

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEROME LEFTWICH, : CIVIL NO. 00-4703  
 : CRIMINAL NO. 98-649-02  
Petitioner, :  
 :  
v. :  
 :  
UNITED STATES OF AMERICA, :  
 :  
Respondent. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

NOVEMBER , 2000

I. INTRODUCTION

Petitioner Jerome Leftwich ("petitioner") was indicted for crimes stemming from his involvement in the sale and receipt of stolen automobiles. Pursuant to a plea agreement that petitioner entered into with the government, he pleaded guilty to one count of conspiracy to sell or receive stolen motor vehicles in violation of 28 U.S.C. §§ 371, 2313, and eleven counts of aiding and abetting the sale or receipt of stolen motor vehicles in violation of 28 U.S.C. § 2313. Petitioner was sentenced to sixty-six months imprisonment.

Petitioner has filed a motion under 28 U.S.C. § 2255 seeking to vacate, set aside or correct his sentence on the grounds that his attorney rendered ineffective assistance at sentencing. Petitioner's claim is based on three separate

allegations. First, petitioner alleges that his attorney rendered ineffective assistance by failing to explain the effect that the length of petitioner's involvement in the aforementioned conspiracy would have on petitioner's sentence under the United States Sentencing Guidelines. Second, petitioner alleges that his attorney rendered ineffective assistance by failing to object to a number of alleged errors in petitioner's Presentence Investigation Report. Third, petitioner alleges that his attorney at sentencing was ineffective by virtue of his failure to raise a combination of factors that may have warranted a departure from the sentence that petitioner would receive under the Guidelines.

Based on the discussion that follows, the court concludes that 1) petitioner's claims regarding his date of entry into the conspiracy fail to demonstrate deficient performance on the part of counsel and 2) petitioner's remaining claims fail to establish that counsel's alleged errors resulted in prejudice to the petitioner.

## II. BACKGROUND

In 1997, petitioner was charged with a number of criminal offenses arising out of his involvement in an automobile theft ring. After numerous meetings with government agents, petitioner entered into a plea bargain with the government.

Under the relevant terms of the plea agreement, petitioner agreed to cooperate in the identification and prosecution of other individuals with whom he had conspired in the instant offense and to plead guilty to an indictment charging him with one count of conspiracy to sell or receive stolen motor vehicles in violation of 28 U.S.C. §§ 371, 2313 ("stolen vehicle conspiracy"), and eleven counts of aiding and abetting the sale or receipt of stolen motor vehicles in violation of 28 U.S.C. § 2313. The plea agreement specifically stated that petitioner's involvement in the stolen vehicle conspiracy began in 1985 and lasted until August of 1996. In return, the government agreed to file a motion for downward departure from petitioner's sentence under the United States Sentencing Guidelines, pursuant to section 5K1.1 of the Guidelines.

On September 3, 1998, pursuant to the plea agreement, petitioner testified before a federal grand jury. During his testimony, petitioner made numerous statements implicating himself and others in the conspiracy for which he had been criminally charged. Petitioner also testified that his involvement in the stolen vehicle conspiracy began during the early eighties. Following his testimony before the grand jury, petitioner was indicted. The indictment charged that petitioner's involvement in the automobile theft conspiracy began in 1985.

In October of 1998, petitioner's original court appointed attorney was allowed to withdraw. One month later, in November of 1998, the court appointed Mr. Martin Isenberg, Esq. as defense counsel.

On February 3, 1999, pursuant to the plea agreement, petitioner plead guilty to one count of conspiracy and eleven counts of aiding and abetting in connection with his involvement in the sale and receipt of stolen vehicles. During petitioner's guilty plea hearing, petitioner stated that he received a copy of the indictment, and that he and his attorney had an opportunity to discuss the charges contained therein. Additionally, petitioner stated that he read the plea agreement, discussed it with his attorney and signed it. Based upon petitioner's statements to the court, the court accepted petitioner's guilty plea.

