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

SHAWN DIXON, a/k/a WILLIAM DIXON, a/k/a SHIZ Petitioner,	:	CIVIL ACTION NO. 04-4315
v.	:	CRIMINAL ACTION NO. 01-570
UNITED STATES OF AMERICA, Respondent.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. November 1, 2005

Shawn Dixon has filed for habeas relief pursuant to 28 U.S.C. § 2255 collaterally attacking his sentence and asking this Court to vacate, set aside or correct his sentence (doc. no. 42). He presents four grounds for relief: (1) he received a two point enhancement for being on probation at the time of the underlying offense according to the PSI, but claims his probation had ended; (2) ineffective assistance of counsel because his lawyer did not object to the two point enhancement despite petitioner's advising him of the mistake in the PSI and for failing to object to the amount of cocaine base; (3) denial of his right to appeal because he had not fully paid his privately retained lawyer which he claims created a conflict of interest and effectively denied his right to appeal; and (4) violation of the plea agreement by the prosecutor, which appears to be an Apprendi v. New Jersey/Blakely v. Washington (now Booker) argument that his sentence was

enhanced by factors obtained during the sentencing hearing that were not pleaded to by defendant and were not found by a jury. For the following reasons, petitioner's motion is denied.

I. BACKGROUND

Dixon pleaded guilty to one count of conspiracy to distribute in excess of 50 grams of cocaine base ("crack") in violation of 21 U.S.C. § 846. He was sentenced by this Court to 115 months imprisonment, a $1000 fine, a $100 special assessment and 5 years supervised release. This Court granted both the government's 18 U.S.C. § 3553(e) motion and § 5k1.1 motion for a downward departure. Dixon's sentence fell below both the 10 year statutory mandatory minimum and the 262-327 month guideline range.

His sentence was affirmed by the Third Circuit on appeal. His counsel filed an Anders brief that there were no non-frivolous issues for appeal and the Third Circuit agreed.

II. ANALYSIS

Section 2255 allows a prisoner in custody to attack his sentence if it was imposed in violation of the Constitution or statute, the court lacked jurisdiction to impose it, it exceeds the maximum allowed by law, or it is otherwise subject to

collateral attack.[1] See 28 U.S.C. § 2255. The petitioner is entitled to an evidentiary haring as to the merits of his claim unless it is clear from the record that the prisoner is not entitled to relief. See United States v. Victor, 878 F.2d 101, 103 (3d Cir. 1989). Here, Dixon is not entitled to an evidentiary hearing because it is clear from the record that his sentence should not be set aside, vacated or corrected under § 2255.

A. Two-Level Enhancement at Sentencing Obtained from Incorrect Information in the PSI.

Dixon was awarded two criminal history points under the Sentencing Guidelines because he committed the underlying offense while on supervised release. Dixon argues that his supervised release period was from May 4, 1997 to May 17, 2001 and that the instant offense was committed on August 27, 2001. The government asserts that the offense occurred from July 2000 to August 22, 2001 and that Dixon agreed to those dates at the plea colloquy as part of the factual basis of the charge. Plea Hr'g Tr. at 19 (defendant agrees with the factual statement of the government). In addition, as described below, defense counsel made an

[1]Section 2255 also has a one-year statute of limitations that requires the petition to be filed within one-year of the date on which defendant's conviction became final. See 28 U.S.C. § 2255. Dixon's petition was timely filed on September 14, 2004 as his conviction became final on June 20, 2004, 90 days after the Third Circuit affirmed his conviction upon expiration of the time to file a writ of certiorari to the United States Supreme Court.

extensive argument about issues with the PSI, namely that defendant's juvenile history should not be used to enhance his sentence. This issue cannot be the basis for relief under § 2255 because Dixon agreed to the dates that the offense spanned in the plea colloquy.

