UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHRISTINE BURSEY,

Petitioner-Defendant,

vs.

Civil Case No. 99-72418
Criminal Case No. 97-80227

UNITED STATES OF AMERICA,

Respondent-Plaintiff.

HON. AVERN COHN

_____/

MEMORANDUM AND ORDER DENYING MOTION UNDER 28 U.S.C. § 2255

I. INTRODUCTION

This is a 28 U.S.C. § 2255 proceeding claiming ineffective assistance of counsel during plea negotiations, at trial, and at sentencing. On December 18, 1998, petitioner-defendant, Christine Bursey, was sentenced to a custody term of 188 months on her jury conviction of conspiracy with intent to distribute and to distribute cocaine, and aiding and abetting the possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 846 and § 841(a)(1) and (2). The jury acquitted defendant of conspiracy to extort property under color of official right, in violation of 18 U.S.C. § 1951 and § 1952.

Defendant's conviction and sentence were affirmed on appeal. United States v. Albert Bursey and Christine Bursey, Nos. 99-1006, 1001, 215 F.3d 1327, 2000 WL 712377 (6th Cir. May 23, 2000) (unpublished). The Court of Appeals excluded from consideration defendant's claim of ineffective assistance of counsel, stating:

> Christine Bursey was originally represented by an attorney from the Federal Defender's Office ("FDO"). Her FDO attorney reviewed the evidence, filed pretrial motions and engaged in plea negotiations on Christine Bursey's behalf. The government asserts that based on these negotiations, the FDO attorney obtained a plea offer from the government, although the record does not disclose the particulars of the offer. Christine Bursey declined to consider the plea offer and retained new counsel to represent her at trial. Christine Bursey now claims that she was deprived of effective assistance of counsel based on her counsel's failure to properly raise an entrapment defense and informing her that she had a viable entrapment defense thus influencing her to reject the government's plea offer.
>
> This Court will not ordinarily review claims of ineffective assistance of counsel when they are raised for the first time on appeal. *See, e.g., United States v. Hill*, 30 F.3d 48, 51 (6th Cir. 1994). Rather, such claims must be brought pursuant to a post-conviction motion under 28 U.S.C. § 2255, unless the trial record allows us to adequately assess whether the defendant's Sixth Amendment right to counsel was satisfied. *See id.; see also United States v. Wunder*, 919 F.2d 34 (6th Cir. 1990). Because the record before us is not adequate to make such a determination, we decline to consider here Christine Bursey's claim that her attorney's performance was constitutionally inadequate.

Id. at ***5.

On May 3, 1999, defendant filed the instant motion under § 2255 claiming that she was deprived of the effective assistance of counsel in violation of the Sixth Amendment. For the reasons which follow, the motion will be denied.

II. THE FACTS

A.

The facts relating to the charges against the defendant at trial are generally described in the Court of Appeals decision and need not be repeated here except as

follows:

Defendant's prosecution was triggered by a complaint filed March 7, 1997, in which defendant, her husband Albert Bursey, and several others were named. On defendant's initial appearance a lawyer from the Federal Defender's Office was appointed as her counsel and as counsel for her husband. An indictment naming defendant and nine other persons was returned on March 20, 1997. Again, a lawyer from the Federal Defender's Office was appointed counsel for defendant and for her husband. Negotiations leading to a plea of guilty were unsuccessful. Although defendant's counsel recommended defendant plead guilty because of counsel's belief communicated to defendant that the evidence inculpating her was overwhelming defendant adamantly refused to plead guilty unless assured of a minimum prison sentence, if any. The sentence cap discussed by defendant's counsel and communicated to defendant and the government was significantly lower than the guideline sentencing minimum applicable to the crimes charged in the indictment.

On August 19, 1997, a superceding indictment was returned against defendant with an eleventh defendant added. Shortly after the superceding indictment was returned defendant and her husband hired their own counsel. Prior counsel for defendant and prior counsel for her husband were experienced and competent. What apparently happened was that defendant simply did not want to take the advice of her counsel and negotiate a plea because of the minimum sentence provided for in the plea agreement proferred by the government. On October 24, 1997, an attorney from the Federal Defender's Office was again appointed counsel for defendant's husband. Defendant's husband pled guilty on February 23, 1998 to the cocaine conspiracy

charge under a plea agreement, which limited his sentence to a maximum of 226 months. On December 16, 1995, the day her husband was sentenced, the government moved for a downward departure consistent with what was promised in the plea agreement. That is, if defendant's husband cooperated, the government would so move; defendant's husband cooperated.

In the interim between defendant's husband's plea of guilty and sentence, defendant went to trial.

B.

The government's evidence at trial overwhelmingly inculpated defendant. Particularly potent evidence against defendant were audio and video tapes in which she was heard talking about delivery of cocaine and seen participating in the delivery of cocaine. Also inculpating, aside from the testimony of Roberto Rodriguez who master minded the conspiracy, was the testimony of defendant Irwin Heard, a City of Highland Park police officer, who was part of the protective services provided Rodriguez in delivering the cocaine. At trial, defendant's counsel made no opening statement and called no witnesses, relying for the most part on challenging the testimony of the government's principle witness, Rodriguez, through cross-examination. At the conclusion of the government's proofs, and following denial of defendant's motion to dismiss the conspiracy to extort count, the following colloquy took place with defendant's counsel and defendant herself relating to defendant testifying and her understanding of the defense her counsel intended to argue to the jury.

