

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

FAHED T. TAWALBEH,)	
)	
Petitioner,)	Civil Action No. 7:00CV00858
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	By: Samuel G. Wilson
)	Chief United States District Judge

Fahad Tawalbeh was convicted of offenses arising out of the the burning of a competitor’s store with a “Molotov Cocktail.” The court sentenced Tawalbeh to a total term of 431 months imprisonment. He appealed to the Court of Appeals, and the Court of Appeals affirmed. Following the denial of certiorari by the United States Supreme Court, Tawalbeh, pursuant to 28 U.S.C. § 2255, moved to vacate his convictions on numerous grounds. The Court finds that all of Tawalbeh’s claims lack merit except the single claim that his counsel improperly prevented him from testifying, and court will hold an evidentiary hearing to resolve that claim.

I.

Tawalbeh was charged in six counts of a multiple count, multiple defendant indictment. Count 1 charged him with being a member of a criminal enterprise in violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1962(d) (RICO); Count 2 charged him with conspiring to violate RICO in violation of 18 USC § 1962(c); Count 9 charged him with conspiring to damage and destroy by means of fire a building, known as The Corner Store, used in interstate commerce or in an activity affecting interstate commerce in violation of 18 U.S.C. §

844(i) and conspiring to use an incendiary destructive device, a “Molotov Cocktail,” in violation of 18 U.S.C. § 924(c), all in violation of 18 U.S.C. § 371; Count 10 charged him with maliciously damaging and destroying by means of fire a building, known as The Corner Store, used in interstate commerce or in an activity affecting interstate commerce, in violation of 18 U.S.C. § 844 (i); Count 11 charged him with 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); and Count 12 charged him with conspiracy to distribute cocaine, cocaine base, and marijuana in violation of 21 U.S.C. § 846. The jury acquitted Tawalbeh of the two RICO counts, Counts 1 and 2, and the drug distribution conspiracy count, Count 12. The jury found him guilty, however, on the remaining counts (counts 9, 10, and 11). The court sentenced Tawalbeh to 60 months on Count 9, 70 months on Count 10 (with one of those months to run consecutive to count 9), and 360 months consecutive on Count 11, for a total sentence of 431 months.

The other 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 the court will not repeat them here.

II.

In claim one Tawalbeh contends that the court was without jurisdiction over Count 9 which charges a conspiracy in violation of 18 U.S.C. § 371 because the government failed to prove an offense against the United States. He argues that “the use of the Commerce Clause to criminalizes a fire at The Corner Store is overreaching and overbroad.” (petitioner’s response at 7). The argument is a nonstarter.

Count 9 charges, in part, that Tawalbeh conspired to violate 18 U.S.C. § 844(i) by

conspiring to damage and destroy by means of fire a building used in interstate commerce or in an activity affecting interstate commerce. A two-part inquiry determines “whether a building fits within the strictures of § 844(i).” *United States v. Terry*, 257 F.3d 366, 368 (4th Cir. 2001). “First, courts must inquire ‘into the function of the building itself.’ Second, courts must determine ‘whether that function affects interstate commerce.’” *Id.* at 368-369 (quoting *Jones v. United States*, 529 U.S. 848, 854 (2000)). Under § 844(i) “used in an activity affecting interstate commerce” means “active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce.” *Id.* at 369 (quoting *Jones*, 529 U.S. at 855).

At trial, the United States proved that, at the time of the fire, The Corner Store was actively engaged in purchasing and reselling goods that were manufactured outside the Commonwealth of Virginia. Accordingly, the United States proved that the building was actively employed for commercial purposes and had more than a mere passive, passing, or past connection to commerce. That proof was not only sufficient to meet the strictures of § 844(i), it was sufficient to establish the requisite commerce clause nexus. *Jones v. United States*, 529 U.S. 848 (2000) (construing § 844(i) narrowly to require active employment for commercial purposes to avoid constitutional challenge).¹ It follows that Tawalbeh’s challenge lacks merit.

III.

