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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 06-377-1
	:	
CHARLES WHITE	:	

MEMORANDUM

SURRICK, J. **APRIL 21 , 2016**

Presently before the Court is Petitioner's pro se Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (ECF No. 587.) For the following reasons, Defendant's Motion will be denied.

I. BACKGROUND

On September 6, 2007, Petitioner was found guilty by a jury of conspiracy to commit bank fraud and identity theft, four counts of bank fraud, and 16 counts of aggravated identity theft. On September 9, 2008, Petitioner was sentenced to a total of 259 months in prison.[1] At the sentencing hearing, several enhancements were applied to Petitioner's offense level. These included a fourteen-level enhancement, pursuant to U.S.S.G. § 2B1.1(b)(1), for an offense involving a loss exceeding $400,000, a four-level enhancement, pursuant to U.S.S.G. § 2B1.1(b)(2), for an offense involving at least fifty victims, and a two-level enhancement, pursuant to U.S.S.G. § 2B1.1(b)(10), for an offense involving sophisticated means. (*See* ECF No. 317.) Petitioner filed an appeal. (*See* ECF No. 319.) The conviction was affirmed by the Third Circuit Court of Appeals, but the sentence was vacated. *United States v. Norman*, 465 F. App'x 110 (3d Cir. 2012). The Third Circuit remanded the case for resentencing in light of its

[1] The Total Offense Level was 31 and the Criminal History Category was VI, yielding Sentencing Guidelines of 188 to 235 months plus the aggravated identity theft convictions.

decision in *United States v. Kennedy*, 554 F.3d 415 (3d Cir. 2009). At the original sentencing, we determined that Petitioner's conduct involved 146 victims, including many account holders who were eventually reimbursed by the banks for their losses. After Petitioner's sentencing, the Third Circuit in *Kennedy* clarified the definition of the term "victims" in § 2B1.1(b)(2) of the Sentencing Guidelines when it held that account holders who suffer only temporary losses are not victims. *Norman*, 465 F. App'x at 121. The Third Circuit specifically left it to the discretion of the Court whether to permit the introduction of additional evidence at sentencing with regard to this enhancement. *Id.*

On November 2, 2012, before we held individual sentencing hearings, we held a joint hearing involving all Defendants to ascertain the number of victims involved for purposes of § 2B1.1(b)(2). (ECF No. 485.) At this hearing, two victims testified that they had unreimbursed expenses as a result of Petitioner's fraud on their bank accounts. (*See* Nov. 2, 2012 Hr'g Tr. (on file with Court).) In addition, Postal Inspector Thomas Ninan testified about interviews that he had with other victims who also incurred unreimbursed expenses. (*Id.*) In 2010, three years after trial, and approximately two years prior to the Third Circuit's decision in *Norman*, Inspector Ninan became the case agent for this matter. (*Id.* at 54.) In conjunction with Inspector Ninan's testimony, the Government introduced victim-impact statements from five individuals. (*See* Gov't's Exs. G-1-G-5 (on file with Court).) After the hearing, we determined that there were 12 victims of the offense—four banks and eight individuals. (*See* ECF No. 505.) We concluded that Defendants' offenses involved ten or more victims and that a two-level enhancement under § 2B1.1(b)(2)(A) was appropriate. (*See* ECF Nos. 505, 506.)

On February 22, 2013, Petitioner was resentenced to 192 months in prison.[2] To avoid an *ex post facto* violation, we used the version of the Guidelines in effect at the time of the offense, rather than that the Guidelines in effect on the day of sentencing. (*See* ECF No. 505 at 4-5.) Petitioner filed a timely notice of appeal. (ECF No. 546.) On June 2, 2014, the Third Circuit Court of Appeals affirmed the judgment of sentence. (ECF No. 576.) On June 29, 2014, Petitioner filed the instant Motion. (Pet'r's § 2255 Mem., ECF No. 587.)

II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 2255, a federal prisoner may move the sentencing court to vacate, set aside, or correct a sentence "upon the ground[s] that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Relief under this provision is generally available "to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1989).

While the Court may in its discretion hold an evidentiary hearing on a § 2255 petition, *Gov't of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989), such a hearing need not be held if the "motion and the files and records conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *see also United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992). "[V]ague and conclusory allegations contained in a § 2255 petition may be disposed of without

[2] This was based on a Total Offense Level of 29 and a Criminal History Category of VI, yielding a Sentencing Guidelines of 151 to 188 months plus the aggravated identity theft convictions under 18 U.S.C § 1028A. (ECF No. 533.)

further investigation by the District Court." *United States v. Thomas*, 221 F.3d 430, 437 (3d Cir. 2000) (citation omitted); *see also United States v. McCoy*, 410 F.3d 124, 134 (3d Cir. 2005) (reasoning that an evidentiary hearing is mandated only when a petition "alleges [] facts warranting relief under § 2255 that are not clearly resolved by the record").

