

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

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	<u>Criminal No. 92-498-02</u>
	:	Civil No. 96-8634
	:	
FRANK AMERMAN	:	

M E M O R A N D U M

McGlynn, J.

October 20, 1997

Before the court is petitioner Frank Amerman's Exceptions to the Chief United States Magistrate Judge's (hereinafter "the Magistrate Judge")¹ proposed findings of fact and conclusions of law in connection with petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. Petitioner was convicted and sentenced to life imprisonment for his role in a conspiracy to manufacture and distribute more than one (1) kilogram of methamphetamine during the summer of 1987 through August 13, 1992. Petitioner asks this court to resentence him with a base offense level of 26 and to grant a downward departure of three levels based on the grounds that: (1) the trial testimony of prosecution witness William Kelly limits the duration of petitioner's involvement in the methamphetamine conspiracy; (2) petitioner was not a supervisor in the conspiracy; (3) the government failed to meet its burden of proof regarding the isomeric composition of methamphetamine attributed to petitioner;

¹ Richard A. Powers, III, former Chief United States Magistrate Judge, retired from office on September 30, 1997.

(4) the government committed prosecutorial misconduct by presenting allegedly false testimony in opposition to the petitioner's § 2255 motion; and (5) the district court erroneously included the weight of precursor chemicals when estimating the capability of petitioner's methamphetamine laboratory for sentencing purposes.

A. Procedural Background

A federal grand jury in the Eastern District of Pennsylvania indicted petitioner on October 16, 1992, for conspiracy to manufacture and distribute more than one (1) kilogram of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 846 (1992). Following a jury conviction on January 25, 1993, this court sentenced petitioner to life imprisonment without parole in accordance with the 1992 Sentencing Guidelines.² The Court of Appeals affirmed petitioner's conviction in a November 17, 1993 memorandum opinion filed on December 9, 1993. United States v. Amerman, No. 93-1471 (3d Cir. Nov. 17, 1993) (Doc. No. 108).

On December 19, 1996, petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The government filed its reply to the motion on March 18, 1997. The Magistrate Judge recommended an evidentiary hearing to calculate

² Petitioner was sentenced pursuant to United States Sentencing Commission, Guidelines Manual, §§ 2D1.1(c), 3B1.1 (1992) [hereinafter U.S.S.G.]. This sentence was based upon: (a) three (3) 1988 methamphetamine "cooks" since petitioner's additional methamphetamine activities between 1987 and August of 1992 could not be specifically quantified; (b) the amount of methamphetamine that passed between petitioner and prosecution witness William Spotts in 1989; and (c) the quantity of methamphetamine that could be produced from the methylamine seized in 1992 from Spotts' garage.

the quantity of methamphetamine used to determine the appropriate guideline for sentencing.³ This court adopted the report on May 6, 1997, and the Magistrate Judge conducted an evidentiary hearing on July 29, 1997 following which he issued a Report recommending that petitioner be resentenced with a base level offense of 38 in accordance with the amended guidelines.⁴ Each party filed objections to the Report. For the following reasons, the Report is approved, the petitioner's objections are denied, and the government's objections are adopted.

B. Government's Objections

The government requests that two clarifications be made to the Report's Proposed Findings of Fact. First, the government asks that paragraph two of the Introduction be changed to state that the government failed to prove at sentencing, not at trial, the

³ The Magistrate Judge based his recommendation for an evidentiary hearing on the 1995 Amendments to the United States Sentencing Guidelines which retroactively amended the Drug Quantity Tables of U.S.S.G. § 2D1.1 and amended the maximum base level. See U.S.S.G. § 2D1.1, App. C, Amend. 518 (1995).

Moreover, if the isomeric composition of methamphetamine was not determined at sentencing, then the issue must be remanded for consideration. United States v. Bogusz, 43 F.3d 82, 91 (3d Cir. 1994), superseded by regulation, United States v. DeJulius, 121 F.3d 891 (3d Cir. 1997). Since petitioner failed to raise this issue at sentencing, it was not addressed by the court. Thus, the Magistrate Judge recommended an evidentiary hearing. Report, April 11, 1997, at 6.

