

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

UNITED STATES OF AMERICA

v.

REGINALD IRBY

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CRIMINAL ACTION

NO. 14-284-3

MEMORANDUM

Tucker, J.

December 18, 2017

Before the Court is Petitioner’s *pro se* Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (“Habeas Petition”) (Doc. 263) and the Government’s Response thereto (Doc. 272). Upon consideration of the Parties’ submissions and exhibits, and for the reasons set forth below, the Petitioner’s Habeas Petition is DENIED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 4, 2014, a grand jury returned an indictment charging Petitioner Reginald Irby and his co-defendants with conspiracy to possess 5 kilograms or more of cocaine with intent to distribute, in violation of 21 U.S.C. § 846. Indictment, Doc. 5. The charges were based on the following facts.

Irby, along with three co-conspirators, met with a confidential source in Tempe, Arizona, on April 17, 2014, to arrange for the purchase of 25 kilograms of cocaine in exchange for approximately \$300,000. On May 12, 2014, Petitioner and co-conspirator Omar Teagle met with the confidential source in Arizona and paid approximately \$25,000 to the confidential source as a down payment for the cocaine. On May 30, 2014, Petitioner and another co-conspirator, Omar Scott (“Scott”), met the confidential source near Philadelphia with an amount of currency meant to serve as a partial payment for the cocaine. Petitioner and Scott used vehicles equipped with hidden compartments to transport the currency. At this meeting, authorities arrested Petitioner.

On April 6, 2015, Petitioner pleaded guilty to violations of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) pursuant to a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). Gov't's Resp. Ex. A, Doc. 272. As part of the agreement, the Government agreed not to file an Information listing Petitioner's two prior felony drug convictions pursuant to 21 U.S.C. § 851. *Id.* at 1. By agreeing not to file an Information, the Government relieved Petitioner from the mandatory minimum sentences under 21 U.S.C. § 841.¹ *Id.* at 2. Instead, the parties agreed that "a sentence within the range of 180 months and 204 months imprisonment, a fine, if any, as directed by the Court, 10 years supervised release and a \$100 special assessment" was appropriate. *Id.* at 1–2.

The Parties also stipulated that "[i]f the Court accepts the recommendation of the parties and imposes a sentence within the range stated in paragraph 3 of this agreement, the parties agree that neither will file an appeal of the conviction and sentence in this case." *Id.* at 4. Petitioner, thus, agreed to waive his right to appeal or to attack his conviction, sentence, or any other matter relating to the prosecution. *Id.* at 4–5. Under the plea agreement, the only right Petitioner retained relating to appeals or collateral attacks was the limited right to appeal on the basis of constitutionally ineffective assistance of counsel. *Id.* at 5.

On April 6, 2015, at a change of plea hearing, the Court accepted Petitioner's guilty plea after a thorough colloquy. During the colloquy, Petitioner expressed his understanding of the

¹ A defendant convicted under 21 U.S.C. § 841 may be sentenced to an increased mandatory minimum sentence if the defendant has prior convictions for felony drug offenses. A defendant with a prior conviction for a felony drug offense, for example, would be sentenced to a mandatory minimum of 20 years imprisonment. 21 U.S.C. § 841(b)(1)(A). A defendant with two or more prior convictions for felony drug offenses would be sentenced to a mandatory minimum of life imprisonment. *Id.*

In order to seek such higher sentence, the Government must file an Information listing the prior felony drug offenses. Accordingly, where the Government decides not to file such Information, an increased sentence will not be imposed.

rights he agreed to waive and his decision to plead guilty. *See generally* Gov't's Resp. Ex. C, Doc 272 (showing that Petitioner answered all Court questions). Following Petitioner's guilty plea, and in advance of his sentencing hearing, an officer from the United States Probation Office for the Eastern District of Pennsylvania ("Probation") prepared a Presentence Investigation Report ("PSR"). Habeas Pet. Ex. B., Doc. 263.