In anticipation of petitioner's sentencing hearing, the court ordered the probation department to prepare a Presentence Investigation Report ("PSI Report"). The PSI report stated that petitioner became involved in the stolen vehicle conspiracy in 1985.

On September 21, 1999, petitioner was sentenced. At the sentencing hearing, and in the presence of petitioner, counsel stated to the court that he and petitioner had reviewed the PSI Report. Counsel noted a number of objections to the

information contained therein, but at no time objected to the time frame of petitioner's involvement in the conspiracy. After considering the information contained in the PSI report under the United States Sentencing Guidelines, as well as the testimony of a number of individuals who testified on behalf of petitioner, the government's section 5K1.1 motion, the arguments of counsel, and testimony from the petitioner himself, and ruling on all of petitioner's objections, the court sentenced petitioner to 66 months imprisonment.<sup>1</sup>

Petitioner has now filed a motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255 on the grounds that his plea was involuntary and his counsel was ineffective.<sup>2</sup> The court appointed counsel and heard argument on the petition.

Petitioner contends, first, that his attorney rendered ineffective assistance by failing to bring various alleged errors contained in the PSI Report to the attention of the sentencing

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<sup>1</sup> The PSI Report attributed to petitioner a total offense level of 24, and a total of 30 criminal history points, which placed petitioner in Criminal History Category VI. Under the Guidelines, a total offense level of 24 combined with a Criminal History Category of VI calls for a sentence of 100-125 months imprisonment. The sentencing court, however, upon consideration of a number of factors, including the government's 5K1.1 motion, granted a substantial departure from the sentenced called for under the Guidelines.

<sup>2</sup> Petitioner originally alleged that he did not knowingly and voluntarily plead guilty, because he had received promises from the government that were not contained in the plea agreement and not disclosed to the sentencing court. Petitioner has since withdrawn all claims regarding these alleged promises.

court. The most significant of these alleged errors concerns the date on which the petitioner joined the stolen vehicle conspiracy to which he pleaded guilty. Petitioner alleges that despite the statements in the indictment, plea agreement, PSI Report and during his grand jury testimony, petitioner did not become involved in the stolen vehicle conspiracy until 1992. Petitioner claims that he failed to object to the date of entry into the conspiracy in all of these occasions, as well as in his grand jury testimony, because he was unaware that the date on which he joined the conspiracy would affect the calculation of his Criminal History Category and, in turn, the length of his sentence under the Guidelines.<sup>3</sup>

Accordingly, petitioner contends that his attorney acted unreasonably under prevailing professional norms by 1) failing to explain to petitioner the interrelatedness of petitioner's date of entry into the conspiracy and the length of

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<sup>3</sup> Under the United States Sentencing Guidelines, only previous offenses that occurred within a certain period prior to the offense for which an individual is being sentenced, can be included in the calculation of that individual's Criminal History Category. See U.S. SENTENCING GUIDELINES MANUEL § 4A1.2(e) (1998) (hereinafter Guidelines). Additionally, an individual's Criminal History Category effects the sentence that individual will receive for a particular offense. See Guidelines Ch. 5, Pt. A, Sentencing Table.

Thus, the earlier petitioner's involvement in the conspiracy began, the more of his prior offenses may be used in the calculation of his Criminal History Category; the higher his Criminal History Category, the greater the sentence he will receive for the offenses at issue.

his sentence under the Guidelines and 2) failing to object to the inclusion of certain prior offenses in the calculation of petitioner's Criminal History Category as being time-barred under the Guidelines.<sup>4</sup>

Second, petitioner makes a number of unrelated allegations concerning other alleged errors in the PSI Report and contends that his attorney rendered ineffective assistance by failing to object to these errors. For the purposes of this opinion, the precise nature of these errors is irrelevant.

Finally, petitioner alleges that his attorney at sentencing was ineffective by virtue of his failure to make the court aware of factors that may have warranted a departure from the sentence that petitioner would receive under the guidelines.