B. Ineffective Assistance of Counsel.

Dixon claims that his counsel was ineffective for failing to object to the error in the PSI that listed the underlying offense as having been committed while on probation. This is an extension of the argument addressed in section (A) above. In his response to the government's brief, Dixon also argues that counsel was ineffective for failing to object to the indictment listing the amount of cocaine base as being in excess of 50 grams. Dixon claims he only had 14.4 grams of cocaine base that was relevant to his guilty plea.

To succeed on an ineffective assistance of counsel claim, Dixon must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's mistakes, the result of the proceeding at issue would have been different. See Victor, 878 F.2d at 103 (citing Strickland v. Washington, 466 U.S. 668, 687-96 (1984)). In guilty plea cases specifically, the second prong of Strickland "requires that the petitioner show a reasonable probability that, but for counsel's errors, he would

not have pleaded guilty and would have insisted on going to trial." See Powell v. United States, No. 03-3754, 2004 U.S. Dist. LEXIS 12964, at *5-6 (E.D. Pa. July 1, 2004) (Robreno, J.) (citing Parry v. Rosemeyer, 64 F.3d 110, 118 (3d Cir. 1995)).

The records of the plea colloquy and of sentencing are replete with references to an amount of cocaine base in excess of 50 grams, including discussions of Dixon's own confession that confirmed his leadership role on the drug conspiracy. See, e.g., Plea Hr'g Tr. at 16 (listing elements of offense); Sentencing Hr'g Tr. at 21 (referring to Dixon's Mirandized confession confirming him as a leader of the conspiracy). The notes of testimony show that Dixon paid close attention during his plea. Dixon even corrected the charges against him during the plea colloquy to omit the portion relating to selling cocaine base within 1000 feet of a housing project, but did not dispute the amount of cocaine base charged. See Plea Hr'g Tr. at 8 (stating that he understood that "[e]verything except for the housing authority part" was part of the charges against him). Moreover, Dixon's counsel vehemently argued to reduce his criminal history category and to depart below the guideline range and the mandatory minimum at sentencing. See Sentencing Hr'g Tr. at 2-12. Counsel proved effective, for defendant was sentenced below both the guideline range and the mandatory minimum. Although this discussion goes to the reasonableness of counsel's actions,

that reasonableness need not be addressed at length because Dixon has failed to make a showing of prejudice under the second prong of Strickland. There is no assertion that Dixon would not have pleaded guilty had he known that he would receive two criminal history points for committing this violation while on supervised release. Moreover, Dixon admitted in the plea colloquy that the events contributing to the conspiracy occurred over a substantial period of time, part of which included his supervised release. See Plea Hr'g Tr. at 4-5 (summarizing charges). The Court also addressed other criminal history issues with defense counsel and the government at sentencing, with a rather lengthy discussion of Dixon's prior confinement as a juvenile. For these reasons, Dixon is not entitled to relief for ineffective assistance of counsel.

Finally, Dixon argues that he was never charged in the indictment with possessing more than 14.4 grams of cocaine base and that his counsel was ineffective for failing to object to the more than 50 grams to which defendant pleaded guilty. See Pet'r Reply Br. at 2. This argument is without merit, for the conspiracy charge--Count I of the indictment and the only charge to which defended pleaded guilty--clearly states that the conspiracy involved more than 50 grams of cocaine base. The 14.4 grams to which defendant refers is one of the overt acts done as part of the conspiracy and is the basis for Count II of the

indictment, possession of cocaine base, to which defendant did not plead guilty.

C. Denial of the Right to Appeal.

Dixon asserts that his right to an appeal was effectively denied because his retained counsel had a conflict of interest. That conflict, Dixon claims, arose because Dixon was unable to pay counsel's fee and counsel developed animosity toward Dixon, which prevented counsel from properly and effectively representing Dixon on appeal.