⁴ Petitioner also claimed that his sentence violated not only his Sixth Amendment right to effective assistance of counsel, but also his rights under the Fifth Amendment's Due Process Clause. The Magistrate Judge recommended dismissal of these claims. Id.

isomeric identity of the methamphetamine.⁵ Second, the government requests that paragraph one of the Report clarify that petitioner engaged in the manufacture and distribution of methamphetamine on at least three (3) occasions from the summer of 1987 through August 13, 1992, rather than the Report's language.⁶ The government contends that this language can be interpreted to suggest that petitioner engaged in the manufacture and distribution of methamphetamine on only three occasions. Since the record supports the finding that petitioner engaged in the manufacture and distribution of methamphetamine on more than three occasions, the government's objections to the Report are approved.⁷

⁵ The Report states that "defendant . . . seeks resentencing on the basis that the government failed to prove at trial the isomeric identity of the methamphetamine manufactured and sold, and intended to be manufactured and sold." Report, August 14, 1997, at 1 (emphasis added).

The court will modify the language in the second paragraph of the Report's Introduction to state "at sentencing" rather than "at trial".

⁶ The Report states:

At three (3) different times during the period of the conspiracy to manufacture and distribute methamphetamine from the summer of 1987 to August 13, 1992, defendant produced and sold a quantity of DL-methamphetamine, a mixture and substance containing D-methamphetamine within the meaning of the 1992 Sentencing Guidelines Manual.

Id.

⁷ The court will modify paragraph one under the Magistrate Judge's Proposed Findings of Fact to state:

On at least three (3) occasions during the period of the conspiracy to manufacture and distribute methamphetamine from the summer of 1987 to August 13, 1992, defendant produced and sold a quantity of DL-methamphetamine, a mixture and substance containing D-

C. Petitioner's Exceptions

1. Duration of Conspiracy

Petitioner claims that he withdrew from the methamphetamine conspiracy in 1988. At sentencing, however, the court accepted the testimony of the government's witnesses which clearly revealed that petitioner's involvement in the methamphetamine conspiracy lasted from the summer of 1987 through August 13, 1992. The Court of Appeals affirmed this finding on appeal.⁸ Therefore, petitioner's Exception is denied.

2. Petitioner Amerman as Supervisor

methamphetamine within the meaning of the 1992 Sentencing Guidelines Manual.

On other occasions during 1989-90, that are not necessary to the court's conclusions of law, the defendant sold additional quantities of methamphetamine.

This will accurately reflect the testimony at trial that petitioner engaged in other methamphetamine sales in addition to the three cooks in 1988.

⁸ The sole issue at the evidentiary hearing was to determine for sentencing purposes the isomeric identity of the methamphetamine petitioner was accused of manufacturing. Petitioner, however, seeks to relitigate the duration of his involvement in the conspiracy. This issue was actually litigated and necessarily decided by the district court and affirmed by the Third Circuit. Therefore, principles of collateral estoppel bar the relitigation of this issue.

In the alternative, evidence at trial established that: (1) petitioner scouted locations for methamphetamine laboratories; (2) recruited various co-conspirators; (3) supervised transportation of chemicals and equipment; and (4) jointly directed and supervised the manufacturing and distribution of methamphetamine with his co-defendant, Walker. United States v. Amerman, No. 93-1471, at 8 (3d Cir. Nov. 17, 1993) (Doc. No. 108). Thus, the government proved that petitioner was involved in the conspiracy from the summer of 1988 through August 13, 1992.

Next, petitioner contends that the prosecution mischaracterized him as a supervisor of five (5) or more participants in the methamphetamine conspiracy. Petitioner believes that this mischaracterization erroneously increased his original base level offense by plus four (+4) pursuant to U.S.S.G. § 3B1.1(a). Petitioner grounds this argument on two statements contained within two documents not produced at his trial or evidentiary hearing.

a. Hummel DEA Interview

First, petitioner claims that the court must vacate and reduce his sentence based upon the government's suppression of a 1991 DEA interview report. In this report, Arthur Hummel, a co-conspirator of prosecution witness William Kelly, claimed that Kelly was the "boss" of an operation.⁹ Petitioner argues that the government's alleged suppression of this statement contributed to petitioner's supervisory role enhancement at his original sentencing. Hummel's statement, however, does not exonerate petitioner from his supervisory role in the conspiracy.

