

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>RAYED FAWZI ABED,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	<b>Civil Action No. 7:01CV00383</b>
<b>v.</b>	)	
	)	
<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Respondent.</b>	)	
<b>OBAYDA HANIFI ABED,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No. 7:01CV00356</b>
	)	
<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Respondent.</b>	)	
<b>AMAR KHALID ABED,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No. 7:01CV00355</b>
	)	
<b>UNITED STATES OF AMERICA,</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	
<b>Respondent.</b>	)	<b>By: Samuel G. Wilson</b>
	)	<b>Chief United States District Judge</b>

Amar Abed, Rayed Abed, and Obadya Abed (collectively “petitioners”) were convicted in this court of being members of a criminal enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d) (RICO), of conspiracy to violate RICO, and of a

host of offenses arising out of their membership in the RICO enterprise. The court sentenced Amar to a total term of 570 months imprisonment, Rayed to a total term of 438 months, and Obadya to a total term of 497 months. They appealed to the Court of Appeals, and the Court of Appeals affirmed. Following the denial of certiorari by the United States Supreme Court, petitioners, pursuant to 28 U.S.C. § 2255, moved to vacate their convictions. The court consolidates their motions for purposes of this opinion and denies their motions.

## I.

The facts of this case are amply set forth in the memorandum opinion of the Court of Appeals, *Abed v. United States*, 203 F.3d 822, 2000 WL 14190 (4th Cir. January 10, 2000) (unpublished), and this court will not repeat them here.

## II.

The petitioners challenge their § 924(c) convictions under Count 11 for using an incendiary destructive device, a “Molotov Cocktail,” during and in relation to a crime of violence (arson) under 18 U.S.C. § 844(i). Essentially, they argue that the court invaded the province of the jury by instructing the jury that a Molotov Cocktail, “a device consisting of a bottle, gasoline, and a rag,” is an incendiary destructive device. According to petitioners, the court’s instruction ran afoul of *Jones v. United States*, 526 U.S. 227 (1999), which was decided while their appeals were pending in the Court of Appeals. According to petitioners, as *Jones* makes plain, the Due Process Clause of the Fifth Amendment and the Notice and Jury Trial Guarantees of the Sixth Amendment require that “any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Jones* 526 U.S. at 243 n.6. Counsel did not raise the issue at trial or on direct

appeal. “Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in a federal habeas proceeding only if the defendant can show both cause for and actual prejudice from the default [citations omitted], or that he is actually innocent [citations omitted].” *United States v. Harris*, 183 F.3d 313, 317 (4th Cir. 1999).

Although petitioners’ argument and reading of the court’s instruction are, in context of the court’s overall instruction, somewhat strained, even if they were not, petitioners have defaulted the issue because they neither raised that issue at trial nor on direct review, and they have not shown actual prejudice or actual innocence. Of the many arguments they made at trial, they certainly never argued that they were innocent because a Molotov Cocktail does not qualify as an incendiary destructive device under § 924(c). Indeed, they concede, as they must, that a Molotov Cocktail can qualify. Nor do they argue now that the Molotov Cocktail was not an incendiary destructive device under § 924(c). Instead, they argue that the court’s instruction invaded the province of the jury. Since they are unable to show *actual* prejudice from the default or actual innocence, the court will dismiss the claim.<sup>1</sup>

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<sup>1</sup> In part, the court instructed the jury that Count 11 had two essential elements which the government was required to prove beyond a reasonable doubt. First, the court instructed the jury that in order to find any defendant guilty that defendant must have committed the crime alleged in Count 10. Count 10 alleged that defendants maliciously damaged or destroyed and attempted to damage and destroy by means of fire a building known as The Corner Store which was used in interstate commerce or in an activity affecting interstate commerce in violation of 18 U.S.C. § 844(i). Second, the court instructed the jury that the defendant must have knowingly used a firearm, that is a “Molotov cocktail,” during and in relation to the crime alleged in Count 10. The court also instructed the jury that the government was required to prove that “the defendant actively employed the ‘Molotov cocktail’ during and in relation to the crime of violence charged.” The court assumed – as the Supreme Court later found in *Castillo v. United States*, 530 U.S. 120 (2000) – that Congress intended the statutory references to particular firearm types in § 924(c)(1) to define separate crimes not simply to authorize enhanced penalties. Thus, even if petitioners’ strained reading of the court’s instructions as to Count 11 was credited and the court’s instruction was found erroneous, it was hardly plain error.