If there is an actual conflict between counsel and client, prejudice under the Strickland test is presumed. See Government of the Virgin Islands v. Zepp, 748 F.2d 125, 132 (3d Cir. 1984) (citing Cuyler v. Sullivan, 446 U.S. 335, 350, 348 (1980)). Following that presumption, the petitioner need only show that the actual conflict "adversely affected counsel's performance" to prove ineffective assistance of counsel. See id. at 134. The Third Circuit has adopted the following definition of an actual conflict: "if, during the course of representation, the defendant's interests diverge with respect to a material factual or legal issue or to a course of action." See id. at 136 (citing Sullivan v. Cuyler, 723 F.2d 1077 (3d Cir. 1983) (Sullivan II)). In Zepp, the actual conflict arose when the lawyer possibly could have been implicated in the same crime as his clients because the lawyer was in the house when the police

claim drugs were being flushed down the toilet following the execution of a search warrant. See id. There was further conflict at trial when the lawyer stipulated that he did not flush any toilets while in the house. The court noted that the lawyer's interests diverged from the clients' when the stipulation led to the inference that the defendant(s) must have flushed the toilet if the lawyer had not. See id. at 137. The court then granted habeas relief pursuant to § 2255, reversed the district court and remanded for the district court to a new trial. See id. at 139.

Here, Dixon has not made a showing of actual conflict beyond his own assumption that his counsel developed animosity from the unpaid legal fees that made counsel more inclined to "enrich his purse" rather than defend his client. See Pet'r Reply Br. at 4. Dixon's "bald assertions and assumptions are not sufficient to require a hearing on the merits." United States v. Martinson, No. 97-3030, 1998 U.S. Dist. LEXIS 2787, at *5 (E.D. Pa. Mar. 4, 1998). In Martinson, the petitioner claimed ineffective assistance of counsel based on a conflict of interest. Martinson claimed that an actual conflict arose because his retained counsel was prevented from advising petitioner that he might have received a more lenient sentence had he offered what he paid in legal fees in forfeiture. See id. at * 4. Moreover, petitioner alleged that an unspoken agreement

existed between the prosecutor and defense counsel that the government would not examine money allotted for legal fees if there was a guilty plea. See id. The court did not grant relief because petitioner offered no evidence of collusion or other conflict. Moreover, even if there was an actual conflict, petitioner would not have been able to show that it adversely affected the outcome of his case because the court operated from the premise that all forfeitable assets had been delivered to the government. See id. at 10.

Moreover, the cases Dixon cites is his reply brief are distinguishable. For example, Dixon cites United States v. Swartz, 975 F.2d 1042 (4th Cir. 1992), for the proposition that counsel cannot equate defendant's guilt with that of another. This argument stems from Dixon's claim that the government's factual basis for the plea was the testimony of another person knowledgeable of the conspiracy.[2] Dixon did not object to the factual basis of the plea. Swartz involved co-defendants who were represented by the same lawyer at their plea hearings. Swartz was asked to testify at the sentencing of her co-defendant. That was the actual conflict that warranted vacating Swartz's sentence. No such conflict exists here. Dixon also cites Homer v. Mathis, 937 F.3d 790 (2d Cir. 1991), where habeas

[2]It is important to note that Dixon did not list this as a ground for his § 2255 petition, but rather mentioned it in his reply brief.

relief was granted. There, the actual conflict arose when petitioner's appeal had been delayed for six years while he unsuccessfully attempted to work with counsel to make that appeal. The court found an actual conflict to have arisen when the lawyer would have exposed himself to liability and disciplinary action had he brought the appeal because of the extreme and inexcusable delay he caused. Again, no such conflict exists here upon which prejudice can be presumed, for Dixon appealed his sentence within six months. On appeal, counsel filed an Anders brief listing that there were no non-frivolous issues for appeal. There was no conflict of interest that effectively denied Dixon his right to appeal.

D. Application of Apprendi v. New Jersey.

Dixon argues that the prosecutor violated the plea agreement by using factors developed at sentencing to enhance his sentence. Violation of the plea agreement is a misnomer for this argument, as Dixon is apparently arguing that his sentence was enhanced by factors to which he did not plead and which were not found by a jury beyond a reasonable doubt. To that effect, he cites Apprendi in his initial § 2255 petition and Blakely in his response to the government's brief (with further reference to Booker and Fanfan, which were on appeal to the Supreme Court at that time). The government concludes that Apprendi does not apply because it is not retroactive.