Foremost, Hummel's statement is not conclusive proof of Kelly's role in the conspiracy. This statement does not indicate

⁹ Specifically, petitioner refers to a sentence in the Hummel DEA Interview which states, "HUMMEL said that KELLY also works with Ronny MCCONNELL and Dennis MCINTYRE, but that KELLY is the boss." See Petitioner's Exceptions, at 2, Exh. A, para.7. Hummel made this statement in connection with a separate proceeding in which he was convicted for methamphetamine manufacturing and conspiracy. See United States v. Stephen Zagnojny, et al., (Indictment No. 90-550).

that Kelly was the "boss" of the Amerman-Walker conspiracy, but rather, that he was the "boss" among Hummel, McIntyre and McConnell. In contrast, testimony at petitioner's trial verified petitioner's involvement as a supervisor in the Amerman/Walker methamphetamine conspiracy from 1987 through August of 1992.¹⁰

b. Leinenbach Presentence Investigation Report

Petitioner also asserts that paragraph twenty-one (21) of James Leinenbach's confidential presentence report demonstrates that petitioner did not participate in a supervisory role. However, neither paragraph 21 nor any other paragraph in the report demonstrates that Leinenbach was the "boss" of the Amerman-Walker conspiracy.¹¹ Specifically, the extracted observation by William Thompson concerns a different time and a different methamphetamine operation than petitioner's conspiracy. Moreover, the testimony at

¹⁰ According to the record, petitioner supervised at least five other participants in the methamphetamine conspiracy including: co-defendant Walker, William Kelly, William Spotts, Eugene Millevoi, and one or two other unidentified male participants. United States v. Amerman, No. 93-1471 (3d Cir. Nov. 17, 1993) (Doc. No. 108).

¹¹ The presentence report states that Leinenbach began his drug association with Kelly in 1986, approximately one year prior to the initiation of the Amerman/Walker conspiracy. Leinenbach Presentence Report, at para. 17. Petitioner bases his supervisory enhancement challenge and Brady allegation on an observation by William Thompson. Thompson was an underling in the Leinenbach-Kelly operation who worked as a "gopher" for Kelly beginning in the Spring of 1987. Id. at para. 21. In Thompson's opinion, Leinenbach was the "boss of the operation." Id. This statement, however, does not absolve petitioner of his supervisory role because it appears that Thompson is referring to a methamphetamine operation involving Kelly and Leinenbach, not petitioner or his co-defendant Walker. In fact, according to paragraph 25 of the presentence report, Kelly and Leinenbach were "partners." Id. at para. 25.

trial revealed that petitioner supervised at least five other participants during the life of the conspiracy. Consequently, petitioner's supervisory position merits a four (+4) level enhancement to his base level offense under the prevailing sentencing guidelines. See U.S.S.G § 3B1.1(a)(1997).

c. Alleged Brady Violation

Additionally, petitioner maintains that the government willfully suppressed the Leinenbach presentence report and the Hummel DEA Interview from petitioner during trial. As a result, petitioner argues that this non-disclosure materially affected petitioner's sentencing and amounted to a Brady violation by the government.¹² After careful review of the documents, this argument fails.

Under Brady, when an accused requests that the prosecution disclose evidence that is material to either his guilt or innocence, the prosecution's refusal or failure to disclose the evidence amounts to a violation of due process. Brady, 373 U.S. at 87. Complexities arise, however, "when exculpatory information is available to the prosecution but is not within its actual knowledge in the context of a particular case . . . and the existence of the information is understandably unknown by the prosecutor in that context." United States v. Joseph, 996 F.2d 36, 39 (3d Cir. 1993).

¹² See Brady v. Maryland, 373 U.S. 83, 87 (1963) (detailing the prosecution's affirmative duty to disclose "evidence favorable to an accused . . . where evidence is material to guilt or punishment, irrespective of good faith or bad faith of the prosecution").

