal observation (Tr. 62-63, 64).

one or two bags" of the chosen drug for ready access to use (Tr. 60, 66, 68).

The Defense Case

The defendant claimed that on August 22, 1989, he took his girlfriend's "camcorder, one of those cameras that you take picture for[sic]" to the 2d and L Street, S.E., area to trade it for drugs (Tr. 70- 71, 85).4/ "I wanted to at least get $200 worth of money or heroin" but instead sold the camcorder5/ to "[t]he female that the officer had seen6/ with me" -- a woman he "grew up with" named "Robin Lyles" and who was "known to sell heroin"7/ -- for the nine bags the police recovered from him (Tr. 71-72, 82).8/

The defendant vowed that he intended to use all nine bags of heroin himself within the next 24 hours (Tr. 75).9/ His habit was

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4/ Defendant claimed he "borrowed" the camcorder from his girlfriend earlier that day (Tr. 85-86).

5/ Defendant says that "Robin" placed the twelve-by-six inch camcorder inside her shoulderbag (Tr. 71-72).

6/ The defendant claimed that the transaction took place behind a wooden fence with one-and-one-half inch slats on either side (Tr. 74-75). He said that until he opened fence for him, he was unable to see Officer O'Neal (Tr. 74-75). Defendant did not explain how he opened the fence with his closed fist containing the nine blue bags.

7/ The defendant -- claiming to have known Robin "all my life" -- revealed that he had bought heroin previously from her (Tr. 72).

8/ Asked why he didn't use the $74 in currency to purchase heroin instead of taking a loss on the value of the camcorder, the defendant replied "I wanted to sell the camera" (Tr. 85).

9/ The defendant said he intended to smoke the rock of crack cocaine to offset the depressive effects of the heroin (Tr. 77). He explained "[i]t's a up and down process. When the dope (continued...)

to do "three bags and then do two about four or five hours later" saving two "for the next day so I won't wake up and be sick" (Tr. 75-76). The amount of heroin he used daily had increased since he began injecting in 1980, because the strength of the drug sold on the street has decreased (Tr. 76). He elaborated that "if you don't sell that day the cut is going to eat the purity of the drugs up. So that's why you have to sell it [cut heroin] that day." (Tr. 76, 91)10/

The defendant claimed that in addition to $74 and the rock of crack, he had his identification card and "a couple of drug needles and cookers" in his bicycle pouch (Tr. 87).11/ Admitting he had no bicycle, the defendant said that he wore the pouch because "[i]nstead of carrying a big bag with me to put my ID and drug paraphernalia and whatever I might have in my pockets in a bag, it's easy to just" use a pouch when wearing "a sweat suit with no pockets" (Tr. 91-92). Finally, despite two prior convictions for

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9/(...continued)
take me so far down I want to hit a little piece of the coke so it can bring me back up so I won't be nodding all over the place." (Tr. 78.)

10/ On cross-examination the defendant claimed that he did not purchase in bulk because "it's easy to buy nine bags but to buy a spoon or a dipper or uncut dope, you're not likely to find that person on the corner selling those. It's easy to get individual bags of scramble that's already cut up." (Tr. 84.)

11/ Officer Agee earlier testified that he recovered only the money and the rock of crack from defendant's pouch (see supra). Officer Stroud earlier opined that a user likely would carry his "works" in that pouch (see supra). Defendant was, of course, present in the courtroom during both officers' testimony.

drug distribution,12/ the defendant swore that this time he was "buying. I wasn't distributing anything, I was buying." (Tr. 76-77.)

The Verdict

The Court, crediting Detective O'Neal's testimony, found that the defendant was interrupted during a drug transaction in which he was the seller (Tr. 111). Applying "common sense" and recognizing the defendant's "powerful motivation to lie" to avoid the mandatory minimum sentencing,13/ the Court disbelieved that he purchased the heroin for a "trade-in" on the camcorder and that he had drug paraphernalia in his bicycle pouch with the rock of crack cocaine and currency (Tr. 111).14/ It found the defendant guilty on both counts (Tr. 111).

Argument

Defendant seeks a second trial claiming that he has "discovered new evidence" since his first, and that his counsel then ineffectively represented him. In support of his "newly discovered evidence" claim, defendant appends the affidavits of

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12/ The defendant was previously convicted of distributing heroin (1985), distributing PCP (1985), forgery (1984), carrying a pistol without a license (1983), and burglary II (1982) (Tr. 78-79).

13/ During closing arguments, the Court asked the prosecutor whether it could consider the defendant's desire to avoid the mandatory minimum penalty for possession with the intent to distribute in assessing his credibility (Tr. 102-106). The prosecutor said yes, defense counsel said no, and the Court considered it (see Tr. 104-106).