MS. MONTGOMERY: Your honor, I'd like a break.

THE COURT: Well, we're going to take a break, but my question

is are you going to make an opening statement, are you going to offer any testimony?

MS. MONTGOMERY: I would like to confer with my client.

THE COURT: All right. We'll take that up after the recess. Thank you.

. . .

THE COURT: All right. Ms. Montgomery, do you intend to make An opening statement?

MS. MONTGOMERY: No, sir.

THE COURT: Do you intend to put on any witnesses?

MS. MONTGOMERY: No, sir.

THE COURT: Ms. Bursey, would you stand up please. Do you understand you are the defendant in this case?

THE DEFENDANT: Yes.

THE COURT: You understand that the government has presented its proof, its presented its case against you.

THE DEFENDANT: Yes.

THE COURT: You've been here these seven days and have heard all the witnesses testify?

THE DEFENDANT: Yes, sir.

THE COURT: And know now the government has rested?

THE DEFENDANT: Yes.

THE COURT: And you know now you have an opportunity to present witnesses?

THE DEFENDANT: Yes.

THE COURT: And introduce testimony?

THE DEFENDANT: Yes.

THE COURT: And *you* choose not to do that?

THE DEFENDANT: Yes.

THE COURT: Is that a fair understanding?

THE DEFENDANT: Yeah, that's a fair understanding.

THE COURT: And you expect your lawyer to make a final argument to the jury?

THE DEFENDANT: Yes, I do.

THE COURT: Pardon?

THE DEFENDANT: Yes, I do Your Honor.

THE COURT: And what do you anticipate she's going to say to the jury?

THE DEFENDANT: In reference to my defense?

THE COURT: Yes.

THE DEFENDANT: I'm not really sure.

THE COURT: Have you discussed that with her?

THE DEFENDANT: We haven't had a chance.

THE COURT: What?

THE DEFENDANT: We really haven't had a chance. The possibility of an entrapment defense.

THE COURT: You want her to argue to the jury that You were entrapped?

THE DEFENDANT: Yes.

THE COURT: Are you familiar with the instruction on entrapment?

THE DEFENDANT: Yes I am.

THE COURT: So you say you want her to argue – you want me to instruct the jury on the defense of entrapment?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: Mr. Allen, do you think that she's entitled to the defense of entrapment in light of the latest court pronouncement of the subject?

MR. ALLEN: No, sir.

THE COURT: Why?

MR. ALLEN: There is no factual basis on this record, Your Honor, that would provide the Court the basis to give an entrapment instruction.

THE COURT: Are you willing to stand on that position and defend it if I do not instruct them on entrapment?

MR. ALLEN: Yes, sir. I will be happy to provide the Court with a short brief in the morning. Ms. Montgomery needs to sit down and discuss instructions with me, in any event.

THE COURT: I'll tell you what we'll do, I will simply tell the jury that we have recessed until tomorrow morning at 9:00 and I will meet with you all at 2:30 to go over the instructions, and at that time I want to see the proposed language on entrapment.

Do you think I have an obligation, Mr. Allen, to say anything more to the defendant at this time?

MR. ALLEN: Your Honor, I think you've covered it. I think you have made it clear to her that it is her decision and solely her decision to present a defense.

THE COURT: I want it distinctly understood, Mrs. Bursey, that I am operating on the assumption that Ms. Montgomery as your lawyer is following your instructions as her client and that there is no basis for you to claim at any later

time that you received ineffective assistance of counsel.

You are an educated person. You were a public safety officer for more than ten years. You have been in court for seven days. You have seen the videos. You have heard the tapes. You have heard the testimony of the witnesses. You are aware that your husband has pleaded guilty. You're aware that Cecil Dawson has pleaded guilty. You are aware that Irwin Heard has pleaded guilty. So I want this record clear that if there is a conviction in this case at some later date you will not be heard to claim that you are entitled to a new trial or that your conviction should be set aside because of ineffective assistance of counsel.

Do you understand what I've just said to you?

THE DEFENDANT: I understand what you're saying, Your Honor.

THE COURT: Okay.

MR. ALLEN: The defendant indicated they have not discussed the specifics of the closing.

THE COURT: I am recessing. I'm not going to even announce to the jury that you've rested. No, I will announce that you've rested. I'll let you read the stipulation and then say that we've recessed until tomorrow morning, then we'll see where we go. Thank you.

Trial Transcript Vol. VII, March 4, 1998 at pp. 104-09.

C.

The following morning outside the presence of the jury, the Court confirmed the fact that the government and the defendant had each rested. The Court then confirmed the fact that it had distributed draft instructions to counsel for the government and counsel for defendant and asked if there were any additions, deletions or changes. Defendant's counsel for defendant then said:

> Yes, Your Honor. You didn't make a determination on the entrapment instruction.

Trial Transcript, Vol. VII, March 5, 1998 at p. 3.

The government objected to any such instruction. A lengthy argument followed in which counsel for defendant gave reasons supporting the instructions and counsel for the government gave his reasons in opposition. The argument, with the Court asking questions, and counsel for the government and for defendant responding went on for some time. The Court carefully reviewed the evidence at trial saying at the beginning of the argument:

> THE COURT: Well, let's go more slowly. Let's dissect it. ...
>
> . . . .