### III. DISCUSSION

#### A. Applicable Law.

When considering a petition for post conviction relief under 28 U.S.C. § 2255, "the question of whether to order a hearing is committed to the sound discretion of the district court." United States v. Day, 969 F.2d 39, 41 (3d Cir 1992). In exercising this discretion, "the court must accept the truth of the movant's factual allegations, unless they are clearly frivolous on the basis of the existing record." Day, 969 F.2d at

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<sup>4</sup> See supra note 3.

41-42 (citing Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989)) (emphasis added). The court's discretion is further limited by section 2255, itself, which states that:

[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C. § 2255. Thus, an evidentiary hearing must be ordered, "unless the motion and files and records of the case show conclusively that the movant is not entitled to relief." Day, 969 F.2d at 42 (emphasis added). In sum, when a petition for section 2255 relief is filed, courts are required to order an evidentiary hearing, unless the court concludes, in its discretion, that, even if all of the petitioner's non-frivolous factual assertions are true, he is not entitled to relief. See id.

When a petitioner seeks section 2255 relief on the grounds of ineffective assistance of counsel, he must show unprofessional conduct on the part of his attorney that caused petitioner to suffer prejudice. Day, 969 F.2d at 42 (3d Cir. 1992) (explaining that a criminal defendant has a Sixth Amendment right not just to counsel, but to "reasonably effective assistance" of counsel and citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). Specifically, in order to obtain section

2255 relief via an ineffective assistance claim, the claimant must show, by a preponderance of the evidence, that 1) "his or her attorney's performance was, under all the circumstances, unreasonable under prevailing professional norms," Day 969 F.2d at 42 (citing Strickland, 466 U.S. at 687-91), and 2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Strickland, 466 U.S. at 694; see also Virgin Islands v. Nicholas, 759 F.2d 1073, 1081 (3d Cir. 1985) (the burden of proving ineffective assistance of counsel is on the petitioner). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Additionally, the Strickland prongs are conjunctive. See Strickland, 466 U.S. at 697; United States v. Nino, 878 F.2d 101, 104 (3d Cir. 1989). Thus, for the petitioner to prevail, both of these prongs must be satisfied. Strickland, 466 U.S. at 697; Nino, 878 F.2d at 104.

To satisfy the first prong of Strickland, the petitioner must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690. In examining this prong, courts must recognize the strong presumption that counsel has rendered adequate assistance and that all significant decisions were made in the exercise of reasonable professional judgment. Id. at 689. Moreover, the

evaluation of the objective reasonableness of counsel's performance must be made "from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential." Kimmelman v. Morrison, 477 U.S. 365, 381 (1986). Stated differently, "[t]he standard by which we judge deficient performance is an objective standard of reasonableness, viewed to the extent possible from the attorney's perspective at the time, without 'the distorting effects of hindsight.'" Stevens v. Delaware Correctional Ctr., 295 F.3d 361, 370 (3d Cir. 2002) (quoting Duncan v. Morton, 256 F.3d 189, 200 (3d Cir. 2001)(quoting Strickland, 466 U.S. at 688-90)).

The second prong of Strickland requires that petitioner show that he suffered prejudice as a result of counsel's deficient performance. See Strickland, 466 U.S. at 694. Thus, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691.

In sum, "[i]f a nonfrivolous claim clearly fails to demonstrate either deficiency of counsel's performance or prejudice to the defendant, then the claim does not merit a hearing," but, if a claim, accepted as true and evaluated in light of the record, states a claim of ineffective assistance, "then further factual development in the form of a hearing is

required." United States v. Dawson, 857 F.2d 923, 928 (3d Cir. 1988).

B. Counsel's Failure to Inform Petitioner that the Length of His Involvement in the Conspiracy Would Affect the Length of his Sentence did not Render Counsel's Assistance Ineffective.