The Third Circuit held in Lloyd v. United States, 407 F.3d 608 (3d Cir. 2005), that a § 2255 petition arguing that a sentence was imposed in violation of Blakely is governed by the Supreme Court's intervening decision in United States v. Booker, 125 S.Ct. 738 (2005), which concluded that Blakely applies to the Federal Sentencing Guidelines. As in Lloyd, therefore, Dixon's § 2255 petition to vacate, set aside or correct his sentence in light of Apprendi/Blakely is governed by the Third Circuit's Booker analysis. See Lloyd, 407 F.3d at 611.

Booker, the court held in Lloyd, is not retroactive according to the three prong test set forth by the Supreme Court in Teague v. Lane, 489 U.S. 288, 310 (1989). That inquiry includes (1) whether the conviction became final before the decision in Booker;[3] (2) whether the rule announced in Booker is

[3]The Third Circuit elaborated on this Blakely-Booker continuum in a footnote of the Lloyd opinion. See Lloyd, 407 F.3d at 611 n.1. The Court stated:

> We note in passing that some courts, when considering the issues now before us, refer to the "Blakely rule" and others refer to the "Booker rule." We believe it is appropriate to refer to the "Booker rule." It is the date on which Booker issued, rather than the date on which Blakely issued, that is the appropriate dividing line." Blakely, as the Court of Appeals for the Seventh Circuit pointed out, reserved decision about the status of the Federal Sentencing Guidelines, and Booker established a new rule for the federal system.

Id. (citations omitted). Because Blakely was issued on June 24, 2004, Dixon's conviction was still final as of the dates of both relevant opinions.

"new;" and (3) whether an exception for "watershed [rules] of criminal procedure" applies. See Lloyd, 407 F.3d at 611-612. First, Dixon's conviction became final before January 12, 2005, the date the Supreme Court issued Booker. Dixon did not petition the United States Supreme Court for writ of certiorari, so his conviction became final when the time to file that petition expired.[4] Therefore, Dixon's appeal became final June 20, 2004, 90 days after the Third Circuit affirmed his conviction. As for the second and third prongs of the Teague inquiry, the Third Circuit determined that the rule announced in Booker is "new" and "procedural," but not "watershed." Therefore, Booker--and by extension Blakely--"does not apply retroactively to initial motions under § 2255 where the judgment was final as of January 12, 2005." See id. at 615-16; see also United States v. Cherynak, No. 04-4243, 2005 U.S. Dist. LEXIS 16799, at *7 (E.D.

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[4]The Third Circuit held in Kapral v. United States, 165 F.3d 565, 577 (3d Cir. 1999), that:

> "judgment of conviction becomes final" within the meaning of § 2255 on the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires.

Supreme Court Rule 13 notes that time for filing a petition for writ of certiorari is within 90 days of entry of judgment. Therefore, 90 days from the date the Third Circuit entered its judgment, Dixon's conviction became final for § 2255 purposes.

Pa. Aug. 15, 2003) (following Lloyd to hold that "Defendant cannot claim that his plea was 'constitutionally invalid' based upon Blakely and Booker"). Dixon's argument that his sentence is in violation of Apprendi does not entitle him to relief under § 2255.

III. CONCLUSION

Dixon's § 2255 motion requesting this Court to vacate, set aside or correct his sentence should be denied. Dixon admitted to participating in the conspiracy during a span of dates that preceded the expiration of his supervised release. There was no ineffective assistance of counsel nor was there any conflict of interest. Finally, the Apprendi line of cases does not apply retroactively to Dixon's sentence.

An appropriate order follows.

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ORDER

AND NOW, this **1st** day of **November, 2005**, upon consideration of the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255, it is hereby **ORDERED** that the petition is **DENIED**.

IT IS FURTHER ORDERED that the case shall be marked **CLOSED**.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.