The argument, with defendant present, went as follows:

> THE COURT: So that Mr. Rodriguez prior to January 17th, 1997, knew Mr. Bursey, had been involved in criminal activity with Mr. Bursey, of which Mrs. Bursey was aware?
>
> MR. ALLEN: Yes, sir.
>
> THE COURT: So there was a personal relationship between Rodriguez and Bursey during the period of time that Rodriguez was a fugitive and was engaged in criminal activity?
>
> MR. ALLEN: Absolutely.
>
> THE COURT: The record then shows that after January 17,th 1997, when Mr. Rodriguez then became under the control of the Drug Enforcement Administration, he came back, he again contacted Mr. Bursey?
>
> MR. ALLEN: That's correct, Your Honor.

THE COURT: And asked Mr. Bursey for assistance in protecting a drug shipment?

MR. ALLEN: Yes. ...

. . . .

THE COURT: Mr. Bursey putting her on the phone?

MR. ALLEN: Absolutely correct, Your Honor.

THE COURT: Christine: "Hi." So the first thing she says to Mr. Rodriguez is hi, which exhibits a familiarity with Mr Rodriguez, right?

MR. ALLEN: Yes, sir.

THE COURT: "Hi, babe."

Christine: "How you doin'?"

So this is asking him how is he doing, which is an exchange between people who know each other and who have been apart for a period of time, right?

MR. ALLEN: Yes, sir.

THE COURT: "Okay. How you doing?"

"Okay. How's she doing?"

Now Mrs. Bursey is asking Mr. Rodriguez about his wife?

MR. ALLEN: Correct, Your Honor.

THE COURT: She's doing fine. "Our baby's doing fine."

"Oh."

"She's not that nervous anymore."

"Good, good."

"We've been working out things."

"Good."

"We getting all the paperwork."

"Yeah."

"Okay."

"Hey listen."

"You're going to have to, um, go to, um, Las Vegas every week with a hundred."

What is that to mean?

MR. ALLEN: $100,000, Your Honor.

THE COURT: To be a courier?

MR. ALLEN: Yes. Further conversation bears that out.

THE COURT: "Well when?"

There's no entrapment. It shows that Mrs. Bursey is a willing participant in Mr. Rodriguez's illegal activities, and that's the inception, and from their relationship, as I recall the evidence, continues to be a positive one. While Mr. Rodriguez may be the leader and the formulator and the planner, Mrs. Bursey is a willing participant.

MS. MONTGOMERY: Your Honor, again, I would indicate to the Court this is January 20th after he is an agent. He's telling her what she has to do. She didn't ask him when am I going to Vegas to make all of this money. He asked her. It's January 20. He is an agent. Prior to this she didn't have a predisposition. Knowledge of it is certainly not a crime. Knowledge about another crime is not a crime.

THE COURT: One of the proposed instructions reads, "One of the questions in this case was whether the defendant was entrapped.

"Entrapment has two related elements. One is that the defendant was not already willing to commit the crime. The other is that the government, or someone acting for the government, induced or persuaded the defendant to commit it.

"If the defendant was not already willing to commit the crime, and the government persuaded her to commit it, that would be entrapment. But if the defendant was already wiling to commit the crime, it would not be entrapment, even if the government provided her with a favorable opportunity to commit the crime, or made the crime easier, or participated in the crime in some way.

"It is sometimes necessary during an investigation for a government agent to pretend to be a criminal and to offer to take part in a crime. This may be done directly or the agent may have to work through an informer or decoy. This is permissible and, without more, is not entrapment. The crucial question in entrapment cases is whether the government persuaded a defendant who was not already willing to commit a crime to go ahead and commit it."

No, there's no entrapment here. There was no persuasion. She was a willing participant. She got on the phone, she knew the man, and he said this is what we're going to do, and she said fine, let's go ahead. And from there on she's a positive participant in the criminal activity, a member of the conspiracy. In the face of the government's objection to the entrapment instruction and based on the record as the Court has described it briefly, the Court will not instruct the jury on the issue of entrapment.

. . . .

MS. MONTGOMERY: Well, Your Honor, may I make a record that I indicate to the Court that entrapment allows the admission of doing certain things, but you've taken away the defense of why she did this and why it is to be presented to the jury and just having effectively taken away the defense for the defendant because I firmly believe if this man had not been handing out money,

given them $2,000 for Christmas presents, buying food, paying – I asked every time you went out socially who paid. He paid. He continued to pay, he continued to dangle money in front of their noses, and again, there's just no testimony.

And the government continues to say Chris and Al Bursey, but they stand on their own. There's no testimony that Chris Bursey did anything prior to the inducement of this man beside knowing him and his wife. Yes, she's got a big mouth, she countersigns everything her husband does; yeah, yeah, yeah, we can do it. She wasn't even in a position, she was not an officer, she was not in a position to follow through on anything that was being promised to Rodriguez.

The only thing she did was run her mouth; yeah, we can do anything, we can handle anything, we can do it, we can do it, we can do it. She countersigned. She was greedy. She is not an innocent sitting here, but she would not have been involved in it had it not been for Rodriguez dangling money before her.

. . . .