14/ The Court remarked that, had the police found paraphernalia in the defendant's pouch, they likely would have charged him with its unlawful possession (Tr. 111).

three fellow Lorton inmates who recount in part his version of the events of August 22, 1989. He also offers a 1985 discharge summary from a detoxification unit of the Veterans Administration Hospital which, he declares, corroborates the magnitude of his drug habit in 1989. In decrying counsel's performance, defendant suggests several areas where -- in his opinion -- she divested him of his Sixth Amendment right to representation: i.e., she failed to investigate, to call witnesses, to object to improper expert testimony, to file a motion to suppress, to bolster his claim of mere possession by introducing the hospital discharge summary and to ask the Court explicitly to consider the lesser included charge of heroin possession.

Despite its misleading length, defendant's motion offers neither "new" evidence nor evidence that his counsel's actions separately or in the aggregate constituted ineffective assistance. He received a fair trial.

I. Defendant's Counsel Effectively Represented Him.

In evaluating claims of ineffective assistance of counsel, this Court applies the two-prong Strickland test. See Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the defendant must show both that his counsel's performance was deficient, -- i.e., "that [she] made errors so serious that counsel was not functioning as the counsel guaranteed defendant by the Sixth Amendment," -- and that he was prejudiced by those deficiencies. Strickland, supra, 466 U.S. at 687-689. Significantly, "judicial scrutiny of counsel's performance must be

highly deferential ... [A] Court must indulge a strong presumption that counsel's conduct falls with the wide range of reasonable professional assistance." Strickland, supra, 466 U.S. at 689. Accord, McAdoo v. United States, 515 A.2d 412, 419 (D.C. 1985). Accordingly, the Court should not "engage in vague speculation about the kind of investigation counsel might have made or what witnesses he might have called," Atkinson v. United States, 366 A.2d 450, 453 (D.C. 1976); accord, Curry v. United States, 498 A.2d 534, 540 (D.C. 1985), and should not find ineffective assistance on the basis of tactical decisions gone awry or errors in judgment that became apparent in light of subsequent events. Carter v. United States, 475 A.2d 1118, 1123 (D.C. 1984), cert. denied, 469 U.S. 122622 (1985); Wesley v. United States, 499 A.2d 282, 284 (D.C. 1982).

Under Strickland, the defendant must show that counsel's negligence prejudiced him, i.e., there must be "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland, supra, 466 U.S. at 694. Thus, even if perchance he demonstrates counsel's deficiency, the defendant is not entitled to relief unless counsel's incompetence led to a trial with an "unreliable" result. Id. at 697. See McAdoo v. United States, supra, 515 A.2d at 426-427; Godfrey v. United States, 454 A.2d 293, 295 (D.C. 1982). Moreover, the Court may address the Strickland-prongs in any order and need not consider both prongs if it finds that the defendant has made an insufficient showing on either.

Finally, a hearing is unnecessary under D.C. Code § 23-110 (even when a defendant attacks his counsel's effectiveness) if (1) the claim is wholly incredible, (2) the claim, even if true, would not entitle the movant to relief, and (3) the allegations are vague and conclusory. See Luckey v. United States, 562 A.2d 130, 132 (D.C. 1989); Ellerbe v. United States, 545 A.2d 1197, 1198-1199 (D.C.), cert. denied, 469 U.S. 936 (1988); White v. United States, 484 A.2d 553, 559 (D.C. 1984). Thus, even if the movant's allegations appear adequate, if the files and records of the case refute them, a hearing is superfluous. Luckey v. United States, supra, 562 A.2d at 132; Ellerbe v. United States, supra, 545 A.2d at 1199.

A. Counsel Investigated Thoroughly.

Defendant hypothesizes that had counsel investigated properly, she would have unearthed the witnesses he now offers -- three fellow inmates at Lorton -- presented their testimony at trial, bolstered his story about attempting to sell a camcorder for drugs and procured his acquittal. This is nonsense. Defendant either expects his counsel to perform unheard of feats of investigation by tracking down witnesses without knowing they exist or he imbues her with clairvoyance. The affidavits he appends to his motion affirm that the defendant must have known of at least two of these new witnesses before trial,15/ -- i.e., Anthony Salley and Ivan

15/ Anthony Salley's affidavit says that he "ran into Melvyn Johnson" between 5 and 6 p.m. on August 22, 1989, before the defendant was arrested. Likewise, Ivan Driver's affidavit relates that he "was approached by Melvyn Douglas" on August 22, (continued...)