Tawalbeh’s second and third claims essentially are a repackaging of his first claim. He

¹ Tawalbeh also appears to challenge the court’s subject matter jurisdiction. “The District Court had subject matter jurisdiction in this case by virtue of fact that [the defendant] was charged with an ‘offense against the United States’. 18 U.S.C. § 3231. The interstate commerce aspect of this case arises merely as an element of the § 844(i) offense. If that element is not satisfied, then [defendant] is not guilty; but the court is not by the failure of proof on that element deprived of judicial jurisdiction.” *United States v. Ryan*, 41 F.3d 361, 363-364 (8th Cir. 1994).

claims that the government failed to prove the essential element of interstate commerce for counts 9, 10, and 11 or that a crime was committed by the arson of The Corner Store. Count 9, as stated, was the conspiracy to burn The Corner Store in violation of 18 U.S.C. § 371; Count 10 was the burning the corner store in violation of 18 U.S.C. § 844 (i); and Count 11 charged him with using an incendiary destructive device, a “Molotov cocktail” during and in relation to the § 844(i) offense, in violation of 18 U.S.C. § 924(c). Having already concluded that the government made the appropriate interstate commerce showing, the court finds claims two and three meritless.

IV.

Tawalbeh argues in claims four and five that the evidence was insufficient to prove beyond a reasonable doubt his involvement in the conspiracy or to convict him of aiding and abetting the use of a destructive device. Tawalbeh repackages arguments made and rejected on appeal. As the Court of Appeals concluded, the evidence “is sufficient to support a reasonable factfinder’s conclusion that Tawalbeh participated at the planning stage in the illegal use of a Molotov cocktail, had knowledge of the result, and intended to bring about that result.” *Abed v. United States*, 203 F.3d 822, 2000 WL 14190 (4th Cir. January 10, 2000) (unpublished). Claims four and five lack merit, and the court rejects them.

V.

In claim seven Tawalbeh contends that his convictions under both § 844(i) and § 924(c) violate the Double Jeopardy Clause because “Congress did not clearly express an intention to impose cumulative punishments under the explosives statutes and the firearm statutes.” (Petitioner’s response at 12). The court, however, agrees with and follows the Second and Fifth

Circuits which have held that Congress clearly intended to impose multiple punishments under § § 844(i) and 924(c). *United States v. Nguyen*, 117 F.3d 796 (5th Cir. 1997); *United States v. Salameh*, 261 F.3d 271 (2d Cir. 2001). In the words of the Second Circuit “the imposition of separate § 924(c) sentences is not defeated by the fact that the violent crimes underlying the § 924(c) convictions themselves provide for enhanced penalties for use of explosives.” *Salameh*, 261 F.3d at 278. Accordingly, the court rejects claim seven.

VI.

After the verdict was received and the jury discharged, but before sentencing, the jury foreman stated that the jury had misread the court’s instructions. Tawalbeh moved for a new trial, and the court denied Tawalbeh’s motion. In claim eight, Tawalbeh essentially renews that motion. The court finds that the claim is frivolous. First, the claim is based on the statement of a juror and may not be received to impeach the jury’s verdict. A juror’s statement or testimony only is admissible “on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.” Fed. R. Evid. 606(b). Second, a § 2255 motion is not a substitute for appeal. Under the circumstances, even if the claim had merit the time to raise it has passed. Therefore, the court denies the claim.

VII.

In claim nine, Tawalbeh challenges his § 924(c) conviction under Count 11 for using an incendiary destructive device, a “Molotov Cocktail,” during and in relation to a crime of violence (arson) under 18 USC § 844(i). Although he cites *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), his precise argument is unclear. He seems to be making the same argument his

codefendants at trial made in their respective § 2255 motions.² Essentially, they argued 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. They contended that 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. They claimed that, 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. As the court noted in their cases, however, 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).

Moreover, as the court also noted in their cases, although their argument and reading of the court’s instruction were, in context of the court’s overall instruction, somewhat strained, even if they were not, they defaulted the issue because they neither raised that issue at trial nor on direct review, and they did not show actual prejudice or actual innocence. *See Abed et al. v. United States*, No. 7:01CV00355 (W.D. Va. October 19, 2001). As the court stated:

Of the many arguments they made at trial, they certainly never argued that they were

² He also seems to contend that the court sentenced him for the § 924 (c) violation using a preponderance of the evidence standard. His argument, however, fails to account for the fact that the jury found him guilty beyond a reasonable doubt of the § 924 (c) violation.

innocent because a Molotov Cocktail does not qualify as an incendiary destructive device under § 924(c). Indeed, in their § 2255 motion they concede that a Molotov Cocktail can qualify. Nor did they argue 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.

Id.