III. DISCUSSION

Petitioner alleges that his trial counsel was ineffective for: (1) failing to challenge the Court's inclusion of criminal history points for his September 9, 2005 conviction in the Philadelphia Court of Common Pleas, (2) failing to challenge the Court's inclusion of one criminal history point for the recency of the offense after his release from a prior sentence under U.S.S.G. § 4A1.1(e), and (3) failing to inform the Court that the Government induced perjured testimony at the resentencing hearing. (Pet'r's § 2255 Mem. 4-13.) In addition, Petitioner alleges that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding impeachment evidence. (*Id.* at 13-17.)

A. Ineffective Assistance of Counsel

Ineffective assistance of counsel claims may be raised for the first time in § 2255 motions. *Massaro v. United States*, 538 U.S. 500, 509 (2003). To succeed on such a claim, a petitioner must demonstrate that an attorney's error was both professionally unreasonable and prejudicial to the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687-98 (1984). Although not insurmountable, this is a high bar. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* at 689; *see also Harrington v. Richter*, 562 U.S. 86, 105 (2011). The deference is particularly strong with respect to counsel's strategic choices. *Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1433-34 (3d Cir. 1996). Even if a petitioner establishes that an

attorney's error was professionally unreasonable, he must also demonstrate a reasonable probability that, but for that error, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694 (citation omitted).

1. Failure to Challenge Points for the 2005 Conviction

Petitioner first argues that he received ineffective assistance of counsel as a result of his attorney's failure to challenge the inclusion of criminal history points for his September 9, 2005 conviction. Petitioner contends that the crimes involved in the prior state conviction were part of the same course of conduct as those involved in the instant case. Under the two-part test of *Strickland*, Petitioner must demonstrate that his attorneys' performance was deficient and that he was prejudiced by the deficiency. 466 U.S. at 687. Petitioner cannot satisfy the first of these requirements.

> U.S.S.G. § 4A1.2. Subsection (a) defines 'prior sentences' for the purposes of determining which sentences should be included in a defendant's criminal history score: 'The term prior sentence means any sentence previously imposed upon adjudication of guilt . . . for conduct not part of the instant offense.' Application Note 1 to § 4A1.2 elaborates that '[a] sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense.'

United States v. Irvin, 369 F.3d 284, 289 (3d Cir. 2004). "A crime merely suggested by or arising out of the commission of a previous crime is not . . . related to the earlier crime in the special sense of being part of a common scheme or plan." *United States v. Hallman*, 23 F.3d 821, 826 (3d Cir. 1994) (alteration in original) (quoting *United States v. Ali*, 951 F.2d 827, 828 (7th Cir. 1992)).

There is no evidence to suggest that the crimes for which Petitioner was convicted in state court were part of or jointly planned with the crimes committed in the instant case.

Petitioner was arrested by state authorities in June 2004 for a theft and fraud scheme against Citizens Bank that took place in 2003. *See* Phila. Crim. Docket Sheet, *Commonwealth v. White*, Cp-51-CR-0907841-2004 (Ct. Com. Pl. 2004) (listing the date of offense for all charged crimes as March 31, 2003). Petitioner was adjudged guilty and was sentenced in the Philadelphia Court of Common Pleas on December 30, 2005. *See id.* The conduct in the instant case, per the Indictment, took place from February 2004 through at least November 2005. (Indictment, ECF No. 1.) Petitioner was initially sentenced for the instant offenses on September 9, 2008. There is no temporal overlap between the crimes committed in the state case and those involved in the instant case that would lead us to believe that the crimes were part of a common scheme or plan. *Compare* Phila. Crim. Docket Sheet *with* Indictment.

In addition, there is no evidence demonstrating that the Defendants charged in the instant case were related in any way to the defendants charged in the state case. Indeed, the codefendants joined in the state court matter do not share any names in common with those charged in the instant case. Moreover, Petitioner was charged with and adjudged guilty in the instant matter of conspiring in a scheme to defraud Commerce Bank, Wachovia Bank, M&T Bank, and PNC Bank of monies under their care and control. Citizens Bank was not listed as a victim in the instant case. The fraudulent acts in the state case occurred prior to the acts in the instant matter, involved different co-conspirators, and were against a different victim. It appears that the convictions in the state court were for wholly separate conduct and were not part of the instant offense.