Driver -- but strangely opted not to tell his counsel about them or to mention them during his trial testimony. (See Exhibit 1; Affidavit of Susan Borecki, ¶ 4 [hereinafter "Affidavit"]; Defendant Motion For a New Trial [hereinafter "Motion"], Exhibits 1, 2, & 3). Counsel plainly has no obligation to interview witnesses of whom she is unaware. See Townsend v. United States, 549 A.2d 724, 728 (D.C. 1988) (counsel is not ineffective for failing to unearth witness whose testimony would not have changed result), cert. denied, 109 S. Ct. 2457 (1989); White v. United States, 484 A.2d 553, 558-559 (D.C. 1984) (investigatory decisions of counsel are necessarily reliant on information supplied by the defendant). Cf. Harris v. United States, 441 A.2d 268, 273-273 (D.C. 1982) ("failure to make reasonable efforts to interview and utilize known witnesses having a direct bearing on the substantial defense" may be considered ineffective assistance of counsel).

The fact is that defendant's assailment of counsel's pretrial investigation as dilatory is a sham. He directed the course of counsel's pretrial investigation by telling her of only one witness before trial: a woman he eventually identified as "Robin"16/ whom

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15/(...continued)
1989, between 5 and 6 p.m. Based on these statements, defendant must have known of these witnesses existence before trial.

16/ Defendant eventually gave counsel "Robin's" first name before trial (See Affidavit ¶ 5). Counsel's credibility on this point is bolstered by defendant's reaction to being asked to reveal her full name by the prosecutor:

> Q. Now, sir, did you say that you had purchased drugs from this black female on other occasions?
> A. Yes.

(continued...)

he claimed accompanied him to the area to purchase heroin to share.17/ (See Affidavit ¶ 6). He never told her of others (See Affidavit ¶¶ 5, 6). He never told her about Ivan Driver or Anthony Salley (See Affidavit ¶ 4). In short, he steered his counsel to prepare a totally different version of events than the yarn he ultimately spun while at trial and that he now, in hindsight, seeks to corroborate.

In addition to not knowing about other witnesses, counsel had no idea (despite their numerous meetings and telephone conversations) that the defendant was going to claim that he was in the area to trade a camcorder for drugs, that "Robin" sold the drugs to him or that she was a well known dealer. (See Affidavit ¶¶ 3, 6, 7). Counsel's ignorance of the defendant's newest version is understandable. On November 14, 1989, defendant outlined in a written statement his version of the events and counsel relied on it when preparing his defense. (See Affidavit ¶ 6 & Exhibit B). Contrary to his trial testimony, defendant claims in that statement

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16/(...continued)
Q. And in fact, one time earlier the same day?
A. No, not the same day.
Q. That day you purchased from her once.
A. Yes.
Q. And what was her name?
A. Do I have to say her name? Her name is Robin Lyles. (Tr. 82.)

17/ Crediting either of defendant's versions -- i.e., that "Robin" was the seller or a co-buyer -- she was unavailable to him as a witness because she had a Fifth Amendment privilege. Even had she learned Robin's last name and located her before trial, therefore, counsel could not be remiss in failing to call her as a witness.

that he went with Robin to purchase heroin to use together. Consistent with his earlier story to counsel, defendant did not mention other witnesses or a camcorder. There is a simple explanation for this gap. Defendant improvised the newer version while on the stand.18/ Given that the Court when issuing its verdict mused that his story was in part "plausible" (see Tr. 110), defendant is now simply attempting fraudulently to embellish it. His ability "to secure sworn affidavits from three witnesses subsequent to his incarceration" demonstrates his ability to suborn perjury, not his "trial counsel's deficient performance." (See Motion at 10-11).

Even if, however, the newer version is true and his earlier story false, defendant's eleventh hour revelation of it to counsel does not render her assistance ineffective.19/ Defendant had every opportunity to fully inform counsel of his recollection of events on August 22, 1889, prior to his trial -- seven face-to-face meetings and several telephone conversations -- but kept her in the

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18/ There are several plausible explanations for defendant's strategy. Foremost, defendant may have been reluctant to tell his counsel the camcorder story lest she investigate and find it to be a fabrication. If the defendant's story about the camcorder were true, surely counsel would have presented defendant's girlfriend as a witness at trial. [Indeed, if defendant's story were true, he would have included his girlfriend's affidavit with those of his fellow Lorton inmates.] Second, if defendant told counsel that "Robin Lyles" sold him the drugs before trial, she would have been able to locate her and "Robin" likely would have denied his story. By keeping his counsel in the dark regarding "Robin's" role, the defendant was free to make up his version after having heard the testimony of the police officers.