In the present case, petitioner failed to prove the materiality of these allegedly suppressed statements. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). In Bagley, the Court interpreted "reasonable probability" to mean "a probability sufficient to undermine confidence in the outcome." Id. Additionally, a court must consider whether, in the absence of the evidence, the defendant received a fair trial. Kyles v. Whitley, 514 U.S. 419, 434 (1995). Finally, the materiality test requires a court to view the allegedly suppressed evidence "collectively, not item-by-item." Id. at 436.

Here, petitioner claims that the "[s]uppression of information like the Hummell [sic] DEA6 and Leinenbach's PSI constitutes suppression of information material to punishment in violation of Brady v. Maryland [citations omitted]." No other explanation or analysis is provided by petitioner.

The Leinenbach report, viewed in conjunction with the Hummel Interview statement, would not have undermined the court's confidence in the outcome of the sentencing proceedings. Specifically, the net effect of these statements would not have rendered the government's case markedly weaker nor did the failure to disclose result in petitioner being denied a fair hearing. In fact, had these two statements been discovered earlier, there is not a "reasonable probability" that the result of the trial would

have been different. At most, petitioner showed that the government had some access to an item of favorable evidence unknown to the defense. This alone, however, is insufficient to amount to a Brady violation.¹³ Since there is no evidence that the government acted in a calculating manner to circumvent its Brady disclosure requirements, the government did not commit a Brady violation and petitioner's Exception is denied.

3. Isomeric Composition Controversy

Next, petitioner contends that the government did not carry its burden of proof at the evidentiary hearing because it failed to demonstrate that DL-methamphetamine is a mixture and substance containing D-methamphetamine. As a result, petitioner claims that he must be resentenced based upon the Drug Equivalency Tables for L-methamphetamine. This argument also must fail.

a. Isomeric composition

At petitioner's sentencing, the court adopted the testimony of DEA Forensic Chemist Jack Fasanello, finding over 100 grams of methamphetamine were attributable to petitioner. Sentencing Transcript, at 38. Subsequently, at the evidentiary hearing, Fasanello testified that petitioner manufactured DL-methamphetamine which is comprised of 50% D-methamphetamine and 50% L-methamphetamine. Evidentiary Hearing Transcript, at 7, 10.

¹³ Kyles, 514 U.S. at 437 (determining that "prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility of gauging the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached").

Petitioner claims that Fasanello's testimony should be rejected for two reasons. First, petitioner argues that the testimony is inconsistent with the holding of the Court of Appeals in United States v. DeJulius. 121 F.3d 891 (3d Cir. 1997). Second, petitioner purports to offer a signed declaration, via his Exceptions, from a different DEA chemist as evidence disputing the government's contention that DL-methamphetamine contains D-methamphetamine.

In United States v. Bogusz, the Court of Appeals explained that DL-methamphetamine is generally recognized as a "combination of the two forms." 43 F.3d at 89 n.10, superseded by regulation on other grounds, United States v. DeJulius, 121 F.3d 891 (3d Cir. 1997). Since Bogusz, the Court of Appeals revisited the issue of the isomeric composition of methamphetamine in United States v. DeJulius. 121 F.3d 891 (3d Cir. 1997). In DeJulius, the Court of Appeals, in adopting the Bogusz determination, stated that "methamphetamine comes in two isomeric forms-- D and L DL-methamphetamine is generally recognized as a combination of the two forms." Id. at 892 n.2.¹⁴

¹⁴ Petitioner claims that this court should utilize the rule of lenity since "there is reasonable doubt that the Sentencing Commission intended equal punishment for manufacturing D-Metahmphetamine[sic] and DL-Methamphetamine because D-Methamphetamine has twice the effect on the human body as DL-." Petitioner's Exceptions, at 5.