### III.

Count 12 charged a conspiracy “to distribute cocaine, marijuana, and/or cocaine base.” The allegations of Racketeering Act 1 of Count 1, a RICO count, mirrors the allegations of Count 12. At trial, petitioners did not request, and the court did not include a special verdict form that required the jury to make findings as to either drug type or quantity. Amar and Obadya challenge on due process grounds their conviction and the attribution of drug types and quantities. First, they maintain that where general verdicts are returned as to a drug conspiracy count involving several types of drugs with differing punishments, circuit precedent, primarily *United States v. Rhynes*, 206 F.3d 349, 380 (4th Cir.1999) and *United States v. Quicksey*, 525 F.2d 337 (4th Cir. 1975), prohibits punishment that exceeds “the statutory maximum punishment for the least punished of the drugs.” They contend that the court committed plain error in exceeding the five-year statutory maximum for, in their words, the “least punished” offense—a conspiracy “involving less than 50 kilograms of marijuana.” Second, relying on *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), they contend that the court could not sentence them based on the quantity of drugs involved because the quantity was not alleged in the indictment or submitted to the jury as an element of the offense. The court finds that petitioners did not raise the claims at trial or on direct appeal, that they cannot show actual prejudice or actual innocence, and that they have defaulted the claims.<sup>2</sup> The court also denies petitioners’ *Apprendi* claim on the additional ground that *Apprendi* may not be retroactively applied in a § 2255 proceeding. *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001).

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<sup>2</sup> The claims are not analyzed under the plain error standard. Rather, they are analyzed under the more stringent cause and actual prejudice standard. *Gregory v. United States*, 109 F. Supp. 2d 441, 457 n.14 (E.D. Va. 2000).

There is even a more fundamental reason why Amar and Obadya are not entitled to § 2255 relief on this due process claim: the complained of errors did not affect the total sentences they received. Amar and Obadya were convicted of Counts 1 and 2 of the indictment which charged racketeering violations under 18 U.S.C. § 1962 (c) & (d) (RICO). Racketeering Act 1 of Count 1 simply mirrored the drug trafficking allegations of Count 12 – the count about which they complain. The jury found by way of special verdict that Amar and Obadya committed Racketeering Act 1. Clearly, drug trafficking, even narrowly defined, was relevant conduct under the sentencing guidelines for the racketeering counts. There is no requirement that relevant conduct under the sentencing guidelines be submitted to or determined by the jury. “[F]actual determinations that increase the defendant’s sentence under the sentencing guidelines do not implicate *Apprendi* and may be made by the sentencing judge as long as the sentence imposed is less than the maximum permitted by statute for the offense for which the defendant was convicted.” *United States v. Obi*, 239 F.3d 662, 667 (4th Cir. 2001); *United States v. Skidmore*, 254 F.3d 635, 643-644 (7th Cir. 2001). The maximum possible penalty for each RICO conviction is 20 years (240 months). The court sentenced Amar and Obadya well below the statutory maximum on each of those counts. The court sentenced Amar to a concurrent 210 month sentence on each RICO count and sentenced Obadya to a concurrent 137 month sentence on each of those counts. The court then ran the 360 month sentences they received on Count 11 consecutively, as required by law. This resulted in a total sentence of 570 months for Amar and a total sentence of 497 months for Obadya. The additional concurrent 210 month sentence Amar received on Count 12 is immaterial to his total sentence, as is the additional concurrent 137 month sentence Obadya received on that count. Non-prejudicial sentencing errors do not warrant §

2255 relief. *See United States v. White*, 238 F.3d 537, 542 (4th Cir. 2001).