19/ Nowhere in his lengthy motion does defendant claim that told his counsel of other witnesses or of the camcorder.

dark. (See Affidavit ¶ 3). Significantly, counsel told her client before trial that she would ask for a continuance if he had other witnesses he wished her to contact or any other investigation of his defense he wanted her to perform. (See Affidavit ¶ 8). Defendant responded (and signed a letter to this affect) that he was satisfied with her performance, that he wanted to proceed with a bench trial20/ and that there were no witnesses to call other than "Robin." (See Affidavit ¶ 8 & Exhibit B). There was simply nothing else that counsel could have done to assist him further. Before trial, defendant plainly believed that his storytelling aptitude would assure his acquittal. Justly, that aptitude -- not his counsel's performance -- proved to be deficient.

B. Counsel Could Not Call Witnesses of Whom She Was Unaware.

Defendant labels his counsel ineffective for failing to call at trial "witnesses to corroborate his version of the incident and his long-term drug addiction." (Motion at 8). Defendant offers three individuals -- "Mr. Driver, Mr. Upshaw and Mr. Salley," present acquaintances at Lorton -- as examples of the witnesses who "would have corroborated the defendant's version that he was trying to sell the camcorder and in fact, did sell the camcorder to the woman from whom he purchased the drugs" (Motion at 8).

For the reasons outlined above, defendant's ineffectiveness claim in this regard is absurd. Defendant never told defense counsel of these witnesses and there is no reason to believe, based

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20/ Counsel advised her client against a bench trial. (See Affidavit ¶ 8 & Exhibit B).

on the version he had revealed to her, that counsel could have discovered them independently. (See Affidavit ¶¶ 4, 6). Also noted above, until the defendant said it on the stand, counsel was operating under the assumption that he and "Robin" jointly bought the drugs to share. Thus, counsel was utterly taken aback21/ by the version he chose to reveal on the stand, that he was in that area to exchange for drugs a camcorder he had appropriated from his girlfriend.22/ (See Affidavit ¶¶ 6,7).

Defendant's claim that counsel was deficient in opting not to present evidence to corroborate his testimony regarding the magnitude of his drug addiction is insupportable. At trial, defendant quantified his habit on the date of his arrest -- August 22, 1989 -- by saying that within 24 hours, all of the nine bags of heroin in his possession would be gone. Officer Stroud testified that -- in his experience gleaned by talking to addicts -- the maximum amount of heroin packets one would consume in a day

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21/ Counsel's surprise at defendant's testimony is somewhat evident in the beginning of her direct examination of him. After a few opening questions she asked:

> Q. [defense counsel] You had gone there [between 2d and L Street, S.E.] that day?
> A. [defendant] Yeah. 2d and L Street, S.E., by the Navy yard off M Street.
> Q. You had gone there that day?
> A. Yeah.
> Q. Were you with anybody?
> A. I was by myself. (Tr. 70-71.)

Plainly, counsel expected a different response.

22/ Again, noticeably lacking in the trilogy of affidavits he submits to support his trial "version" is the affidavit of defendant's girlfriend stating that she even owned a camcorder.

was six. Defendant's Veteran's Hospital discharge summary reveals that in 1985 the defendant claimed that he had a "5 to 6 quarters of 'street' heroin per day" habit. (See Motion, Exhibit 4). The discharge summary thus adds little or nothing to the testimony already submitted in defendant's behalf at trial. It was, if relevant, merely cumulative. Defense counsel was not ineffective in failing to present cumulative evidence. Moreover, the document did not contradict the expert's opinion about an addict's maximum heroin intake, but supported it. At the zenith of his addiction, i.e., when seeking treatment, defendant claimed that he was consuming precisely the amount the expert predicted the heavy user would inject.

Counsel's failure to call any other witnesses (whom defendant does not name) to support his claim that his habit was great enough to justify purchasing nine packages at once, when testimony on that subject was merely cumulative of his own, does not constitute ineffective assistance. As a matter of law, "[a]lthough [defendant] may disagree with his counsel's reasoning, the decision of whether to put witnesses on the stand is clearly a tactical decision." Curry v. United States, supra, 498 A.2d at 545; Smith v. United States, 454 A.2d 822, 825 (D.C. 1983) (decision to call witnesses is judgment left entirely within defense counsel's discretion); Atkinson v. United States, supra, 366 A.2d at 453 (decision to call witnesses is a choice of trial tactics that must be left to counsel's judgment). Counsel's possible "[e]rrors in judgment and tactics as disclosed by hindsight do not, by

themselves, constitute ineffectiveness." Curry v. United States, supra, 498 A.2d at 545.