THE COURT: . . . While Mrs. Bursey may be a lesser participant, a minor character . . . the guidelines and the sentencing scheme established by the guidelines take apart the level of participation of a person in criminal activity, but the level of participation and whether or not their conduct is criminal are two different things.

The defense of entrapment is not applicable to the circumstances which have been presented by the government in its case in chief and therefore the Court instructing the jury on entrapment would be a gratuity and would be confusing. She is not entitled to that instruction, and as a consequence, the Court will not give it.

If she is convicted, in a determination of the offense level she may be entitled to credit, I think that's the word, a deduction or a reduction either as a minor participant or a minimal participant. That remains to be seen, determined, based upon the probation officer's recommendation to the Court should there be

a conviction and based upon the government, how the government views the matter.

So as a consequence we will now call the jury in, I will ask you if you rest, you will say yes, and we will proceed to final argument.

Id. at pp. 4-16.

D.

The Court recessed following the conclusion of the argument and with defendant's counsel's permission met separately with counsel for the government. Upon returning to the courtroom, and before calling the jury to return for final argument, the Court said:

THE COURT: This is an ex parte meeting between counsel for the government and the Court with the permission of defendant's counsel.

The Court has advised the government that the colloquy which occurred in the courtroom regarding the instruction on entrapment caused the Court grave concern that the representation by Ms. Montgomery of the defendant is inadequate because she shows a – demonstrated a woeful lack of understanding of the elements of entrapment and that if this is the advice that she's given her client then her client has been misadvised as to what her rights are and what she's entitled to in the way of a defense.

Id. at p. 18.

Defendant made no statement and defendant's counsel did not ask for any further time to prepare for final argument.

E.

The defendant appealed, represented by appointed counsel. In the appeal the defendant adopted the issues and brief of her husband, who appealed his sentence,

and raised the following separate issue:

> The Defendant was denied adequate assistance of counsel by the failure of her trial counsel to properly present an entrapment defense where that was the only defense agreed upon by the Defendant and her attorney.

The appeal was rejected by the Court of Appeals as described above.

The motion now before the Court was filed at the inception of the appeal and initially supported by defendant's appeal brief. The petition was also supported by defendant's affidavit which generally states that:

- her counsel told her that government had entrapped her into committing the crimes charged and she could be acquitted if defendant claimed entrapment;
- she did not know burden was on her to promote the defense of entrapment by going forward with proofs;
- her counsel never told her that the government's proofs were overwhelming and she would be convicted;
- her counsel never fully explained to her the entrapment defense. Therefore, she did not object to resting without putting in an affirmative defense;
- had she realized the full impact of the affirmative defense requirement she would have testified in own defense;
- had her counsel been forthright and informed her that she would be convicted given the lack of a meaningful entrapment defense she would have entered into a plea negotiation with the government in order to limit her liability;
- she never was told if she pleaded guilty she could rely on a sentencing entrapment defense at the time of her sentencing in an attempt to have the Court reduce her sentence based upon the true amount of drugs rather than the shown amount.

Sometime following the filing of the motion, defendant retained new counsel in

substitution for her appointed counsel who represented her on appeal and who filed the motion.

F.

To sort out what precisely went on between defendant and her counsel and to establish what defendant knew and did not know of her situation, the Court held a one day evidentiary hearing. The following individuals testified at the hearing: the attorney from the Federal Defender Office, who represented defendant initially, defendant's trial counsel, an attorney expert in criminal matters, and defendant.

Defendant's trial counsel testified as follows: She reviewed the evidentiary material furnished by the government including agent reports, recordings of telephone conversations and video tapes of the defendant and others. She was of the opinion entrapment was a good defense and could be supported through cross-examination of the government's witnesses. She was of the view she could persuade the jury that but for government action defendant would not have done what she did and had no predisposition to deal in cocaine. She did not interview any witnesses. She found an absence of inculpatory evidence in the government's materials. She did not draft an entrapment instruction. She did not guarantee defendant of an acquittal and never told her the evidence against her was overwhelming. She had no memory of any plea offer by the government even though she acknowledged talking to the United States Attorney about the case, and that defendant "would only agree to a guilty plea involving several grams of cocaine." She gave no thought to asking that the jurors make a finding on the quantity of drugs involved. She filed no motions. She was satisfied defendant was fully aware of the evidence against her. Lastly, she acknowledged she did not ask for a

recess to give her time to formulate a closing argument following the Court's denying her request for an entrapment instruction.

Defendant testified as follows: Her trial counsel told her she felt she had an entrapment defense because she was not disposed to commit the type of crime with which she was charged. Her counsel did not ask for the names of witnesses or go over the government evidence with her. Her counsel did not discuss her taking the witness stand. The entrapment defense was her counsel's idea, not hers. She discussed the entrapment defense with her initial counsel. Her counsel told her she had to make an "off-the-cuff" final argument when she found out the Court would not give the jury an entrapment instruction. She still believed she was entrapped and that the Court should allow her to present this defense to a jury. She did not agree that the evidence against her was overwhelming. She declined to say she was guilty if she was not entrapped. She has turned down a plea offer of ten years since the time the jury found her guilty. She was not asked to identify witnesses favorable to her defense. She was not asked whether if she knew she had no defense to the charges, she would have pleaded guilty.