Using the United States Sentencing Guidelines, Probation determined Petitioner's base offense level to be 32. *Id.* ¶ 27. Probation then decreased Petitioner's offense level by three levels under U.S.S.G. §§ 3E.1.1(a)–(b) because Petitioner accepted responsibility for his crimes in a timely manner. *Id.* ¶ 24. Probation increased Petitioner's offense level by two levels under U.S.S.G. § 3B1.1(c) because Petitioner admitted to enlisting Scott to accompany Petitioner in transporting money for the purchase of illicit drugs. In view of this, therefore, Petitioner qualified for a criminal organizer/leadership enhancement. *See* Gov't's Resp. Ex. C at 13–14, Doc. 272. In sum, Petitioner's offense level was set at 31. No objection was made to the guideline calculation at the hearing. In the absence of the plea agreement, Petitioner faced the possibility of a mandatory minimum sentence of life imprisonment because of Petitioner's prior felony drug offenses. 21 U.S.C. § 841(b)(1)(A).

At the sentencing hearing on July 8, 2015, the Court sentenced Petitioner to the minimum sentence agreed upon by the Parties. Specifically, the Court adopted the recommended sentence of 180 months imprisonment, five years of supervised release, and a \$100 special assessment. J. in a Crim. Case, Doc. 198.

On January 26, 2017, Petitioner filed this Habeas Petition, seeking to challenge his sentence on two grounds. First, Petitioner claims that he was denied effective assistance of counsel when his attorney failed to object to a two-point leadership enhancement and failed to

file a direct appeal of Petitioner's sentence. Second, Petitioner claims his rights were violated when the Court sentenced him without finding what portion of the total drug quantity the conspirators sought to purchase was specifically attributable to Petitioner. Understanding that his waiver of appellate rights precludes him from filing the present Habeas Petition, Petitioner argues that he is, nevertheless, entitled to relief because the waiver was not knowing and voluntary and, therefore, the waiver is unenforceable.

The Government requests that the Court deny Petitioner's Habeas Petition because Petitioner's Habeas Petition is untimely. Even if the Habeas Petition were timely, the Government argues that Petitioner waived his right to attack or appeal his sentence by executing the plea agreement. Finally, even if the Habeas Petition were timely, and Petitioner's waiver were not enforceable, the Government contends that Petitioner's counsel's conduct was, nevertheless, not prejudicial because Petitioner pled guilty to facts sufficient to sustain an organizer/leadership enhancement and because Petitioner pled guilty to conspiring to possess and distribute the full 25 kilograms of cocaine.

After consideration of the Parties' arguments, the Court concludes, as discussed in greater detail below, that Petitioner's Habeas Petition is untimely and, therefore, the Habeas Petition is denied. Although the Court concludes that Petitioner's claims are untimely, the Court further concludes that even if Petitioner's claims were not barred as untimely, his substantive arguments for relief also fail on the merits.

II. STANDARD OF REVIEW

A prisoner in custody may petition the court that imposed the sentence upon him and request that the court vacate, set aside, or correct the sentence if the "the sentence was imposed in violation of the Constitution or laws of the United States[.]" 28 U.S.C. § 2255(a). A § 2255

petitioner is entitled to relief “for an error of law or fact only where the error constitutes a ‘fundamental defect which inherently results in a complete miscarriage of justice.’” *United States v. Eakman*, 378 F.3d 294, 298 (3d Cir. 2004) (quoting *United States v. Addonizio*, 422 U.S. 178, 185 (1979)). The court may dismiss a petition brought under § 2255 where the record shows conclusively that the movant is not entitled to relief. 28 U.S.C. § 2255(b); *see also United States v. Day*, 969 F.2d 39, 41–42 (3d Cir. 1992) (discussing a district court’s duty when reviewing a § 2255 motion). If the court finds grounds for relief, it “shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” 28 U.S.C. § 2255(b).

As a threshold matter, however, the law requires that a petitioner bring his claim for relief within a one-year statute of limitations. *Id.* § 2255(f). The statute of limitations begins to run the day on which “the judgment of conviction becomes final[.]” 28 U.S.C. § 2255(f)(1).

III. DISCUSSION

A. Procedural Default Under 28 U.S.C. § 2255

A motion for relief under 28 U.S.C. § 2255 is subject to a one-year statute of limitations that runs from the date on which the judgment of conviction becomes final. Under Federal Rule of Appellate Procedure 4(b)(1)(A)(i), Petitioner had 14 days to appeal his sentence beginning on July 8, 2015, the day of sentencing. Accordingly, Petitioner’s sentence became final on July 22, 2015. Petitioner did not file this Habeas Petition, however, until January 26, 2017—over eighteen months after his judgment became final. Petitioner concedes that he did not meet the timing requirement of § 2255, but asserts a claim of actual innocence to overcome this procedural default.