Finally, counsel's decision not to further corroborate defendant's habit did not effect the outcome of the trial. The Court based its verdict that the defendant possessed with the intent to distribute the heroin on Detective O'Neal's testimony that he saw an aborted transaction where the defendant was the seller, and discredited defendant's claim that he was trading in a camcorder for drugs. He did not specifically discredit defendant's testimony regarding the magnitude of his heroin habit. Indeed, the government never disputed that defendant was a drug user and the defendant told the Court that he had undergone treatment (unsuccessfully) twice before (Tr. 77).23/ Given his prior record, however, there was also no dispute that defendant was a drug seller. In short, any failure by counsel to corroborate defendant's testimony regarding the magnitude of his habit did not effect the outcome because that evidence did not address the most important element of the government's case (Detective O'Neal's observation of the aborted transaction) and thus its omission was "not so prejudicial as to deprive [defendant] of a fair and reasonable trial." Curry v. United States, supra, 498 A.2d at 545.

C. Counsel Properly Chose Not To File a Frivolous

23/ In fact, the defendant testified that he had attended the Veterans Hospital program (Tr. 77). The hospital discharge summary quantifying his habit was thus plainly cumulative of his testimony.

Pretrial Suppression Motion.

Defendant asserts that his counsel was deficient in failing to move to suppress the tangible evidence, i.e., the drugs recovered from his hand and his pouch. This claim is legally and factually insupportable and should be dismissed summarily.

Defendant's claim here is without merit not only because counsel's decision to eschew a suppression motion was not deficient but because, on the record, he plainly was not prejudiced by counsel's failure to challenge a legal detention, search and seizure. Where -- as here -- counsel had no grounds upon which to question the admissibility of the drugs, she obviously could not in good faith file a motion to suppress them. See United States v. Madewell, 917 F.2d 301, 304-305 (7th Cir. 1990) (if defendant's motion to suppress evidence on Fourth Amendment grounds would have failed, counsel was not ineffective in failing to file it).24/

As the government's proof at trial established,25/ defendant had no Fourth Amendment claim to challenge the admissibility of the drugs. Detective O'Neal, an eighteen-year Metropolitan Police veteran who had made hundreds of drug arrests, testified that while on foot in plain clothes in a high drug area he observed from only

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24/ It is axiomatic that "the failure to file a suppression motion does not constitute per se ineffective assistance of counsel." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986).

25/ In deciding whether a motion to suppress would have been denied, the Court may consider the undisputed trial testimony. See Lewis v. United States, No. 89-1277, slip op. (D.C. July 19, 1991) (citing Masiello v. United States, 113 U.S. App. 32, 34, 304 F.2d 399, 401 (1962) and Carroll v. United States, 267 U.S. 132, 162 (1925)).

five or six feet away defendant's outstretched hand brimming with blue-tinted glassine bags, which (because of his experience) he knew to be heroin. When he announced his presence, the woman fled and the defendant -- unable to flee -- closed and dropped the hand containing the bags to his side. Given this sequence of events, the detective plainly had an articulable suspicion that the defendant was involved in a drug transaction. His observations amply supported a Terry 26/ investigatory stop and -- once the defendant resisted -- the brief detention that occurred. See Price v. United States, 429 A.2d 514, 516 (D.C. 1981). Once he retrieved the bags from the defendant's hand, field-tested its contents and determined that it was heroin, he had probable cause to arrest him. Rucker v. United States, 455 A.2d 889, 891 (D.C. 1983); Price v. United States, supra, 429 A.2d at 516. Once lawfully arrested, the officers were entitled to conduct a search of the defendant's person. Gustafson v. Florida, 414 U.S. 260 (1973). Seizure of the rock of crack cocaine and $74 in currency from his bicycle pouch plainly did not violate the defendant's Fourth Amendment right against unlawful seizures. In sum, had counsel sought to suppress either the drugs or the money, the trial testimony establishes that the Court would have denied the motion. Thus, even if for some reason (not apparent to the government) counsel was deficient in failing to file a motion, the defendant plainly was not prejudiced because the evidence was admissible. See United States v. Wood, 879 F.2d 927, 933 (D.C. Cir. 1989) (when the ineffectiveness claim

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26/ Terry v. Ohio, 392 U.S. 1 (1968).

concerns an attorney's failure to raise a Fourth Amendment issue, the defendant must show that the Fourth Amendment claim has merit and that there was a reasonable possibility that the verdict would have been different absent the excludable evidence).