The attorney expert testified that an opening statement by the defendant was essential to an entrapment defense and that if the Court says it will not give an entrapment instruction, the proper course to take is to attempt to negotiate a plea. He was of the opinion that based on his examination of the record, exclusive of the trial transcripts, defendant's counsel at trial was not competent to try defendant's case.

The attorney from the Federal Defender Office testified as follows: She discussed at length a plea bargain with defendant and told her what her likely sentence

would be under a best case scenario and under a worse case scenario. Defendant declined to discuss a plea bargain or to engage in meaningful plea negotiations. She discussed with the attorney for the government possible plea bargain sentence caps ranging from twenty years to 135 months and lower with cooperation, including a possible four year sentence. Everything she discussed with the attorney for the government she told defendant. She gave defendant an assessment of the strength of the government's case against her and recommended that she negotiate a plea bargain with the government as the best course for her to follow. In her discussions with defendant she was joined by other attorneys in the Federal Defender's Office.

III. THE ISSUES

Defendant, in her appeal of conviction and in her petition, stated the issue as follows:

> Defendant was denied adequate assistance of counsel by the failure of trial counsel to properly present an entrapment defense when that was the only defense agreed upon by defendant and her attorney.

In the body of her appellate brief, which is incorporated into her petition, defendant goes further in that she claims she was prejudiced by the inadequacies of her trial counsel because there was a reasonable probability that but for the incompetency of her trial counsel she would have accepted a plea bargain rather than proceed to trial, and further argues that her trial counsel's performance was so egregious as to amount to either the virtual or constructive denial of counsel.

In defendant's Amended Brief In Support Of Motion To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody Brought Pursuant to 28 U.S.C. §

2255, defendant framed the issues as follows:

I.

> . . . DEFENDANT-PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO ADEQUATELY PRESENT AN ENTRAPMENT DEFENSE WHICH WOULD HAVE ALLOWED FOR A CHARGE TO THE JURY ON THE ISSUE OF ENTRAPMENT.

II.

> . . . DEFENSE COUNSEL'S ADMITTING THE DEFENDANT'S GUILT TO THE JURY IN HER CLOSING ARGUMENT, CONSTITUTES INEFFECTIVE ASSISTANCE.

III.

> DEFENDANT-PETITIONER [WAS] DENIED THE DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO REQUEST OF THE TRIAL COURT TO INSTRUCT ON THE ISSUE OF THE AMOUNT OF COCAINE THAT WAS INVOLVED BEING MORE THAN 5 KILOGRAMS AND IN NOT ARGUING SENTENCING ENTRAPMENT AT THE TIME OF SENTENCE.

IV. THE LAW

As recently stated by the Court of Appeals for the Sixth Circuit in Magana v. Hofbauer, 263 F.3d 542 (2001), in commenting on Strickland v. Washington, 466 U.S. 668 (1984), the seminal case regarding the adequacy of counsel:

> In order to succeed on a claim of ineffective assistance of counsel, a petitioner must show both that his counsel's performance was constitutionally deficient such that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that he was prejudiced by his counsel's errors. To prove constitutionally deficient performance, petitioner must show that his counsel's performance fell below an objective standard of

> reasonableness under prevailing professional norms. If he can meet this standard, then petitioner must establish prejudice by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome."
>
> . . . .
>
> [This] analysis also applies to claims of ineffective assistance of counsel involving counsel's advice offered during the plea process.
>
> . . . .
>
> we have [also] held that a petitioner who claims that his counsel was ineffective for encouraging him to reject a plea bargain and go to trial states a viable Sixth Amendment claim. Such a petitioner must prove both deficient performance on the part of his counsel and that, but for his counsel's advice, there is a reasonable probability that he would have pleaded guilty.

Id. at 547 (citations omitted).

Similarly in Turner v. State of Tennessee, 858 F.2d 1201, 1205-06 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit said as to claim of ineffective assistance regarding rejection of a proferred plea bargain:

> . . . the State does not challenge the proposition that incompetent advice to reject a plea offer can constitute a Sixth Amendment deprivation. The district court, after a thoughtful analysis, concluded that "an incompetently counseled decision to go to trial appears to fall within the range of protection appropriately provided by the Sixth Amendment." We agree with the district court's analysis and conclusion. . ....
>
> . . . .
>
> . . . To establish the requisite prejudice, 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." "A reasonable probability is a probability sufficient to undermine confidence in the

> outcome."

(citations omitted).

Regarding prejudice, there are circumstances where it is not necessary to show prejudice. In Rickman v. Bell, 131 F.3d 1150, 1555 (6th Cir. 1997), the Court of Appeals for the Sixth Circuit stated, quoting and relying on United States v. Cronic, 466 U.S. 648 (1984):

> In *Cronic*, the Court elaborated on the presumed-prejudice exception to which it alluded in *Srickland*, recognizing that "[t]here are ... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658, 104 S.Ct. At 2046. The fundamental question, the *Cronic* Court suggested, is whether the trial "process [has lost] its character as a confrontation between adversaries"; if so, then "the constitutional guarantee is violated." *Id*. at 656-57, 104 S.Ct. At 2045-46. And then, it is not necessary to demonstrate actual prejudice.
>
> This circumstance may arise in several different contexts. "Most obvious," the Court noted, "is the complete [(*i.e.*, actual)] denial of counsel." *Id*. at 659, 104 S.Ct. At 2047. That, of course, is not at issue here. But the *Cronic* Court also noted the possibility of a *constructive* denial of counsel, when, although counsel is present, "the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided." *Id*. at 645 n. 11, 104 S.Ct. at 2044 n.11. Equally important, the Court held, is the case in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," because "then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id*. at 659, 104 S.Ct. at 2047. The Court concluded with a rather imprecise dictate: that the inquiry into *actual* prejudice may be dispensed with "only when surrounding circumstances justify a presumption of ineffectiveness." *Id*. at 662, 104 S.Ct. at 2048.

