

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

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|--------------------------|---|-------------------------|
| UNITED STATES OF AMERICA | : | CIVIL ACTION |
| | : | |
| v. | : | NO. 96-8198 |
| | : | |
| JOSE MARIAS, a/k/a Jose | : | |
| GONZALES | : | (CRIMINAL NO. 92-256-2) |

MEMORANDUM ORDER

Presently before the court is defendant-petitioner's 28 U.S.C. § 2255 petition to vacate, set aside or correct sentence. He asserts that his "counsel was ineffective by not presenting expert testimony that there are several ways of preparing cocaine base, only one of which will yield crack."

Petitioner was a principal participant in a large scale drug distribution operation in Philadelphia. He pled guilty on January 14, 1994 to a count charging him with conspiracy to distribute cocaine and cocaine base or, as noted in two places in the count, "crack."

Petitioner faced a statutory mandatory minimum sentence of ten years of imprisonment. The applicable sentencing guideline range was 262 to 327 months of imprisonment. The court granted the government's § 5K1.1 and § 3553 motion and sentenced petitioner on April 22, 1994 to a period of imprisonment of 97 months.

Petitioner cites United States v. James, 78 F.3d 851, (3d Cir. 1996) to argue that the record in his case does not support a "crack" sentence. Effective November 1, 1993, the

Sentencing Commission amended the Application Notes to § 2D1.1 to include the following definition of cocaine base:

"Cocaine base," for the purposes of this guideline means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

U.S.S.G. Amendment 487. When placed at issue, the government must prove at sentencing by a preponderance of the evidence that the form of cocaine base defendant sold was crack. James, 78 F.3d at 858. In James, there was no reference to crack in the court's plea colloquy or presentence report and no specific admission by the defendant he sold crack.

The term "crack" is used in two places in the conspiracy count to which petitioner pled guilty. The court used the term "crack" nine times in its colloquy with petitioner. The following are examples of such an exchange.

THE COURT: And they say, sir, that you rented and maintained custody or control of a premise on Norris Street for the purpose of storing and packaging some of the cocaine and for processing some of the cocaine into crack cocaine. Let me ask you next, is that true, did you do that?

THE DEFENDANT: Yes.

THE COURT: Did you, sir, supervise and oversee the processing of cocaine powder into crack cocaine?

THE DEFENDANT: Sometimes, yes.

THE COURT: And on those occasions, did you know what was being produced and processed was crack cocaine?

THE DEFENDANT: Yes

The presentence report refers to "items used in crack cocaine processing" found in an apartment rented by petitioner,

and describes petitioner as the leader of a drug-trafficking organization which sold "crack." Petitioner was afforded an opportunity to object to the accuracy of any findings in the presentence report. He never contested these findings. At sentencing the court may accept as factual findings any items not objected to in the presentence report. See Fed. R. Crim. P. 32(b)(6)(D). The government cannot be faulted for failing to present evidence to show petitioner dealt in "crack" cocaine where he admitted he had and did not challenge the finding in the PSR to that effect.

Nevertheless, the government submitted a sentencing memorandum and appended exhibits which show the government could prove that petitioner was the "boss" of an organization that manufactured and sold crack cocaine. DEA agents who searched an apartment rented by petitioner found apparatus for cooking cocaine into crack and numerous vials of the type used for street sales of crack. Several codefendants admitted at their plea hearings that they sold crack for petitioner's organization which, according to cooperating coconspirator Hector Colon, distributed at least 1.8 kilograms of crack between September 1991 and April 1992. A transcript of a tape-recorded conversation shows that petitioner was present when a confidential informant and a subordinate codefendant arranged for the sale of "crack." The government represented that drugs purchased by the "cooperating individual" were tested and found to contain crack cocaine.

Effective assistance of counsel means adequate representation by an attorney of reasonable competence. Government of the Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). To show ineffective assistance of counsel, it must appear that a defendant was prejudiced by the performance of counsel which was deficient and unreasonable under prevailing professional standards. Strickland v. Washington, 466 U.S. 668, 686-88 (1984); Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). Counsel's conduct must have so undermined the proper functioning of the adversarial process that the result of the pertinent proceedings cannot be accepted as reliable, fair and just. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Strickland, 466 U.S. at 686; United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989).

In light of petitioner's admissions and the evidence proffered by the government, counsel's failure to contest the finding that petitioner dealt in crack was not professionally deficient or unreasonable. Further, there is no showing that any such failure prejudiced petitioner. Based on his admissions and the evidence the government proffered, it is virtually certain the court would have found that petitioner sold crack cocaine. Indeed, had petitioner testified that he did not sell crack, he may well have jeopardized his three offense level reduction for acceptance of responsibility.

Petitioner's counsel was effective in helping to secure a substantially reduced sentence, and did nothing which was professionally deficient.

Petitioner also contends that he is entitled to a downward departure pursuant to U.S.S.G. § 5K2.0. He does not specify why but the reason can be inferred from an attached document. The document is a page from a plea agreement in another case in another district of another defendant who is now apparently incarcerated with petitioner. That plea agreement expressly provided for a downward departure in exchange for that defendant's stipulation to an order of deportation. Petitioner's plea agreement, however, contains no such provision. Further, there is no showing that petitioner ever agreed prior to sentencing to stipulate to an order of deportation.

It clearly appears from the petition and pertinent records in the case that petitioner is not entitled to a further reduction of his sentence.

ACCORDINGLY, this day of August, 1997, upon consideration of petitioner's 28 U.S.C. § 2255 petition, **IT IS HEREBY ORDERED** that said Petition is **DENIED** and the above action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.