It is well settled that the "test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1989). In light of the fact that the voluntariness of a criminal defendant's plea depends on the effectiveness of counsel, the Supreme Court has held that the Strickland two-part test also applies to ineffective assistance claims arising out of the plea process. See id. at 57. Although it is clear that "familiarity with the structure and basic content of the Guidelines . . . has become a necessity for counsel who seek to give effective representation" during the plea process, Day, 969 F.2d at 43, the Sixth Amendment does not require that counsel "give each defendant anything approaching a detailed exegesis of the myriad [of] arguably relevant nuances of the Guidelines." Id. (citing Hill, 474 U.S. at 56-57 and Von Moltke v. Gillies, 332 U.S. 708, 721 (1948)).

In the matter presently before the court, petitioner contends that the assistance rendered by his attorney was ineffective because his attorney failed to inform him that the

length of his involvement in the stolen vehicle conspiracy would determine whether certain prior convictions would be included in the calculation of his Criminal History Category and, in turn, affect the length of his sentence. The petitioner's contention has no merit. Even assuming the truth of petitioner's factual allegations, and viewing those facts in the light most favorable to him, petitioner has clearly failed to demonstrate deficient or unreasonable performance on the part of his attorney.

At the time Mr. Isenberg was appointed as defense counsel for the petitioner, the procedural posture of the case was significantly developed,<sup>5</sup> in that: 1) petitioner had already met with the government on a number of occasions and signed a plea agreement stating that petitioner's involvement in the conspiracy began in 1985; and 2) petitioner had already testified before a grand jury that his involvement in the conspiracy began in the early eighties.

In his testimony before the grand jury, petitioner made a plethora of statements explicitly indicating when his involvement in the conspiracy began.<sup>6</sup> Specifically, when asked

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<sup>5</sup> As stated above, petitioner's previous attorney had withdrawn as counsel.

<sup>6</sup> See Transcript of the Testimony of Jerome Leftwich before the Federal Grand Jury for the United States District Court for the E.D. Pa. (September 3, 1998) (hereinafter GJ).

"how" and "[u]nder what circumstances"<sup>7</sup> petitioner met John McCollum, one of petitioner's coconspirators, petitioner responded that he met McCollum "back in the early [eighties] when [petitioner] was a used car salesman" and that he was introduced to McCollum for the purpose of becoming involved in the stolen vehicle conspiracy. GJ, pp. 4-5. Petitioner also indicated that he did, in fact, become involved in the conspiracy at that time. Id. Petitioner was then asked to identify the period in which he was employed at Raj Motors,<sup>8</sup> to which he responded, "It had to be around '82, '83, '81 - between '82 and '84." Id. at 11. "So," the Assistant United States Attorney ("AUSA") continued, "that's when you began doing this, about sixteen years ago?" Id. at 11-12. Petitioner responded, "That's correct." Id.

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<sup>7</sup> The court emphasizes the questions presented to petitioner during his testimony before the Grand Jury because in neither instance does the call of the question invite a response that indicates when the conspiracy began, and to point out that petitioner, by his own accord, gratuitously indicated that the conspiracy began in the early eighties.

Petitioner alleges that he made these statement because he did not want to jeopardize his plea agreement, and that because he was not informed that the implications of these statements would affect his sentence, he did not see a need to correct them. Petitioner's motive in making and failing to object to these statements, however, is irrelevant to the issue before the court, whether counsel was or should have been aware of any discrepancy in petitioner's date of entry into the conspiracy.

<sup>8</sup> Petitioner had previously indicated that he was working at Raj Motors when he became involved in the stolen vehicle conspiracy. GJ, p.5.

The Petitioner was then asked where he was employed after he left Raj Motors in "'83 or '84." Id. at 12. Without reference or objection to the time frame posed in the question, petitioner answered that he was employed at Foyt, another car dealership in Jenkintown, Pennsylvania. See id. And when asked where he worked after leaving Foyt in "'85 or '86," petitioner again answered the question without protest, also indicating that he remained involved in the stolen vehicle conspiracy at that time. See id. at 15.