V. DISCUSSION

A. Counsel's Performance Generally

1.

Notwithstanding the Court's comments following the rejection of the argument in support of presenting an entrapment defense to the jury, the record does not establish that defendant was denied effective assistance of counsel by her trial counsel in either plea negotiations or at trial.

Simply put, defendant rejected any effort to resolve her case except by trial. At all stages of the case defendant adamantly declined to negotiate a plea that would have called for a custody sentence.

Defendant was advised by her original counsel that she stood no chance of an acquittal and the best course for her to follow was to negotiate a plea agreement with the government under circumstances where cooperation would elicit a motion for downward departure and result in a sentence significantly below that called for by the guidelines. Defendant rejected this advice and retained her own counsel. In the days leading up to trial on February 23, 1998 defendant was fully aware that her husband and the others charged with her had pleaded guilty. The attached Exhibit A displays the relevant sentencing data as to all of the defendants.

While defendant did not know the sentences to be imposed on the other defendants at the time of her trial, she did know that each of them was a party to a plea agreement which called for cooperation and a government motion for a downward departure below the sentencing range called for by the guidelines. Defendant knew that Rodriguez would testify at trial and that defendant Heard's plea agreement called for him to testify at her trial. Heard's testimony at trial, Trial Transcript Vol. VI, March 4,

1998, pp. 30-73, fully implicated defendant in the transfer of the cocaine in the warehouse as well as a participant in telephone calls leading up to the transfer. Defendant was also fully aware in advance of trial of the proofs the government intended to present including the video tape of the warehouse transfer.

2.

Defendant's claim that she was misadvised by her counsel that she had a viable defense of entrapment and that this misadvise led her to go to trial rather than plea bargain is revisionist history. Defendant knew that her counsel's statement that she had a viable defense of entrapment was not an insurance policy against a conviction. Defendant also knew she was the only defendant charged in the conspiracy who was going to trial. Defendant was aware that her initial counsel advised her she had no chance of an acquittal and the best course for her to follow was to plead guilty under a plea bargain which, if she cooperated, would result in a sentence significantly below the guidelines.

3.

There is no question but that defendant's counsel did not do a particularly good job of representation at trial. However, she had little, if nothing, with which to work. Had she made an opening statement telling the jury that defendant would prove entrapment she risked the considerable embarrassment of being unable to offer a believable argument for acquittal should the Court reject an entrapment instruction, and she had no way of knowing in advance that the Court would instruct on entrapment. Had her counsel called defendant to testify, defendant was in no position to offer an innocent explanation of the phone calls to which Heard testified and her presence in the

warehouse when the cocaine was transferred. There were no witnesses available to testify in defendant's favor and none have been identified to the Court. Indeed, defendant has not described what more counsel could have done at trial to support an entrapment instruction.

There was nothing in Rodriguez's testimony remotely suggesting that he induced or persuaded defendant to involve herself in the conspiracy and defendant has not explained how cross-examination of Rodriguez or, for that matter, any of the government's witnesses, could have been more effective or done more to support an entrapment defense. As noted above, Heard's testimony alone established the willingness of defendant to participate in the conspiracy and nothing in cross-examination of Heard remotely suggested he was not telling the truth. Likewise, defendant's recorded conversations with Rodriguez and her presence at the warehouse establish beyond contradiction her willingness to participate in the cocaine deal.

4.

Strickland and its progeny, as discussed above, require a showing both of incompetency of counsel and prejudice to the defendant. Here, however poor counsel's performance, and it must be remembered defendant was acquitted of the charge of conspiracy to extort; defendant was not prejudiced. Absent jury nullification, it was inevitable defendant would be convicted if she went to trial. The most experienced and competent of counsel could have done little for defendant given the overwhelming nature of the proofs against her. And defendant knew this.

The extended colloquy following presentations of the government's proofs, recited above, supports the finding that defendant was fully aware of the likelihood the

defense of entrapment would not be allowed by the Court and that she knew of the considerable risk of allowing a jury to decide on her guilt or innocence.

5.