The rule of lenity is only applied when there is a "grievous ambiguity or uncertainty in the language or structure of the Act" Chapman v. United States, 500 U.S. 453, 463 (1991). Here, the plain meaning of the 1995 amendments to U.S.S.G. § 2D1.1, coupled with the recent DeJulius opinion, clearly dictate that the Sentencing Commission intended

Next, petitioner claims that a signed declaration by DEA Chemist Darrell D. Davis is evidence proving that methamphetamine is a third, separate isomer not a combination of D-methamphetamine and L-methamphetamine.¹⁵ First, Davis' Declaration, dated May 31, 1994, was utilized in a separate and wholly unrelated proceeding. Secondly, petitioner had ample opportunity to present evidence contradicting Fasanello's testimony at the evidentiary hearing, however, he failed to do so. Petitioner had the assistance of an expert throughout the evidentiary hearing and had the opportunity to present evidence contradicting Fasanello's testimony, but he failed to do so. The government, in contrast, presented credible testimony regarding the isomeric composition of methamphetamine. Accordingly, this court will not reopen the evidentiary hearing to include Davis' Declaration. Since the government has carried its burden of proof in support of the proposition that DL-methamphetamine contains D-methamphetamine, petitioner's adjusted base level offense will be fixed at 38.

punishment for the manufacturing of methamphetamine. The DeJulius Court recognized that the 1995 amendments deleted the distinction between D- and L- methamphetamine. Id. at 894. As a result, the Court of Appeals concluded that "[t]he distinction between D- and L- methamphetamine will only be relevant for those few defendants whose conduct occurred prior to the November 1, 1995 amendment and for whom the mandatory statutory minimum is not applicable." Id. at 894-95. While petitioner's conduct occurred prior to November 1, 1995, the mandatory statutory minimum is applicable to petitioner's conduct, and therefore, his base offense level will be fixed at 38. Accordingly, this court need not resort to the rule of lenity.

¹⁵ See Petitioner's Exceptions, Declaration of Darrell D. Davis, at Exh. B, p. 2.

b. Perjury charges

Petitioner claims that prosecution witnesses Fasanello and Kelly perjured themselves at trial and that Fasanello also perjured himself at the evidentiary hearing. Since petitioner did not raise the perjury issue at trial, at sentencing, on direct appeal, or at the evidentiary hearing, his claim is waived.¹⁶ In the alternative, even if petitioner did not waive his perjury claim, petitioner has still failed to demonstrate how the witnesses perjured themselves. Instead, petitioner makes unsubstantiated allegations concerning the testimony of Fasanello and Kelly.

1. Alleged Perjury of William Kelly

Petitioner claims that William Kelly committed perjury when he testified at trial that he produced 12-13 pounds of "pure" (actual) methamphetamine at two (2) 1988 methamphetamine cooks with petitioner. At the evidentiary hearing, the government presented DEA Chemist Fasanello who testified that it is "not uncommon for clandestine laboratory operators to feel that they've gotten, achieved this very high yield and in fact that excess weight is usually made up of moisture or more commonly methylamine

¹⁶ See United States v. Bieberfield, 957 F.2d 98, 104 (3d Cir. 1992) (finding failure to raise perjury claim at trial or on direct appeal in light of petitioner's knowledge and ability to act on perjury is fatal to § 2255 claim). Here, petitioner had the ability to act at trial, on direct appeal, and even at the evidentiary hearing, but he failed to do so. Even disregarding this procedural defect, petitioner failed to demonstrate a factual basis illustrating how the witnesses perjured themselves. Petitioner could have introduced testimony attempting to refute either Fasanello's or Kelly's testimony, but he did not. Therefore, petitioner waived his alleged perjury claims.

hydrochloride." Evidentiary Hearing, at 24. Consequently, it was reasonable for Kelly to believe that he produced 12-13 pounds of pure methamphetamine rather than a mixture containing 8.3 pounds of pure DL-methamphetamine hydrochloride and 3-4 pounds of methylamine hydrochloride. Accordingly, petitioner's allegation is baseless.

2. Alleged Perjury of Jack Fasanello

Petitioner also argues that Fasanello committed perjury at petitioner's original trial and evidentiary hearing regarding the prospective yield of pure methamphetamine producible from the chemicals discovered in Spotts' garage. Petitioner claims it is "inconceivable" that "120 pounds of methylamine hydrochloride, purity unknown could produce forty (40) pounds of pure methamphetamine." Petitioner's Exceptions, at 9. As a result, petitioner requests that this court attribute the allegedly false testimony to the government, vacate petitioner's sentence and reduce the base offense level by three (-3) for prosecutorial misconduct.