Finally, while answering an unrelated question, petitioner again confirmed that his involvement in the conspiracy "started out" in "the early [eighties],"<sup>9</sup> Id. at 21, and that it continued through his return to Foyt in "[a]bout '88 [or] '89." Id. at 22.

It was not until after petitioner had already given this testimony to the grand jury that Mr. Isenberg was appointed to represent him. Accordingly, it is at this point where the court's analysis of the reasonableness of counsel's representation begins. Thus, the precise issue before the court is whether a reasonable attorney, after reviewing the petitioner's testimony before the grand jury, as well as the terms of the plea agreement signed by petitioner, and in light of

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<sup>9</sup> Once again, petitioner's references to the chronology of events and the dates he assigns thereto are unsolicited by the AUSA. GJ, p. 21; see supra note 7.

the indictment, would have, in the exercise of "reasonable professional judgment," Strickland, 466 U.S. at 690, either 1) informed the petitioner that, under the Guidelines, the length of his sentence would be reduced if petitioner's involvement in the conspiracy did not begin until a later date, or 2) conducted an independent factual investigation to determine at what point petitioner's involvement in the conspiracy began, despite petitioner's statements to the grand jury indicating that he became involved in the early eighties.<sup>10</sup> Under the facts presented to the court, both questions must be answered in the negative.

In light of petitioner's own admissions during his grand jury testimony, the plain language of the plea agreement signed by petitioner and the charges made in the indictment, the facts of the case, as would be perceived by a reasonable and competent attorney, clearly show that Mr. Isenberg had no reason to believe or suspect that his client's involvement in the conspiracy began any later than 1985.<sup>11</sup> Petitioner does not

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<sup>10</sup> Assuming, as alleged by the petitioner, that his involvement in the conspiracy at issue did not begin until 1992, and that a reasonable attorney would have conducted an independent investigation to determine when petitioner's involvement in the conspiracy began, it is clear that failure by counsel to address the effect of these facts under the purview of the Guidelines, would constitute deficient and unreasonable performance.

<sup>11</sup> In fact, the statements made during petitioner's Grand Jury testimony more likely lead to the conclusion that

assert that he told Mr. Isenberg anything to the contrary. Accordingly, the court finds that in light of all circumstances present "from counsel's perspective," Kimmelman, 477 U.S. at 381, at the time of his allegedly deficient performance, Mr. Isenberg exercised "reasonable professional judgment," Strickland, 466 U.S. at 690, when he did not explain the interrelatedness of petitioner's involvement in the conspiracy and the length of petitioner's sentence under the Guidelines.<sup>12</sup>

The law does not require counsel to cross examine his own client to determine whether the testimony the client has provided in previous proceedings is, indeed, true. Additionally, there is no duty to explain provisions of the Guidelines which, under the facts stated by the client, are irrelevant to the outcome of the sentence. Since, in this case, it was petitioner's own testimony that apprised counsel of the fact that petitioner's involvement in the automobile theft conspiracy began in 1985, counsel had no duty to explain to petitioner how his sentence would be affected under the Guidelines if, hypothetically, his involvement in the conspiracy had begun in 1992 or, for that matter, in any other year. As the Third

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petitioner's involvement in the conspiracy began well before 1985.

<sup>12</sup> Counsel's perception of the circumstances was further buttressed by petitioner's testimony at his guilty plea hearing. See supra, discussion of petitioner's guilty plea hearing, at Part II.

Circuit has stated, counsel has to duty "give each defendant anything approaching a detailed exegesis of the myriad [of] arguably relevant nuances of the Guidelines." Day, 969 F.2d at 43 (citing Hill, 474 U.S. at 56-57 and Von Moltke v. Gillies, 332 U.S. 708, 721 (1948)).