A convincing showing of actual innocence enables a habeas petitioner to overcome an expiration of the statute of limitations and permits the Court to consider the merits of his claims. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013). The United States Supreme Court has noted, however, that “tenable actual-innocence gateway pleas are rare.” *Id.* As a general matter, actual innocence claims usually arise upon the discovery of new evidence not available to the petitioner at the time of trial.

To succeed on a claim of actual innocence, “the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). This high threshold requires the petitioner to “persuad[e] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* at 329.

In this case, Petitioner fails to set forth any new evidence to show he is actually innocent of the crime for which he pled guilty. Habeas Pet. at 2, Doc. 263. Under the circumstances, with no new evidence and no showing that it is more likely than not that no reasonable juror would have convicted him, Petitioner cannot establish a valid claim of actual innocence. Therefore, there is no legal basis to excuse Petitioner’s eighteen month delay in filing his Habeas Petition.

Even if Petitioner’s claim were not barred by the statute of limitations, however, his Habeas Petition would still warrant dismissal because Petitioner validly waived his right to appeal and attack his sentence by executing his plea agreement and because Petitioner’s substantive claims of ineffective assistance of counsel are without merit. The Court will address each of Petitioner’s contentions in turn below.

B. Petitioner's Guilty Plea and Appellate Waiver

Petitioner argues that his waiver of his appellate rights was not knowing and voluntary and, therefore, he should be permitted to challenge his sentence. By contrast, the Government contends that the waiver is valid and should be enforced because it was signed by Plaintiff and the Court conducted a thorough colloquy of Plaintiff at his change of plea hearing. The Court finds that Petitioner's guilty plea and subsequent waiver was knowing and voluntary because the plea agreement was clear, the colloquy thorough, and no miscarriage of justice will occur by enforcing Petitioner's waiver. Accordingly, Petitioner's Habeas Petition is denied.

a. Petitioner's Waiver of Appellate and Collateral Review was Knowing and Voluntary.

Criminal defendants may waive certain rights "provided they do so voluntarily and with knowledge of the nature and consequences of the waiver." *United States v. Mabry*, 536 F.3d 231, 236 (3d Cir. 2008). To determine whether a waiver of a defendant's right to appeal his conviction or sentence pursuant to a plea agreement is knowing and voluntary, a court must ensure that the written plea agreement executed by the Parties is clear, and the court must place the defendant under oath to conduct a colloquy to determine whether the defendant understands, among other things, "the terms of any plea-agreement provision waiving the right to appeal or collaterally attack the sentence." Fed. R. Crim. P. 11(b)(1)(n).

In *Mabry*, the Third Circuit upheld a waiver of a criminal defendant's appellate rights. Upon review of the record, the Third Circuit found that the defendant's broad waiver of his appellate rights was knowing and voluntary because: (a) the written plea agreement was clear, (b) the defendant acknowledged his understanding of the plea agreement and its waiver provisions by signing the plea agreement, (c) the district court conducted a thorough colloquy during which the district court explained to the defendant the consequences of the waiver, and

(d) the Court’s questions ensured that the defendant “had not been coerced or misled in any way into entering the agreement.” 536 F.3d at 238–39. Indeed, during the colloquy, the defendant “responded directly to the court’s questions, the prosecution reviewed the waiver with the defendant in open court, and defense counsel was permitted to explain [the waiver to the defendant] further.” *Id.* On these facts, the Third Circuit found the defendant’s waiver to be knowing and voluntary. *Id.*

In this case, Petitioner’s waiver is knowing and voluntary because: (a) the terms of the waiver are clear, (b) Petitioner acknowledged his understanding of the waiver by signing the plea agreement, (c) the Court conducted a thorough colloquy of Petitioner regarding his rights during his change of plea hearing, and (d) the Court’s questions during the colloquy ensured that Petitioner had not been coerced or misled into entering the plea agreement.