According to Fasanello, the 120 pounds of methylamine seized from Spotts' garage could produce approximately 40 pounds of actual (pure) DL-methamphetamine.¹⁷ The government maintains that

¹⁷ Fasanello testified that:

A gallon of the liquid [methylamine] would weigh in the area of 8 pounds. And so, each of the gas cans contained approximately a little more than 40 pounds of the methylamine solution. That would mean a total of 120 pounds of this methylamine solution. And the reaction, the aluminum reduction reaction, the maximum you would use would be a 3-to-1 ration. That is, if you had 1 pound of P2P,

Fasanello based his calculation on a theoretical yield supported by scientific literature. Gov't Response to Def. Exceptions, at 13. Moreover, the government contends that Fasanello did not assume a one-to-one ratio, which would have resulted in a theoretical yield of 120 pounds, but instead, he assumed that approximately two-thirds of the methylamine would be wasted. Id. Consequently, his estimate was a conservative figure.¹⁸ The Magistrate Judge found Fasanello's testimony compatible with caselaw and standard practice since certain chemical ingredients were absent from petitioner's possession. See Report, at 4-5. We agree with these determinations.

Petitioner also claims that the purity of the methylamine was unknown since it was never tested and, therefore, it is unreasonable to believe that petitioner could produce 40 pounds of pure methamphetamine. Fasanello testified that chemical companies sell methylamine as a 40% solution. Evidentiary Hearing, at 23. The court accepted the testimony that the 120 pounds of methylamine stored by petitioner in Spotts' garage was a 40% solution, and that

you would react it between 1 and 3 pounds of methylamine. And so for instance, you would end up with the equivalent of at least 40 pounds of methamphetamine from the three of them.

Gov't. Supp. App., at 370.

In response, U.S. Attorney Miller asked Fasanello whether Fasanello meant 40 pounds of pure methamphetamine. Id. Fasanello replied affirmatively. Id.

¹⁸ Fasanello also testified that it was "very possible" that 120 pounds of methylamine solution could result in more than 40 pounds of pure methamphetamine. Gov't. Supp. App., at 370.

Fasanello based his calculations on this 40% solution. Petitioner, however, proffered no support for his assertion to the contrary. Therefore, it is reasonable to believe, based on a theoretical yield, that petitioner could have produced approximately 40 pounds, if not more, of methamphetamine from the 120 pounds of 40% methylamine solution seized.

Finally, petitioner had ample opportunity at trial and at the evidentiary hearing to introduce evidence which would dispute the credibility and testimony of this government witness. Petitioner thoroughly cross-examined Fasanello and Kelly at trial. At the evidentiary hearing, petitioner cross-examined Fasanello, but he did not call any witnesses to dispute Fasanello's testimony. There is simply no credible evidence in the record and none was offered by petitioner to contradict either witnesses' testimony nor support petitioner's perjury allegations. Therefore, petitioner's Exception is denied.

5. Prosecutorial misconduct

Petitioner maintains that de novo review of his sentencing is appropriate because of the government's alleged prosecutorial misconduct. Petitioner claims that United States Attorney Barbara Miller misrepresented the legitimacy of Fasanello's and Kelly's testimony to the court at the evidentiary hearing and made the "misrepresentation that she was unaware this case did not involve 'pure methamphetamine' until United States v. Bogusz [citation omitted]." Petitioner's Exceptions, at 8. As a result, petitioner argues that his resentencing should be based on 10 kilograms of

methamphetamine rather than 42.41 kilograms that was used.

As previously stated, petitioner failed to provide sufficient evidence warranting a finding of perjury on the part of Fasanello or Kelly. Since petitioner failed to prove that either Fasanello or Kelly perjured themselves, logically, there is no avenue to impute knowledge of these false allegations to Attorney Miller.