The petitioner puts forth limited evidence to contradict his previous testimony that the he became involved in the conspiracy in the early eighties. The evidence presented such as it is, however, is irrelevant. The issue presently before the court is not whether petitioner's involvement in the conspiracy began in 1985 or 1992.<sup>13</sup> The issue, instead, is whether petitioner has presented any evidence that would tend to prove that counsel either knew, or should have known that petitioner did not enter the conspiracy until 1992, and failed to advise him accordingly.<sup>14</sup>

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<sup>13</sup> As stated above, Day requires that the court accept the truth of petitioner's factual assertions, unless they are clearly frivolous on the basis of the existing record. Day, 969 F.2d at 41-42. For the purposes of this proceeding the assertion the court must accept as true is not that the petitioner joined the conspiracy in 1992, and not 1985 as charged in the indictment, but that counsel failed to advise petitioner of the implication, under the Guidelines, of the date on which the petitioner joined the conspiracy.

<sup>14</sup> Had petitioner alleged that he specifically informed his attorney, or even insinuated to his attorney, that he did not enter the conspiracy until 1992, then petitioner would at least have somewhat of an argument that his counsel's performance was deficient and professionally unreasonable. See Hill, 474 U.S. at 63 ("because petitioner failed to allege that his attorney knew about his prior conviction . . . petitioner did not allege

The facts before the court are analogous to the precise circumstances discussed by the Supreme Court in Strickland, where counsel has made a tactical decision to forego a certain course of action based upon representations made by his client. See Strickland, 466 U.S. at 691. Moreover, the court's finding is consistent with the edict of the Supreme Court regarding the substantial deference that is to be given to professional decisions made by counsel during the course of representation, Kimmelman, 477 U.S. at 381, as well as the "fundamental interest in the finality of guilty pleas." Hill, 474 U.S. at 58.

Accordingly, the court holds that petitioner's claim, to the extent that it is based upon any alleged error by counsel regarding the length of plaintiff's involvement in the stolen vehicle conspiracy, fails to demonstrate a fatal deficiency in counsel's performance.

C. Counsel's Failure to Challenge Certain Alleged Errors in the Presentence Investigation Report did not Render Counsel's Assistance Ineffective.

1. Counsel's failure to object to the inclusion of certain offenses in the calculation of petitioner's

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sufficient facts to entitle him to an evidentiary hearing on his ineffective-assistance-of-counsel claim.")

The only statement allegedly made to counsel that contradicted the facts as put forth in the plea agreement, Indictment and Pre-sentence Investigation Report, was when petitioner allegedly told counsel that he was unsure as to the actual number of vehicles for which he had provided false documents. This alleged statement is irrelevant to the issue before the court.

criminal history category, because inclusion of those offenses were allegedly time-barred under the Guidelines, did not render counsel's assistance ineffective.

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The petitioner alleges that counsel rendered ineffective assistance by failing to object to the inclusion of certain offenses in the calculation of petitioner's Criminal History Category under the Guidelines. Petitioner alleges that these offenses should have been excluded from the calculation because they occurred beyond the period from which the Guidelines permit prior offenses to be considered in assessing a defendant's Criminal History Category.<sup>15</sup> See Guidelines § 4A1.2(e) (1998). Petitioner's argument here would have merit if, and only if, petitioner could establish that counsel knew or should have known that petitioner did not enter the conspiracy until 1992.<sup>16</sup>

The court's analysis in Part III.B. regarding counsel's alleged failure to inform the petitioner that his date of entry into the conspiracy would affect the length of his sentence is equally applicable here. Likewise, the court concludes that counsel's performance was not deficient, nor did he exercise

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<sup>15</sup> See supra note 3.