D. Counsel Timely Objected to All Potential Trial Errors.

Defendant's claim that his counsel failed to object to the Court's factoring in his possible desire to avoid serving a mandatory minimum prison sentence in assessing his credibility (defendant admitted possession of, but disputed his intent to distribute, the heroin) is simply incorrect. Counsel did object to the Court's consideration of defendant's possible sentence in assessing the credibility of his testimony. Despite counsel's objection, the Court ruled that it could consider the defendant's motivation to lie to avoid the mandatory minimum sentence when determining whether he had the requisite intent to distribute. Counsel was not deficient: she properly has preserved the issue for appeal.

The issue arose in the following context. During the prosecutor's closing argument, the Court asked him whether it could consider defendant's interest in avoiding the mandatory minimum when assessing his credibility (Tr. 102). The prosecutor told the Court that it could (Tr. 103-104). At the beginning of her closing argument, however, defense counsel disagreed:

> MS. BORECKI [defense counsel]: With regard to the last point, Your Honor, I would simply note that the Court is the trier of facts in this case, as obviously, with a jury.

And it would appear to me in answering your question that it would be improper for the Court to take all that into consideration with regard -- that is potential punishment.

The jury wouldn't be able to hear it. I would not object to it today simply because I know that Your Honor is aware of such things and Your Honor does not read your instruction to himself.

THE COURT: But isn't every citizen presumed to know the law, and that would, I imagine, include sentencing law?

MS. BORECKI: Well, if the idea is to instruct the jury about sentencing that's not proper.

THE COURT: No. I'm not talking about that. Assuming that the jury, without any instruction on the subject, because like all good citizens, they all know the law, they are aware that about four weeks before the arrest the applicable sentences for distribution of a controlled substance in the District of Columbia were very substantially increased and the mandatory minimums were very substantially increased and that the defendant's prior record disqualifies him for the addict exception, you have ordinary citizens who spend their time reading Title 33 of the District of Columbia code knows that because the law, presuming; so even if he had given him no instruction wouldn't they be free to take that into account in evaluating the credibility of the defendant?

MS BORECKI: No, Your Honor. You are getting two very, very fine lines of --

THE COURT: Well, it doesn't sound so fine to me. I have been sitting here wondering why Mr. Johnson would go to trial in this case and the minute I hear about his prior record I say, uh-huh, he wants to avoid a mandatory-minimum.

MS. BORECKI: Well, I think that one can[sic] say that if the jury would know about any

> kind of increased penalty. I think that they are asked to put those things out of their minds. And with regard to punishment, because of the punishment, therefore, we have a defendant who is therefore more likely to misrepresent his intent, I think that is a leap that cannot be made simply because the initial surmising regarding the punishment is not allowed and they are not allowed to consider that.
>
> The next move stems directly from what the punishment is and since they are not already supposed to consider that, therefore, they cannot even reach the point as to whether or not Mr. Johnson is simply avoiding the mandatory minimum. So I would simply submit that it just wouldn't even get to that point were we to have a jury in this case, Your Honor. (Tr. 104-106; emphasis added).

Contrary to defendant's claim, the above passage illustrates that defense counsel strenuously objected to the Court's consideration of defendant's desire to avoid of his looming mandatory punishment as a factor in assessing his credibility regarding his intent to distribute. The Court considered it anyway. Counsel's performance was not deficient simply because the Court ruled against her.

E. The Defendant Was Unharmed by Counsel's Failure Explicitly To Request the Court To Consider the Lesser Included Offense of Possession.

Defendant claims that counsel's failure explicitly to request the Court to consider the lesser included offense of possession of heroin was harmful to him. This is absurd. It is indisputably clear from the record that his entire defense to the charge of possession with the intent to distribute heroin charge was that he merely possessed the nine packets. The Court was well aware that defendant was asking it to decide that he committed the lesser

offense and not the greater. Indeed, the Court's findings clarify its options:

> THE COURT: But I think the quantity of heroin found on the defendant, interpreted in the light of Officer's Stroud's testimony, and common sense as to what a drug dealer will accept in return for a bag of heroin, I don't believe we've got any real doubt. I think I am entitled to take into account the defendant's desire to avoid the mandatory minimum sentence in evaluating his credibility. That does not substitute evidence but it does give him a very powerful motivation not to tell the truth on this very specific narrow point of intent to distribute. (Tr. 111.)