Petitioner’s guilty plea agreement contained the following appellate waiver:

If the Court accepts the recommendation of the parties and imposes the sentence stated in paragraph 3 of this agreement, the parties agree that neither will file any appeal of the conviction and sentence in this case. Further, the defendant agrees that if the Court imposes the recommended sentence he voluntarily and expressly waives all rights to collaterally attack the defendant’s conviction, sentence, or any other matter relating to his prosecution. However, the defendant retains the right to file a petition for collateral relief under 28 U.S.C. § 2255 asserting only a claim that the attorney who represented the defendant at the time of the execution of this agreement and the entry of the defendant’s guilty plea provided constitutionally ineffective assistance during any part of the representation.

Habeas Pet. Ex. A, at 4–5. This waiver is clear that Petitioner would relinquish his appellate rights upon the Court’s acceptance of the Parties’ recommended sentence. Petitioner signed the plea agreement and the Court conducted an extensive colloquy to ensure that Petitioner had not been coerced into acceptance of the plea agreement, nor misled regarding his rights. Gov’t’s Resp. Ex. A, at 3, Doc 272. Indeed, Petitioner expressed his understanding during the colloquy

by engaging with the Court and responding directly to the Court's questions. Gov't's Resp. Ex. C, Doc 272.

b. Enforcing Waiver Does Not Work a Miscarriage of Justice.

Before enforcing a waiver of appellate rights pursuant to a plea agreement, a court must not only ensure that a defendant's waiver is knowing and voluntary, but the court must also ensure that the enforcement of such a waiver otherwise "works no miscarriage of justice." *Mabry*, 536 F.3d at 237–38. A miscarriage of justice may occur, for example, where a defendant is prevented from understanding his plea or prevented from filing an appeal due to the ineffective assistance of counsel. *United States v. Shedrick*, 493 F.3d 292, 298 (3d Cir. 2007). To establish an ineffective assistance of counsel claim, a petitioner must meet the so-called *Strickland* test.

Here, while Petitioner alleges that he received ineffective assistance of counsel when his attorney failed to object to the two-point leadership enhancement under U.S.S.G. § 3B1.1(c) and failed to object to the quantity of cocaine attributable to Petitioner, the Court finds that Petitioner's ineffective assistance of counsel claim fails because he has not satisfied the *Strickland v. Washington* test. 466 U.S. 668 (1984). Therefore, enforcing his appellate waiver does not result in a miscarriage of justice.

i. Ineffective Assistance of Counsel

In *Strickland*, the Supreme Court adopted a two-pronged test for evaluating ineffective assistance of counsel claims. 466 U.S. 668 (1984). This test requires a petitioner to show that: "(1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's error, the result would have been different." *Rainey v. Varner*, 603 F.3d 189, 197 (3d Cir. 2010) (citing *Strickland*, 466 U.S. at 687). This test requires both prongs be met to find ineffective assistance of counsel. As the Court finds, in

this case, that Petitioner has not established the second prong, the Court will end its analysis at the second prong and will not address the first.

The first prong, referred to as the “deficient performance” prong, requires a petitioner to show “that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. The court is to “indulge a strong presumption that counsel’s conduct falls within a wide range of reasonable professional assistance.” *Berryman v. Morton*, 100 F.3d 1089, 1094 (3d Cir. 1996). To establish prejudice, the petitioner must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687.

The *Strickland* test also applies to ineffective assistance of counsel claims arising out of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In this context, to satisfy the prejudice prong, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59. A court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant . . . [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice[.]” *Strickland*, 466 U.S. at 697. The Third Circuit explained that “where defense counsel fails to object to an improper enhancement under the Sentencing Guidelines, counsel has rendered ineffective assistance [T]he controlling issue is whether defendant suffered prejudice by reason of this failure.” *Jansen v. United States*, 369 F.3d 237, 244 (3d Cir. 2004).

a. The Two-Point Leadership Enhancement Under U.S.S.G. § 3B1.1(c)

The first instance in which Petitioner alleges ineffective assistance of counsel is in regard to the two-point leadership/organizer enhancement under U.S.S.G. § 3B1.1(c). Petitioner alleges

that his counsel should have objected to the enhancement because there was no evidence to demonstrate that Petitioner had directed Scott to accompany Petitioner to the meeting with any amount of money. To evaluate the prejudice of this failure to object, the Court must consider if an objection would have affected Petitioner's sentence. The Court concludes that an objection would have had no effect on the sentence for two reasons. First, the sentence imposed by the Court was the sentence recommended by the Parties, and, therefore, the leadership/organizer enhancement in the PSR was not applied to the Petitioner's sentence. Second, even if the leadership/manager enhancement did have an effect on the sentence, Petitioner pled guilty to facts sufficient to support such enhancement.