<sup>16</sup> The parties agree that if petitioner's involvement in the conspiracy began on or before 1985, the relevant offenses could be included in the calculation of petitioner's Criminal History Category under the Guidelines. See Transcript of January 16, 2002 Hearing Before the Honorable Eduardo C. Robreno, United States District Judge at 13-14, Leftwich v. United States, 00-cv-4703 (E.D. Pa. 2002) (hereinafter Hearing Transcript).

unreasonable professional judgement by failing to object to the inclusion of these offenses when he neither knew, nor had reason to suspect, that petitioner's involvement in the conspiracy did not begin until 1992.

Accordingly, the court holds that petitioner's claim clearly fails to demonstrate deficient performance on the part of counsel for failing to object to the inclusion of the pertinent offenses in the calculation of petitioner's Criminal History Category.

2. Petitioner's remaining allegations concerning alleged errors in the PSI Report clearly fail to demonstrate ineffective assistance of counsel.

Petitioner makes a number of unrelated allegations concerning alleged errors in the PSI Report and contends that his attorney rendered ineffective assistance by failing to object to these errors. The pleadings are unclear as to the legal bases upon which petitioner rests each allegation, as well as the prejudice that was suffered by petitioner as a result of each individual alleged error. The court need not address these issues, however, because the record conclusively shows that the petitioner suffered no prejudice.

As stated above, under the second prong of Strickland, the petitioner must prove that there is a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different," or, in other words, that the errors of

counsel resulted in prejudice to the petitioner. Strickland, 466 U.S. at 694. Assuming, without deciding, that counsel's failure to object to these alleged errors in the PSI Report was a result of unreasonable professional judgment and deficient representation, petitioner's ineffective assistance claim fails nonetheless, because petitioner cannot establish the requisite prejudice.

Under the Guidelines, an individual with 13 or more criminal history points falls within Criminal History Category VI, the highest Criminal History Category in the Guidelines. See Guidelines Ch. 5, Pt. A, Sentencing Table. Petitioner's PSI Report attributes to petitioner a total of 30 criminal history points, placing petitioner well within the highest category. Petitioner agrees that if his allegations regarding the beginning of his involvement in the automobile theft conspiracy are dismissed by the court, the remaining alleged errors of counsel result in a discrepancy of no more than 9 criminal history points. See Hearing Transcript at 13-14. Thus, even assuming that counsel's performance was unreasonable under prevailing professional norms when he failed to object to all of the remaining alleged errors, petitioner's criminal history points would only be reduced from 30 to 21, in which case, petitioner remains well above the 13 point threshold of Criminal History Category VI. Accordingly, the court concludes that petitioner

has clearly failed to demonstrate that he suffered prejudice as a result of counsel's alleged errors.<sup>17</sup>

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<sup>17</sup> On January 16, 2002, during oral argument on petitioner's motion, counsel for the petitioner argued that perhaps the court would have sentenced petitioner differently if petitioner stood before the court with "21 points versus 30 points," "even though he would still have been a level VI." Hearing Transcript at 14. Counsel's argument has no merit. As stated above, petitioner must produce evidence to establish that there is a "reasonable probability," defined as "a probability sufficient to undermine confidence in the outcome," that, but for counsel's errors, "the result would have been different." Strickland, 466 U.S. at 694. Petitioner has failed to produce any such evidence.

The court has examined the transcript of petitioner's sentencing colloquy. See Transcript of September 21, 1999 Hearing Before the Honorable Eduardo C. Robreno, United States District Judge, United States v. Leftwich, 98-cr-649-2 (E.D. Pa.) (Hereinafter Sentencing Colloquy). An examination of the sentencing colloquy transcript reveals no evidence that would tend to show that the court considered the actual number of criminal history points attributed to petitioner under the Guidelines in assessing petitioner's sentence. During the sentencing colloquy, the court indicated that in deriving petitioner's sentence, the court relied on: 1) the total offense level as per the PSI Report, Sentencing Colloquy at 7; 2) petitioners Criminal History Category, Id.; 3) the Guidelines, Id.; 4) the government's motion for departure, pursuant to section 5k1.1, Id. at 7-11, 35; 5) petitioner's alcohol addiction, Id. at 26-27, 35; 6) petitioner's criminal involvement after he had stopped drinking, Id. at 25-26, 7) petitioner's redeeming value to society, Id. at 35; 8) petitioner's remorse, Id.; and 9) the severity of the offense at issue, Id. at 36.