In summary, and particularly, defendant was not prejudiced by any of the shortcomings she ascribes to her counsel at trial because:

- there was a substantial risk in her counsel making an opening statement which told the jury defendant was entrapped and findings at the conclusion of the proofs she provided what as not performed. Moreover, defendant's papers do not argue what competent counsel should have said in an opening statement;

- there were no witnesses who could have been called whose testimony would have been exculpatory. Moreover, defendant's papers do not identify any such witnesses;

- there was no exculpatory evidence available to defendant. Moreover, defendant's papers do not identify any such evidence;

- had defendant testified she would have been unable to explain the innocent nature of her conversations with Rodriguez and her presence at the warehouse. Moreover, defendant's papers do not state what she would have said had she testified. Defendant voluntarily chose not to testify. She made the decision and not her counsel;

- while defendant's counsel failed to adequately research what was necessary to adequately present an entrapment defense, defendant was not prejudiced since the defense simply was not available to defendant;

- defendant's counsel was retained not to negotiate a plea agreement with the government but rather to take the case to trial. Defendant was not prejudiced by her counsel's failure to assess the consequences of not allowing the defense of entrapment to be presented to the jury;

- defendant was not prejudiced by her counsel's failure to fully explain to her the rules involved in relying on the defense of

> entrapment and the consequence of the Court possible rejecting it. Defendant simply had no interest in negotiating a plea agreement which called for a significant custody term.

B. Final Argument

Defendant's particular claim that in final argument her counsel admitted that defendant was guilty and that this admission denied her effective assistance of counsel also lacks merit. It must be remembered first that the jury had seen and heard hours of audio and video tapes in which defendant was a dominant figure and which implicated defendant in the cocaine transaction. Counsel was faced with the considerable difficulty of explaining away this highly inculpatory evidence. What counsel did was to shift the blame to defendant's husband and portray defendant as an innocent dupe. This effort succeeded in part; defendant was acquitted of the conspiracy to extort charge. Defendant cites Capps v. Sullivan, 921 F.2d 260 (10th Cir. 1990) and United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991), in support of her argument. Neither case gives any comfort to defendant.

In Capps, a state conviction habeas case, the petitioner took the stand and admitted all of the elements of the crime charged. His counsel, in final argument, "in effect, request[ed] the jury to ignore the law out of sympathy for his client rather than seek an entrapment instruction ...," 921 F.2d at 262. After an evidentiary hearing on the habeas petition "the magistrate judge recommended . . . that the prejudice prong of Strickland was satisfied and that a new trial should be required." Id. at 263. The Tenth Circuit was satisfied that the evidence indicated that there was a reasonable probability that, but for defense counsel's failure, the result of the trial would have been different. As explained above, however, that cannot be said here. Also, defendant does not say

what her counsel should have said in final argument that might have persuaded the jury to find her not guilty on the cocaine conspiracy charge.

Swanson does no better for defendant. There, the defendant was charged with bank robbery. The evidence against him was overwhelming. In final argument his counsel told the jury that the evidence against his client was overwhelming and that the evidence did not rise to the level of a reasonable doubt. The decision was 2-1. The lead opinion said:

> We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment.

943 F.2d at 1075. As a consequence, the majority held that counsel's performance created a breakdown in the adversary system and even though it suspected his design was to create prejudice error, which he did, defendant was entitled to a new trial. The dissent said:

> In my view, the majority is excessive in its condemnation of defense counsel. It accuses him of 1) causing a "breakdown in our adversarial system of justice,"; 2) "taint[ing] the integrity of the trial,"; 3) "lessening the Government's burden of persuading the jury that Swanson was the perpetrator of the bank robbery,"; and 4) engaging in an "abandonment of the defense of his client at a critical stage of the criminal proceeding." One would expect such powerful criticism to be justified by the grossest form of misbehavior by counsel. I fail to find it here.

Id. at 1079. The dissent went on to say:

> It is easy to condemn from our vantage point. We are not before the jury, empty handed, yet charged with the duty of providing an honest defense. We should, I believe, view counsel's performance less critically. He did not concede

> that his client was guilty. He did, however, admit that there was no reasonable doubt that one element of the government's case was true, namely, that the bank clerks were intimidated by the robber. Such an admission did not cause a collapse in the adversarial system, it did not taint the integrity of the trial, nor was it an abandonment by counsel of his client's defense. If it was error at all, it was not of the fundamental sort necessary to trigger the *Cronic* exception. United States v. Cronic, 466 U.S. 648 (1984).

Id. at 1080.

Again, defendant fails to recognize that her counsel's final argument persuaded the jury she was not guilty on the extortion count and again she does not say what counsel should have argued in final argument.

C. Sentencing

Defendant's claim that her counsel rendered ineffective assistance at sentencing is belied by the record. The Presentence Report (PSR) recommended a guideline sentence of between 188 to 235 months based on an offense level of 36 and a criminal history category of 1. The offense level was determined by applying U.S.S.G. § 2D1.1(a)(3), the guideline for defendant's offense of conviction, 21 U.S.C. §§ 846 and 841(a)(1), which references the drug quantity table. The table, U.S.S.G. § 2D1.1(c)(4), ascribes an offense level of 36 for the distribution of 50 to 150 kilograms of cocaine. Defendant's counsel filed detailed objections to the PSR stating:

> Drug Quantity
>
> The conviction in this case was for Conspiracy to Possess with Intent to Distribute and to Distribute Cocaine and to Aid and Abet the Possession of Cocaine with Intent to Distribute, making the base offense Level 36. Defendant disagrees with this amount, contending that there were only four (4) total kilograms involved in this case, making the offense Level 30. The government "delivered" three

suitcases filled with 100 kilograms of fake cocaine on both March 5 and March 6, 1997. The fake cocaine "delivered" on March 5 was the same fake cocaine "delivered" on March 6. The suitcases were changed so that it did not look like it was the same fake cocaine.