Finally, although Petitioner's counsel did not object to the inclusion of the additional criminal history points for his September 9, 2005 conviction, counsel did bring to the Court's attention that the crimes were substantively similar to those at issue in the instant case and were

used to calculate Petitioner's criminal offense category. (*See* Feb. 22, 2013 Hr'g Tr. 7, ECF No. 539 ("My client comes before the Court criminal offense category number six. We're not challenging that. He got the six in part, Your Honor, because he was convicted on the very same charge that he came into federal court before the state court. It counted as a state court conviction . . . .").) It is clear that counsel was fully aware of the similarities between the charges for which Petitioner was adjudged guilty in the state court matter and the instant case. Obviously there was no basis upon which to argue that the offenses were inextricably linked. Petitioner was initially sentenced at the high end of the Guidelines range. (*See* Sept. 9, 2008 Hr'g Tr., ECF No. 373.) As a tactical decision at resentencing, counsel chose to highlight Petitioner's personal growth and acceptance of culpability. (Feb. 22, 2013 Hr'g Tr. 7-9.) Indeed, at the post-remand sentencing, the Court imposed a sentence that reflected "a reduction from the top of the guidelines" for what Petitioner had done to "rehabilitate" himself. (*Id.* at 19.) Petitioner's counsel was not deficient for failing to challenge the criminal history score. *See, e.g.*, *Strickland*, 466 U.S. at 690 ("A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."); *Woods v. Lamas*, 631 F. App'x 96, 100 (3d Cir. 2015) ("[A] defendant must overcome the presumption that 'under the circumstances, the challenged action might be considered sound trial strategy.'" (quoting *Strickland*, 466 U.S. at 689)).

2. Failure to Challenge the Recency Point

Petitioner next argues that because his counsel at the post-remand sentencing failed to challenge the inclusion of one criminal history point for the recency of his offense after his release from a prior sentence under U.S.S.G. § 4A1.1(3), he received ineffective assistance of

counsel. Petitioner alleges that this was an error because the version of the Guidelines in effect at the time of his resentencing no longer included that provision.

Section 1B1.11(a) provides that "[t]he court shall use the Guidelines Manual in effect on the date that the defendant is sentenced." U.S.S.G. § 1B1.11(a). However, "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." U.S.S.G. § 1B1.11(b)(1). Once the court determines the appropriate Guidelines Manual, "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual." U.S.S.G. § 1B1.11(b)(2). This is known as the "one book rule." *United States v. Atl. States Cast Iron Pipe Co.*, 627 F. Supp. 2d 180, 196 (D.N.J. 2009).

Article I, Section 9 of the United States Constitution provides that "[n]o Bill of Attainder or *ex post facto* Law shall be passed." *See* Art. I, § 9, cl. 3; see also Art I, § 10, cl. 1 (prohibiting states from enacting the same). This provision is violated when a new law is retroactive and applies to events occurring prior to its enactment, and it disadvantages the affected offender. *Miller v. Florida*, 482 U.S. 423, 430 (1987); *see also United States v. Corrado*, 53 F.3d 620, 622 (3d Cir. 1995) (holding that earlier Guidelines control when the retroactive application of the Guidelines in effect at sentencing would result in more severe penalties for a defendant).

Here, the relevant conduct occurred from approximately February 2004 through November 2005, and Defendants were originally sentenced in 2008 using the Guidelines in effect at that time. Since that time, the Guidelines were revised to amend the definition of

"victim." The Guidelines in effect at the time of Petitioner's resentencing provided that the definition of "victims" under Section 2B1.1(b)(2)(A) included individuals "whose means of identification [were] used unlawfully or without authority." U.S.S.G. § 2B1.1 cmt. n.4(E) (effective Nov. 1, 2009). "Victims" under the version of the Guidelines in effect at the time of the original sentencing were defined as those individuals who sustained an "actual loss" or anyone "who sustained bodily injury as a result of the offense." *See* U.S.S.G. Appx 726. With regard to the definition of the term "victims," clearly the Guidelines in effect at the time of the post-remand sentencing were potentially more severe from Petitioner's perspective than the Guidelines in existence at the time of the original sentencing: The Guidelines in effect at post-remand sentencing would have subjected Petitioner to a four-level enhancement for more than 50 victims under U.S.S.G. § 2B1.1(b)(2)(B). In accordance with *Kennedy*, the Court found that Petitioner would only be subject to a two-level enhancement under the pre-November 2009 Guidelines based upon more than 10 victims.