Even if counsel was remiss in not ceremoniously requesting the Court to consider simple possession, the Court plainly did consider it and thus the defendant simply cannot demonstrate -- under the second prong of Strickland -- that he was harmed by counsel's technical omission. Cf. Chaverria v. United States, 505 A.2d 59, 66 (D.C. 1986) (where failure to give cautionary instruction is not plain error, defense counsel's failure to request it cannot be said to raise to a reasonable probability that the result of the proceeding would have been different); Curry v. United States, 498 A.2d 534, 545 (D.C. 1985) (counsel's failure to request jury instruction though error deemed to be harmless and thus defendant cannot meet his burden to show that he was denied his Sixth Amendment right to effective representation)

G. Officer Stroud Testimony Was Within His Scope of Proffered Expertise.

Defendant complains that his counsel failed to object to a portion of Officer Stroud's testimony that fell outside his area

of proffered expertise. On the contrary, as demonstrated below, Officer Stroud's testimony adhered to the proffer. The following exchange precipitated the parties' stipulation that Officer Stroud was qualified as a drug expert:

> THE COURT: What is it that you wish to have Officer Stroud qualifies as an expert in?
>
> MR. KLINGENSTEIN [the prosecutor]: I want him qualified as an expert in now[sic] the way that the drugs are sold in the street.
>
> THE COURT: You mean trafficking patterns?
>
> MR. KLINGENSTEIN: Right, trafficking patterns.
>
> THE COURT: Anything else?
>
> MR. KLINGENSTEIN: Also the way these drugs are packaged. We are stipulating as to the chain of custody --
>
> THE COURT: Wait a minute. Let's get the one thing at a time. This isn't a chain of custody witness, is he?
>
> MR. KLINGENSTEIN: Not any more he's not, Your Honor.
>
> THE COURT: All right. Well, what is it you want to stipulate he's an expert in?
>
> MR. KLINGENSTEIN: Those two areas.
>
> THE COURT: Not usable amount?
>
> MR. KLINGENSTEIN: Yes, Your Honor, although -- yes. I don't think he needs specifically to be qualified as an expert.
>
> THE COURT: All right. Just the way drugs are sold and packaged on the street?
>
> MS. BORECKI: That's my understanding is the stipulation, Your Honor, yes.
>
> THE COURT: Well, do you agree that the witness is an expert in those subjects?

MS. BORECKI: Yes, he's qualified to testify in those areas. Thank you.

THE COURT: I've got a page and-a-half of notes on his background in the last case he testified in. I'm tired of writing about every three day seminar.

MS. BORECKI: Yes, Your Honor.

THE COURT: All right. By agreement of the parties, the Court will find the witness qualified as an expert in street trafficking and packaging of illicit drugs. (Tr. 54-55.)

Although Officer Stroud was not explicitly offered as an expert in heroin "use", he implicitly was qualified as such. By definition, "street trafficking" includes "use." 27/ Moreover, defense counsel effectively cross-examined Officer Stroud in this area of his expertise. Through her probing, Officer Stroud admitted that his opinion regarding the amount of heroin an addict might use in a single day was gleaned solely from his conversations with incarcerated addicts, and not on personal observation.

Q. [Ms. Borecki]: As far as you know, then, with the purchase of however number of bags that addicts might use during the course of 24 hours, is purely what you've been told by people you have arrested?

A. [Officer Stroud]: Yes. Like I say, I don't have any first hand experience about that myself. (Tr. 62-63.)

Defendant plainly was not harmed by this testimony. Finally, because the Court based its findings on whether a drug dealer might

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27/ The American Heritage Dictionary (2d Ed. 1985) defines "trafficking" as (1) "to carry on trade" and (2) "to utilize something."

take a camcorder as a trade-in for heroin and not upon whether the defendant actually could consume all of the heroin he possessed within 24 hours, defendant was not harmed by any of Officer Stroud's testimony that disputed his on that point.

II. Defendant Has Not Discovered "New Evidence."

Defendant's "newly discovered" evidence claim is a ruse. His submissions are either palpably incredible, cumulative or immaterial and, if offered at a second trial, certainly unlikely to produce his acquittal. The affidavits defendant submits by three fellow Lorton inmates (who just happen to have been eyewitnesses to his possession of the camcorder moments before his arrest) are inherently incredible and immaterial. The hospital report he appends to his motion is simply cumulative of the defendant's testimony that he possessed the heroin for personal use and not to distribute it. Defendant's "new evidence" is far too deficient to justify a hearing on the motion, let alone retrial.

To satisfy Johnson-Heard and obtain a second trial because he discovered evidence since his first, the defendant must show that:

> (1) the evidence was newly discovered since the trial; (2) the defendant was diligent in attempting to procure the newly discovered evidence; (3) the evidence relied on is not merely cumulative or impeaching; (4) the evidence is material to the issues involved; and (5) the evidence is of such a nature that in a new trial it would probably produce an acquittal.