Moreover, despite the request by the government that the court only grant a moderate departure, Id. at 9, the court granted a substantial departure from the sentencing range provided under the Guidelines, sentencing petitioner to 66 months in custody as opposed to 100-125 months as called for in the Guidelines. Id. at 37.

In light of these facts, and the lack of evidence to the contrary, the court concludes that petitioner's claims clearly fail to establish a reasonable probability that the court would have imposed a more lenient sentence if petitioner had come

C. Counsel's Alleged Failure to Request a Koon Departure did not Render Counsel's Assistance Ineffective.

Petitioner contends that the fact that a majority of his convictions were drunk driving convictions, or otherwise alcohol related, constitutes sufficient grounds for a Koon departure, and that his attorney at sentencing was ineffective because he failed to present this argument to the court. Petitioner's contention has no merit.

First of all, the transcript of the sentencing colloquy shows that counsel did, in fact, raise this issue before the sentencing court. See Sentencing Colloquy at 22-23. It can not be said that counsel's decision to raise this issue as an additional factor to be considered in the court's decision as to the extent of the downward departure, which the court had granted for substantial assistance, as opposed to in the form of a separate Koon motion, was a result of unreasonable professional judgment or deficient performance on the part of counsel.

Assuming, however, that counsel's performance was deficient, in terms of the first Strickland prong, petitioner's claim, once again, fails to establish that he suffered prejudice as a result thereof. See Strickland, 466 U.S. at 694.

The purpose for which petitioner contends that his

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before the court with 21, as opposed to 30, criminal history points.

attorney should have requested a departure under Koon at sentencing, is to ensure that the court took into account, when formulating petitioner's sentence, the fact that a majority of the convictions that made up petitioner's criminal history were for drunk driving or alcohol related, and that therefore, petitioner's Criminal History Category of VI overstates petitioner's actual criminality. Counsel, however, raised this precise issue at sentencing, see Sentencing Colloquy at 22-23, and the court explicitly indicated that it took these facts into consideration in determining the extent of the departure and in formulating a sentence. See id. at 24-27, 35.

Moreover, as stated in footnote 17, in light of the considerations raised by defense counsel, the court did, in fact, grant a substantial downward departure from the sentence provided under the Guidelines. Petitioner presents no evidence that could lead the court to believe that had counsel raised these issues in the form of a Koon argument, as opposed to the form in which they were addressed, the court would have granted an even more favorable departure. Thus, the court concludes that petitioner has failed to establish that he suffered prejudice as a result of this alleged error by counsel.

#### IV. CONCLUSION

For the reasons set forth above, petitioner's motion

for relief under 28 U.S.C. § 2255 is denied without an evidentiary hearing.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEROME LEFTWICH, : CIVIL NO. 00-4703  
 : CRIMINAL NO. 98-649-02  
 Petitioner, :  
 :  
 v. :  
 :  
 UNITED STATES OF AMERICA, :  
 :  
 Respondent. :

ORDER

**AND NOW**, on this \_\_\_\_ day of November, 2002, upon consideration of petitioner's amended motion for relief under 28 U.S.C. § 2255 (doc. no. 299), respondent's response to petitioner's motion (doc. no. 272), petitioner's rebuttal to respondent's response (doc. no. 283), respondent's supplemental response, and petitioner's reply to respondent's supplemental response (doc. no. 306), it is hereby **ORDERED** that petitioner's amended motion for relief under 28 U.S.C. § 2255 (doc. no. 299) is **DENIED**.

**AND IT IS SO ORDERED.**

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EDUARDO C. ROBRENO J