Petitioner is correct that the recency provision had been removed from the version of the Guidelines in existence at the time of his post-remand sentencing. However, Petitioner could not use selected portions of the current Guideline Manual while also receiving the benefits of the earlier Guidelines Manual. Under the "one book rule" and to avoid an ex post facto violation, the earlier Guideline Manual was applicable in its entirety to the February 22, 2013 resentencing.[3] There was no error, and Petitioner's counsel was not ineffective for failing to object to the recency enhancement under the pre-November 2009 Sentencing Guidelines.

[3] Under the version of the Guidelines in effect at the time sentencing, Petitioner would have had an adjusted offense level of 31 with a Criminal History Category V, which leads to an advisory Guidelines range of 168 to 210 months with the additional 24 months for conviction under § 1028A.

3. Failure to Inform the Court of Suborned Perjury

In his third claim, Petitioner contends that his post-remand sentencing counsel was ineffective for failing to inform the Court that the Government suborned perjury from United States Postal Inspector Thomas Ninan at the hearing. Petitioner alleges that Inspector Ninan committed perjury by giving false testimony about his involvement in Petitioner's case prior to 2010.

Perjury is defined as:

> Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true.

18 U.S.C.A. § 1621(1).

Petitioner fails to identify any statement or endorsement by Inspector Ninan that was false. Inspector Ninan testified that he inherited the case from another inspector, but he did not deny having participated in previous investigations of Petitioner. (*See* Nov. 2, 2012 Hr'g Tr. 71-72.) If Petitioner is arguing that Inspector Ninan's failure to bring notes, witness impact statements, or subpoenas of witnesses with him to the November 2, 2012 hearing is perjury (*see* Pet'r's § 2255 Mem. 9), he misunderstands the term. Such failures do not constitute false statements. The only testimonial evidence Petitioner presents in the instant Motion is that elicited by his own counsel. Petitioner is relying on mere conclusory statements in an attempt to demonstrate that the Government suborned perjury from Inspector Ninan at the hearing. There was no perjury here, and counsel was not ineffective for failing to inform the Court of something that never occurred.

B. *Brady* Violation

In his final claim, Petitioner asserts that the Government committed a *Brady* violation by withholding impeachment evidence in the form of interview statements of trial witnesses. Petitioner contends that such statements demonstrate that Inspector Ninan testified falsely about his involvement in earlier investigations of Petitioner. Petitioner argues that had such information been available, the Court would not have concluded that there were 10 or more victims in this case, and would not have re-sentenced Petitioner with the subsequent two-point offense level enhancement.

Under *Brady*, a criminal defendant's due process rights are violated when the prosecution suppresses material evidence favorable to the defendant. 373 U.S. at 87. "To establish a *Brady* violation, a defendant must show that evidence was (1) suppressed; (2) favorable to the defense; and (3) material to guilt or punishment." *United States v. Glass*, No. 14-3801, 2015 WL 9311395, at *1 (3d Cir. Dec. 23, 2015). Evidence is said to be favorable when it is either exculpatory or impeaching. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

Petitioner has failed to plausibly establish that the allegedly suppressed statements were favorable to his defense or material to his punishment. As we have already discussed, Inspector Ninan did not deny having participated in prior investigations of Petitioner. Any evidence demonstrating that he had in fact participated in past investigations of Petitioner does nothing to impeach his November 2, 2012 testimony. Therefore, the 2005 witness interview statements cannot be said to be favorable to Petitioner's defense. In addition, the 2005 witness interviews are not material to Petitioner's punishment because they offer the Court no information about the specific victims involved in this case. (*See* Pet'r's § 2255 Mem. Exs. A & B.) Petitioner's allegations here are without merit.

IV. CONCLUSION

For the foregoing reasons, Petitioner's Habeas Corpus Motion under 28 U.S.C. § 2255 will be denied. No certificate of appealability shall issue.[4]

An appropriate Order follows.

BY THE COURT:

/s/R. Barclay Surrick
U.S. District Judge

[4] A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has made no such showing. No reasonable jurist would find this assessment to be debatable or wrong.

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CHARLES WHITE	:	

ORDER

AND NOW, this 21st day of April, 2016, upon consideration of Petitioner's pro se Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 587), and all papers submitted in support thereof and in opposition thereto, it is **ORDERED** as follows:

1. Petitioner's Habeas Corpus Motion under 28 U.S.C. § 2255 is **DENIED**; and

2. No Certificate of Appealability shall issue.

IT IS SO ORDERED.

BY THE COURT:

/s/R. Barclay Surrick
U.S. District Judge