The two-point leadership/organizer enhancement contained in the PSR had no effect on Petitioner's sentence because the recommended sentence was not based on the PSR, but instead, on the sentence contained in the plea agreement that the Parties agreed was appropriate. Petitioner's plea agreement stipulated a range of 180 and 204 months as the appropriate sentence. *See* Gov't's Resp. Ex. A at 1, Doc. 272. This sentence range represented a significant decrease from the sentence that Petitioner would have faced absent a plea agreement. In the absence of the plea agreement, Petitioner would have faced the possibility of life imprisonment because of Petitioner's prior felony convictions for drug crimes. The Court ultimately imposed a sentence of 180 months imprisonment, which represented the minimum sentence within the range agreed upon by the Parties. Accordingly, as Petitioner's sentence was the lowest possible sentence agreed to in the plea agreement, Petitioner was not prejudiced in any way by counsel's failure to object to the two-point leadership/organizer enhancement in the PSR because the Court did not apply the enhancement when it imposed its sentence.

Even if the leadership/organizer enhancement had any effect on Petitioner's sentence, such leadership/organizer enhancement would have been appropriate in view of the facts established by virtue of Petitioner's guilty plea. Under U.S.S.G. § 3B1.1(c), "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels." Here, Petitioner pleaded guilty to having Scott accompany Petitioner to the restaurant. Gov't's Resp. Ex. C, at 13–14, Doc. 272. Accordingly, a leadership/organizer enhancement would have been appropriate had the Court decided to reject the Parties' recommended sentence and impose a different sentence.

b. The Attributable Drug Quantity

The second instance in which Petitioner alleges that his attorney rendered constitutionally ineffective assistance was when his attorney did not object to the failure to allocate what quantity of cocaine was specifically attributable to Petitioner. Petitioner asserts that had counsel objected, Petitioner would only have been found liable for an amount of cocaine equivalent to \$65,000. Habeas Pet. 21–22. Such a finding, Petitioner asserts, would have reduced Petitioner's overall sentence. To evaluate the prejudice of Petitioner's attorney's purported failure to object, the Court must consider if such objection would have affected Petitioner's sentence. The Court concludes that no prejudice resulted from the attorney's purported failure to object because in executing Petitioner's plea agreement, Petitioner admitted to conspiring to acquire and distribute the full 25 kilograms of cocaine. Accordingly, no allocation was necessary nor would such allocation have altered Petitioner's sentence.

Petitioner pleaded guilty to conspiring to possess 25 kilograms of cocaine with intent to distribute. Gov't's Resp. Ex. A at 1, Doc. 272. As discussed above, the plea was knowing and voluntary. Gov't's Resp. Ex. C, at 13–14, Doc. 272. For this reason, there was no need to

allocate any amount of cocaine to Petitioner because Petitioner pled guilty to the full amount that the criminal conspirators agreed to procure. This conclusion further comports with the legal principle that in a prosecution for conspiracy, the Government need not prove that “any of the members of the conspiracy were successful in achieving any or all of the objectives of the conspiracy.” Model Crim. Jury Instr. 3rd Cir. 6.18.371G (2015). Here, there need not have been proof that any specific amount of cocaine was attributable to Petitioner where Petitioner had conspired to effectuate an agreement to possess and distribute 25 kilograms of cocaine.

IV. CONCLUSION

For the foregoing reasons, Petitioner’s Motion to Vacate, Set Aside, or Correct Sentencing Pursuant to 28 U.S.C. § 2255 is DENIED.

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

UNITED STATES OF AMERICA

v.

REGINALD IRBY

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CRIMINAL ACTION

NO. 14-284-3

ORDER

AND NOW, this __18th__ day of December, 2017, upon consideration of Petitioner’s Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (“Habeas Petition”) (Doc. 263) and the Government’s Response thereto (Doc. 272), **IT IS HEREBY ORDERED AND DECREED** as follows:

1. Petitioner’s Habeas Petition is **DENIED**; ¹
2. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

¹ This Order accompanies the Court’s Memorandum Opinion dated December 18, 2017.