The court rejects Tawalbeh's claim on the same grounds.³

VIII.

Tawalbeh maintains in claim ten that the government knowingly used perjured testimony. According to Tawalbeh, a government witness, Michael Witt, testified falsely and the government knew or should have known it because Witt had been convicted of numerous felonies. The court finds, however, that Tawalbeh has not shown either that Witt testified falsely or that the government knowingly permitted him to testify falsely. Moreover, he did not raise this issue at trial or on direct appeal and, therefore, has defaulted it.

It would have offended due process if the government had knowingly used perjured

³ 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 erroneous, it was hardly plain error.

testimony, whether the government solicited that testimony or simply allowed it to pass uncorrected. *Naup v. Illinois*, 360 U.S. 264, 269 (1959); *Boyd v. French*, 147 F.3d 319, 329-330 (4th Cir. 1998). But there are substantial substantive roadblocks to the claim in addition to a procedural one. Substantively, Tawalbeh has no admissible evidence that Witt committed perjury, and no evidence whatsoever that the government knowingly used perjured testimony. That the government used a witness with multiple convictions provides absolutely no support for the claim that the government knowingly used perjured testimony. Moreover, procedurally, Tawalbeh could have raised the issue in the District Court or on appeal. Since he failed to do so, he has defaulted claim. *See United States v. Harris*, 183 F.3d 313, 317 (4th Cir. 1999). For the foregoing reasons the claim lacks merit, and the court dismisses it.

IX.

Tawalbeh claims that he was denied the effective assistance of counsel in violation the Sixth Amendment on numerous grounds. He claims that his counsel (1) failed to raise violation of the Speedy Trial Act; (2) failed to argue for severance; (3) failed to raise a violation of the Vienna Convention; (4) failed to hire a new investigator; (5) failed to assert properly the immunity clause of his prior plea agreement; (6) failed to explore a plea agreement; (7) failed to properly cross-examine key government witnesses; (8) failed to present adequately a defense; (9) did not allow him to testify; (10) was ineffective at sentencing; (11) was ineffective on appeal; and (12) was ineffective based upon the totality of his errors. The court finds that all of Tawalbeh's effective assistance claims except claim (9) – the claim that counsel would not permit him to testify – lack merit. The court finds that it must conduct a hearing on that claim, however.

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. With those strictures in mind the court addresses Tawalbeh’s effective assistance of counsel claims, in turn.

The court has reviewed the trial record as well as documents submitted in this § 2255 proceeding, and it is apparent that counsel failed to raise a violation of the Speedy Trial Act because there was no violation. Accordingly, effective assistance of counsel claim (1) lacks merit. He has not, and cannot, meet either part of the *Strickland v. Washington* test.

Effective assistance claim (2) lacks merit because Tawalbeh did not suffer from prejudicial joinder, was not entitled to a severance, and the court would not have granted a severance motion had it been made. He has not, and cannot, meet either part of the *Strickland v. Washington* test.

Effective assistance claim (3) lacks merit because Tawalbeh has not proven a violation of the Vienna Convention, and even if he had he cannot show actual prejudice.

Effective assistance claim (4) lacks merit because Tawalbeh has not shown actual prejudice, and the investigator’s conflict of interest is not presumptively prejudicial. *See Mickens v. Taylor*, 240 F.3d 348, 363 (4th Cir. 2001). Effective assistance claim (5) lacks merit because Tawalbeh’s prior plea agreement excepted crimes of violence from its coverage, and Tawalbeh’s crimes were crimes of violence. He has not, and cannot, meet either part of the *Strickland v. Washington* test.

Effective assistance claim (6) lacks merit because Tawalbeh never requested his counsel to explore the possibility of a plea agreement, and there is no evidence that the government would have made an agreement with him. He has not, and cannot, meet either part of the *Strickland v. Washington* test.

In effective assistance of counsel claim (7) Tawalbeh complains that his counsel failed to subject to meaningful cross-examination three government witnesses--Richard Chisom, Donna Abed, and Michael Witt. The court finds no hint of incompetency in counsel's handling of the three witnesses.

Richard Chisom was an important witness against Tawalbeh. Yet, Chisom could not identify him. Moreover, other counsel thoroughly cross-examined Chisom. Under the circumstances a strong effective assistance claim could have been made *had* Tawalbeh's counsel cross-examined Chisom.