No amount of drugs was ever discussed with CHRISTINE BURSEY. What was delivered was 96 kilos of a substance that contained absolutely no cocaine, and 4 kilos which contained 1 gram of cocaine mixed into the fake substance in each of the four kilograms. Case law from all of the circuits make clear that unless the substance contains a mixture of cocaine, the non-mixed substance may not be counted in determining the quantity of the controlled substance. [citing cases]

Defendant argues that because of the above, the drug quantity should be at most 4 kilograms. The Guidelines and Application Notes are clear that if the "quantity" contains a mixture of cocaine, regardless of the purity, then the total quantity is used for purposes of the guideline. The 4 kilos involved should not be double-counted, because it was the same cocaine that was delivered on both march 5th and 6th.

Only four (4) kilograms of a mixture containing cocaine were actually delivered. The amount actually delivered should control. The 11th Circuit has recently held when a package possessed by the Defendant contained 99 percent sugar and 1 percent cocaine, that his package WAS not a "mixture" under the sentencing guidelines. Thus, the entire weight of the package could not be included in the sentence calculation for the offense of traveling interstate in aid of racketeering involving distribution of cocaine. Only the actual cocaine could be scored. Based upon the ratio of sugar to cocaine, it was unlikely that sugar could have been used to cut cocaine without rendering the resulting mixture unmarketable. United States v. Jackson, 115 F.3d 843 (11th Cir. 1997). Under this reasoning, defendant should only be held accountable at most for 4 grams of cocaine, because each of the 4 kilograms only contained 1 gram. This is much less than 1 percent cocaine. If this Court follows Jackson, supra, then the base offense level would be 12.

The government will argue that because this was reverse sting operation, MS. BURSEY should be held

> accountable for whatever was discussed, not what was delivered. In this case it is clear that an amount of cocaine to be delivered was never discussed with MS. BURSEY. The action and knowledge of her husband cannot be imputed to her.
>
> For these reasons, Defendant argues that the quantity involved in this case should be, at most, 4 kilos, which makes a base offense level of 30. However, Defendant contends that United States v. Jackson, supra, should control, and that her base offense level should be 12. This change should be made in paragraph 34 of the report.

The probation officer responded as follows:

> Objection 7, Drug Quantity:
>
> The defendant feels she should only be held accountable for at most four kilograms of cocaine as she states that 96 kilograms of a substance contained absolutely no cocaine.
>
> Probation Department's Response:
>
> Christine Bursey was convicted of Conspiracy to Possess with Intent to Distribute and to Distribute Cocaine and to Aid and Abet the Possession of Cocaine with Intent to Distribute. She is being held accountable for between 50 and 150 kilograms of cocaine. Her offense level is determined by the amount of drugs in the defendant's relevant conduct. The facts of this case show that Christine Bursey believed she was protecting two shipments of cocaine and that the kilograms of cocaine were being stored in suitcases. §2D1.1, Application Note 12, page 110 of the Guideline Manual states, "In contrast, in a reverse sting, the agreed upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not the defendant." Christine Bursey believed that the agreed upon amount of cocaine that she was protecting was a large quantity of cocaine. The Probation Officer stands behind the report as written.

There is a vast different between being ineffective in the Strickland sense and

not being persuasive. At most, defendant's counsel was not persuasive at sentencing. Indeed, defendant's counsel's letter objection to the PSR (5 pages) displays a good understanding of the guidelines and familiarity with the record.

Lastly, the assertion that counsel's performance was inadequate because she failed to argue sentencing entrapment also lacks merit. There is simply no basis in Sixth Circuit law for such a claim. See United States v. Jones, 102 F.2d 804 (1996).

VI. CONCLUSION

The Court, throughout the course of this case has made known its concern with the 188 month custody sentence called for by the guidelines and imposed on defendant. However, the sentence was of defendant's own making. Defendant repeatedly rejected the opportunity to negotiate a plea agreement which called for a lesser sentence. Even now, as this § 2255 proceeding concludes, nowhere has defendant said that had she known that the defense of entrapment was not viable she would have pleaded guilty to the charge of conspiracy with intent to distribute and to distribute cocaine and subjected herself to a sentence on the order of that imposed on her husband: 120 months.

Even at this late date the Court is satisfied that the government, in exchange for the considerable effort the § 2255 proceeding has imposed on the Court and the parties, would be willing to negotiate an amelioration of the 188 month sentence. Defendant, however, has shown no willingness to do anything but stand firm in her resolve to contest the government's case. This is not a situation in which the government has acted oppressively or overreached. This is simply a situation in which defendant sought out counsel who would tell her what she wanted to hear and however

inadequate to the circumstances of defendant's case was her counsel, there was no prejudice to defendant by her choice of counsel or her counsel's performance. It simply cannot be said that defendant's counsel "was so manifestly ineffective that defeat was snatched from the hands of victory," United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992), or that had defendant been properly advised "there is a reasonable probability that had [she] known the true sentencing ramifications of losing at trial, [she] would have accepted [a] plea offer," Alvernaz v. Ratelle, 831 F. Supp. 790, 792 (S.D. Ca. 1993).

Accordingly, for all the reasons stated above, defendant's motion is DENIED.

SO ORDERED.

/s/
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: October 18, 2001

Detroit, Michigan