Moreover, even if Amar's argument were accepted and his guideline calculated without exceeding the five-year statutory maximum for the "least punished" offense – a conspiracy "involving less than 50 kilograms marijuana" – his total sentence would remain the same. Under the grouping rules, Amar's guideline was calculated based on the offense having the highest offense level – Racketeering Act 10 charging robbery. Even if the court had not held him accountable for cocaine or cocaine base and only had held him accountable for less than 50 kilograms of marijuana, his total sentence would not have changed. Although his sentence for Count 12 would have changed, the court, as it has previously noted, ran that sentence concurrently with sentences of equal duration. Again, non-prejudicial sentencing errors do not warrant § 2255 relief.

For the reasons stated, the court concludes that this due process claim lacks merit.

#### IV.

A federal indictment must allege each essential element of the crime charged. An essential element is one "whose specification . . . is necessary to establish the very illegality of the behavior and thus the court's jurisdiction." *United States v. Hooker*, 841 F.2d 1225, 1231 (4th Cir. 1988) (en banc) (quoting *United States v. Cina*, 699 F.2d 853, 859 (7th Cir. 1983), *cert. denied*, 464 U.S. 991 (1983)). Rayed contends that counts 9-12 of the indictment were so deficient that the court lacked jurisdiction over him on those counts. Even a cursory review of those counts, however, discloses that the elements of each offense are alleged, including any necessary jurisdictional allegations. Moreover, defects in an indictment ordinarily are not redressable in a § 2255 proceeding unless it is clear that no federal offense is charged. *See Tallman v. United*

*States*, 465 F.2d 282, 286 (7th Cir. 1972). It follows that the court must reject Rayed’s challenge to his convictions on counts 9-12 of the indictment.

## V.

Petitioners contend that they were denied the effective assistance of counsel at trial and on direct appeal and that ineffective assistance is sufficient cause to excuse their procedural defaults. First, they maintain that they were denied the effective assistance of counsel because their counsel failed to raise the issues decided in *Jones* on direct appeal to the Fourth Circuit Court of Appeals. Second, they maintain that their counsel were ineffective at trial because counsel failed to object to the imposition of the sentences petitioners claim were beyond the statutory maximum under the “general drug conspiracy indictment.” Amar also contends that his counsel was ineffective because his counsel failed “to investigate, discover and present alibi evidence.” The court finds that petitioners procedural defaults are not excused and that petitioners are not entitled to § 2255 relief.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth a two-part test for deciding ineffective assistance of counsel claims. First, the defendant “may show that counsel’s performance was deficient.” *Id.* at 687. To prove deficiency, a defendant “must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. Second, the defendant must show that the deficient performance actually prejudiced him. A showing of prejudice requires the defendant to prove that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

The court assumes *without deciding* that petitioners have met the first part of the

*Strickland* test for the two ineffective assistance of counsel claims that they share in common.<sup>3</sup>

Clearly, however, as the court stated above, petitioners have not and cannot show actual prejudice. Accordingly, the court rejects those claims.

Amar claims that his counsel was ineffective for failing to investigate, discover and present alibi evidence. In his verified petition for § 2255 relief, Amar cursorily states that he made his counsel aware that he “had spent the evening of The Corner Store fire in the company of Sharon, a waitress at a local [restaurant]” and that she was available at the time of trial “to confirm this fact.” He claims that the woman he was dating and her mother would have corroborated this “alibi defense.” In an affidavit Amar’s trial counsel, Rena Berry, states that the private investigator who assisted in preparing the case for trial spoke with fifty persons, including two persons Amar had identified as alibi witnesses, Dawn Westmorland and Sheila Fagin. According to Berry, who also spoke with Westmoreland and Fagin, neither Westmorland nor Fagan stated that they were with Amar when The Corner Store fire occurred. Moreover, according to Berry, Fagin could have testified about numerous crimes Amar committed. In short, Berry “could find no alibi witnesses for the night of [The Corner Store] fire.” (Berry aff. ¶ 10.) Amar filed a brief in response stating simply that “the alibi witnesses identified in his [§ 2255 motion] are other than those identified by Ms. Berry in her affidavit.” Amar did not submit the affidavits of his alleged alibi witnesses or provide the details of what they would have allegedly said had they been called to testify.