Donna Abed never identified Tawalbeh either, and other counsel thoroughly cross-examined her. Nothing suggests that Tawalbeh's counsel was ineffective in not cross-examining her.

Other counsel took the lead in cross-examining Michael Witt, effectively revealing matters affecting his credibility. Tawalbeh's counsel cross-examined Witt about Tawalbeh's drug distribution charges. He did not specifically examine Witt about The Corner Store fire. Once again, however, nothing suggests that Tawalbeh's counsel was ineffective in not specifically examining Witt about the fire. In fact, it is just as likely that further questioning would have done more harm than good.

It follows that effective assistance of counsel claim (7) fails to meet either part of the

Strickland v. Washington test.

In effective assistance of counsel claim (8) Tawalbeh maintains that his counsel failed to adequately present a defense. The government contended at trial that Tawalbeh had the Corner Store burned because it was hurting his business at the Speedway Market. According to Tawalbeh, The Corner Store was not in competition with the Speedway Market because the Corner Store was not as large, did not sell many of the same items, and had no available parking. Therefore, Tawalbeh argues that he had no motive to burn The Corner Store, and his counsel was ineffective for not presenting evidence to dispel the prosecution's argument to the contrary.

Once again, the court concludes that Tawalbeh has failed meet either part of the *Strickland v. Washington* test. He has failed to overcome 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*, 460 U.S. at 690. In light of the fact that key witnesses for the government failed to identify Tawalbeh and the witness who identified him had eight prior felonies, there is much to be said for a strategy that minimized testimony and argument about Tawalbeh. Tawalbeh also has failed to demonstrate prejudice. Therefore, the court rejects the claim.

Effective assistance of counsel claim (9) is the only claim that might have merit. According to Tawalbeh's § 2255 motion, which was under oath, counsel deprived Tawalbeh of his right to testify when he threatened to withdraw if he testified. Tawalbeh states that he had no involvement in the burning of The Corner Store and he wanted to testify but because of counsel's threat, he did not. The government has not submitted any evidence to the contrary, and the court concludes that an evidentiary hearing is necessary.

The right to testify in one's own defense is a fundamental right, as is the right to counsel. Tawalbeh could not be forced to choose between the two rights, unless of course he intended to commit perjury and his counsel knew it. Although, tactically and strategically, counsel might have had good reason to recommend that Tawalbeh not testify he could not preclude him from testifying. Since Tawalbeh has raised the claim properly and the government has not submitted any countervailing evidence or place the allegations in context, the court is required to conduct a hearing. At that hearing, Tawalbeh will bear the burden of proving (1) that counsel *improperly* forced him to choose between his right to testify and his right to counsel, and (2) that it is "reasonably probable that [his] testimony would have changed the outcome of the trial in his favor." See *United States v. Tavares*, 100 F.3d 995, 998 (D.C. Cir. 1996).

Effective assistance of counsel claim (10) lacks merit because the court sentenced Tawalbeh to the minimum sentence possible under the sentencing guidelines given Tawalbeh's convictions. Tawalbeh seems to contend that the court would not have imposed the consecutive 360 months sentence under Count 11 for the § 924(c) conviction had his counsel made better arguments. The consecutive 360 month sentence for aiding and abetting the use of a Molotov Cocktail to burn The Corner Store, however, was a consequence of the jury's not the court's findings. Unless the court had found insufficient evidence to support the conviction, it was required to impose the mandatory minimum of 30 years–360 months. It follows that Tawalbeh has failed to show prejudice and is not entitled to relief on this claim.

Effective assistance of counsel claim (11), that counsel should have raised and preserved for appeal the many issues he raises in this § 2255 proceeding, lacks merit because Tawalbeh has failed to demonstrate that counsel's choice of issues on appeal was anything other than a

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UNITED STATES OF AMERICA,)	<u>ORDER</u>
)	
Respondent.)	

In accordance with the Memorandum Opinion entered this day, it is hereby

ORDERED and **ADJUDGED** that:

- vi. the motion to dismiss Tawalbeh’s claim that his counsel prevented him from testifying is **DENIED**; the court will schedule an evidentiary hearing to resolve that claim and Tawalbeh will be permitted to participate in that hearing via video conferencing; and
- vii. the motion to dismiss Tawalbeh’s remaining claims is **GRANTED**.

ENTER: This October 19, 2001.

CHIEF UNITED STATES DISTRICT JUDGE