Next, petitioner claims that Attorney Miller knew that petitioner's case did not involve pure methamphetamine prior to 1994. It appears, however, that petitioner extracted Attorney Miller's representations out of context.¹⁹ As a result, there are no indications of any impropriety on the government's part.

6. Calculating the Weight of Precursor Chemicals

¹⁹ At the evidentiary hearing, Attorney Miller noted that the court sentenced petitioner according to the pre-Bogusz legal standard. Attorney Miller's remarks merely explained the basis for recalculating petitioner's drug quantity. Attorney Miller stated:

When Mr. Amerman was sentenced in 1993, United States v. Bogusz had not been decided, and at that time pure methamphetamine of any form was assumed to be actual methamphetamine since 1993. Specifically, in 1994, United States v. Bogusz has set us straight on that, and has told us that only d-methamphetamine, pure d-methamphetamine qualifies as actual methamphetamine, and any substance containing it, including d,l-methamphetamine, qualifies as a mixture or substance containing methamphetamine. We are now corrected and that's why we are before you today, to set the record straight as to the fact that this large, large amount of substance did contain d-methamphetamine.

Evidentiary Hearing, at 49-50.

These remarks were merely explanatory and do not amount to a misrepresentation nor a "transparent falsehood" as claimed by petitioner.

Finally, petitioner claims that the Magistrate Judge erred when calculating the quantity of methamphetamine that petitioner could have produced from the precursor chemicals. During the original trial and sentencing, the court determined that petitioner could have produced 42.41 kilograms of methamphetamine. On appeal, the Court of Appeals affirmed the district court's decision.²⁰ At the evidentiary hearing, petitioner failed to call any witnesses to dispute this factual finding. Since petitioner failed to introduce any credible evidence in law or in fact to contradict this finding, petitioner's Exception is denied.

Next, petitioner argues that the presence of butanamine discovered in co-defendant Walker's home four (4) years after the 1988 cooks serves as evidence that petitioner, Walker, and Kelly never produced methamphetamine. Not only did petitioner fail to present sufficient evidence at the evidentiary hearing regarding the relevance of this assertion, but petitioner also failed to demonstrate any measurable or significant facts linking the 1988 cooks and the 1992 butanamine discovery. In fact, in petitioner's § 2255 motion, petitioner admitted that the butanamine found in Francis Walker's home in 1992 "had nothing to do with Amerman." Petitioner's § 2255 motion, at 4. Therefore, this claim is also rejected.

²⁰ United States v. Amerman, No. 93-147, at 6 (3d Cir. Nov. 17, 1993) (Doc. No. 108). In reviewing the district court's factual determination for clear error, the Third Circuit affirmed the decision and concluding that "Amerman intended to produce and was capable of producing at least forty pounds of methamphetamine." Id.

E. Conclusion

After a careful and independent review of the record, including the Exceptions filed by the petitioner and the objections and response filed by the government to the Magistrate Judge's Report, I am in accord with the Magistrate Judge's recommended disposition and deny petitioner's Motion to Vacate, Set Aside or Correct Sentence. The Exceptions filed by the petitioner to the Report and Recommendation are denied. The government's two objections to the Proposed Findings of Fact in the Report and Recommendation are approved. Accordingly, an appropriate order will be entered.

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

UNITED STATES OF AMERICA :
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 :
 v. : Criminal No. 92-498-02
 : Civil No. 96-8634
 :
 FRANK AMERMAN :

O R D E R

AND NOW, this day of OCTOBER, 1997, upon careful and independent consideration of petitioner Amerman's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255, and after

review of the government's response, the petitioner's response thereto, the Report and Recommendation of then Chief United States Magistrate Judge Richard A. Powers, III, the petitioner's Exceptions, and the government's response thereto, it is hereby

ORDERED that:

1. The Report and Recommendation is **PARTIALLY APPROVED** and **ADOPTED** with the government's objections to the Report's Findings of Fact incorporated.

2. The Motion to Vacate, Set Aside, or Correct Sentence is **DENIED**.

3. Defendant will be sentenced in accordance with base level 38 under the United States Sentencing Guidelines.

BY THE COURT:

JOSEPH L. McGLYNN, JR. J.