Smith v. United States, 466 A.2d 429, 432 (D.C. 1983); Thompson v. United States, 88 U.S. App. D.C. 235, 236, 188 F.2d 652, 653 (1951). See also Gibson v. United States, 566 A.2d 473, 476 (D.C.

1989); Doepel v. United States, 510 A.2d 1044, 1047 n.10 (D.C. 1986) (materiality and probability of acquittal are prerequisites to granting retrial on the grounds of newly discovered evidence).28/

Regarding Mr. Salley's and Mr. Driver's affidavits, defendant plainly was not diligent in attempting to procure their testimony at his first trial. A plain reading of their affidavits demonstrates that the defendant must have know of these witnesses' existence at the time of his arrest, yet he neither mentioned them to his counsel before trial nor to the Court during his testimony. The simple explanation for his oversight is that the witnesses' stories are post-trial fabrications.

Moreover, even if defendant introduced the testimony of these three witnesses at a second trial, it is unlikely that he would be acquitted. The credibility of all three of these witnesses would be severely impeached by their numerous prior convictions. Anthony Salley has 1978 and 1980 petit larceny convictions, a 1974 Carrying a dangerous weapon conviction, 1976 marijuana possession conviction, 1978 grand larceny conviction, a 1984 possession of heroin conviction, a 1986 distribution of heroin conviction, a 1986 possession with the intent to distribute heroin conviction and a

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28/ A hearing on the new trial motion is unnecessary if the proffer of "new" evidence is sufficiently weak or plainly would not produce an acquittal even if admitted at a second trial. Wilson v. United States, 380 A.2d 1001, 1004 (D.C. 1977) ("[g]enerally, the trial court may decide a motion for new trial without a hearing"). See also Payne v. United States, 516 A.2d 484, 501 (D.C. 1986) (defendant has burden of making "the kind of proffer that would justify a hearing" on his new trial motion).

1989 carrying a pistol without a license (felony) conviction.29/ Twenty year old Charles Upshur is presently serving his first adult sentence for armed robbery and two counts of assault with a dangerous weapon.30/ Ivan Driver has 1976 and 1977 petit larceny convictions, a 1983 armed robbery and forgery conviction. He was paroled for the last offense on August 2, 1989, just twenty days before defendant's arrest in this case. He has since violated parole and is serving his backup time.31/

Setting aside that the affiants' numerous impeachable convictions severely undermine their credibility as witnesses in a retrial, the very substance of their testimony only marginally corroborates the defendant's story and thus would have little impact at a second trial. Moreover, each of the affidavits contain an identical inaccurate recollection, fatally undermining their reliability and implying the witnesses' collusion. Although the statements indeed corroborate defendant's story about his attempt to barter a camcorder for drugs on August 22, 1989, all three witnesses place the defendant -- and the woman named "Robin" -- in the 2d and L Street, S.E. area between 5 and 6 p.m., concluding that the defendant was arrested during that hour. The uncontroverted trial testimony and, indeed all of the police reports, however, place the time of the incident and the arrest at

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29/ These constitute only Mr. Salley's convictions in the District of Columbia.

30/ Mr. Upshur also has a juvenile record.

31/ Certified copies of most of these prior convictions are appended to the government's opposition as Exhibits.

after 7 p.m. (Tr. 4; Government 's Exhibit 2, Police Department Forms 163 & 251). It is difficult enough to believe that three witnesses would remember nearly two years after the arrest the exact time they witnessed these events. That all three would recall the time incorrectly in the same manner, however, invites credulity. In sum, given that: (1) this new "evidence" is the hindsight product of defendant's fellow Lorton inmates; (2) their extensive prior records; and (3) that the affiants are identically inaccurate in their recollection of the time of the incident and defendant's arrest, the government submits that the affidavits are inherently incredible and should be wholly ignored.

Regarding the Veterans Hospital discharge summary, defendant plainly was not diligent in attempting to procure this document before his first trial. Even if he did not know of the reports existence, defendant knew of (and indeed testified about) his treatment at the hospital in 1986 and thus could have provided corroborating evidence regarding the magnitude of his addiction at the first trial. Moreover, because the discharge summary documents the defendant's habit in 1985, it is immaterial to establishing the magnitude of his addition in 1989. In short, defendant fails utterly to demonstrate that the Court should grant retrial based on this submission.

WHEREFORE, the United States respectfully submits that the defendant's petition for relief under D.C. Code § 23-110 should be summarily denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Government's Opposition to Defendant's Motion to Vacate Sentence has been made by mailing a copy to his attorney of record, Joseph Virgilio, Esquire, 1730 K Street, N.W., Suite 304, Washington, D.C. 20006, this 29th day of July, 1991.

BARBARA VALLIERE
Assistant United States Attorney