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<sup>3</sup> Counsel, however, cannot be found ineffective for fighting meaningless battles. The question of whether the court should have made it plain to the jury that they must decide whether the Molotov Cocktail that was used to burn The Corner Store was a “destructive device” is, in context, a meaningless battle. From the trial lawyer’s perspective the real battles were whether petitioners burned The Corner Store and whether they used a Molotov Cocktail to burn it.

“The failure to investigate known potential alibi witnesses can satisfy the ‘performance’ prong” of *Strickland v. Washington*. *Bruce v. United States*, 256 F.3d 592, 597 (7th Cir. 2001). Since the court cannot make findings of fact from conflicting affidavits, the court is required to grant Amar an evidentiary hearing on this claim unless the files and records of the case “conclusively” show that he is entitled to no relief. *United States v. Witherspoon*, 231 F.3d 923, 925 (4th Cir. 2000) (quoting § 2255). The threshold inquiry, however, is whether Amar has made the requisite showing that his counsel’s failure to speak with or subpoena the witnesses he has identified could be considered ineffective assistance. The court finds that he has not.

The court is not compelled to grant an evidentiary hearing on Amar’s claim that his counsel was ineffective for failing to subpoena the alleged alibi witnesses on allegations that are “vague, conclusory, or palpably incredible,” rather than “detailed and specific,” *see Machibroda v. United States*, 368 U.S. 487, 495 (1962), and Amar’s allegations are vague and conclusory. They are not detailed and specific, and their precise significance is not evident. Amar, for example, states that he made his counsel aware that he “had spent the evening of The Corner Store fire in the company of Sharon, a waitress at a local [restaurant].” But according to the evidence at trial, Amar set The Corner Store fire at two or three o’clock in the *morning* on January 13, 1995. Therefore, even if true, Amar’s allegations would fall short of overcoming the strong presumption that his trial counsel acted appropriately not “outside the wide range of professionally competent assistance” the Sixth Amendment requires. *Strickland v. Washington* 466 U.S. at 690.<sup>4</sup>

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<sup>4</sup> The court notes that Racketeering Act 13 of Count 1 charged that Amar committed murder and that the United States introduced more than trifling evidence to support the allegation. Amar’s attorney, no doubt, as a matter of strategy, directed her considerable efforts in obtaining his acquittal of that charge.

For the reasons stated, petitioners' effective assistance claims fail.

**VI.**

For the reasons stated, petitioners' motions to vacate are denied .

**ENTER:** This October \_\_\_\_\_, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

**AMAR KHALID ABED,**

**Petitioner,**

**v.**

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**Civil Action No. 7:01CV00355**

**UNITED STATES OF AMERICA,**  
**Respondent.**

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**FINAL ORDER**

In accordance with the Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that petitioner's motion to vacate his conviction pursuant to 28 U.S.C. § 2255 is **DENIED**. This action is stricken from the active docket of the court.

Amar Abed is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal in this court within thirty (30) days of the date of entry of this Order.

The Clerk is directed to send certified copies of this Order and the accompanying Memorandum Opinion to all parties.

ENTER: This October 19, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

**OBAYDA HANIFI ABED,**  
**Petitioner,**

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**Civil Action No. 7:01CV00356**

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**UNITED STATES OF AMERICA,**  
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**FINAL ORDER**

In accordance with the Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that petitioner's motion to vacate his conviction pursuant to 28 U.S.C. § 2255 is **DENIED**. This action is stricken from the active docket of the court.

Obayda Abed is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal in this court within thirty (30) days of the date of entry of this Order.

The Clerk is directed to send certified copies of this Order and the accompanying Memorandum Opinion to all parties.

ENTER: This October 19, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

**RAYED FAWZI ABED,**  
**Petitioner,**

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**v.**

**Civil Action No. 7:01CV00383**

