

The petition made two claims: first, that the government acted "arbitrarily" in charging conspiracy to distribute crack, rather than powder, cocaine, 21 U.S.C. § 846, def. mem. at 7; second, that his counsel was ineffective for failing to move for a downward departure under the Sentencing Guidelines § 5K2.0 - reduction for a mitigating circumstance not adequately considered by the Guidelines. Id. at 11.

Both claims are rejected. Claims of error in applying the Sentencing Guidelines ordinarily are barred if the issue was not presented to the sentencing judge. "A defendant who fails to object to errors at sentencing and subsequently attempts to raise them on direct appeal must demonstrate 'cause and prejudice' for that failure." United States v. Essig, 10 F.3d 968, 996-97 (3d Cir. 1993). As explained by our Court of Appeals:

Federal habeas review ... is barred unless [defendant] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice.

Flamer v. Delaware, 68 F.3d 736, 755 (3d Cir. 1995) (quoting Coleman v. Thompson, 501 U.S. 722, 724, 111 S. Ct. 2546, 2551, 115 L. Ed.2d 640 (1991)).

Here, there has not been such a showing. Until now, petitioner did not assert that his conduct - manufacture and sales of crack vials - was unrelated to the distribution of crack cocaine. Instead, he knowingly and voluntarily pleaded guilty to violating 21 U.S.C. § 846 - conspiracy to aid and abet the distribution of cocaine base through the sale of crack vials.

Furthermore, at sentencing, he did not object to the presentence report, which stated that he was liable for the distribution of 158,000 grams of crack cocaine based on distribution of 3,160,000 crack vials.³ He also did not raise this issue on direct appeal.⁴ Petitioner has not demonstrated cause for the procedural default or a fundamental injustice. See Essiq, 10 F.3d at 996-97.

Petitioner argues that the fact basis for his guilty pleas was defective because the government did not evidence a specific controlled substance - crack, as opposed to powder cocaine - in support of the drug distribution charges 21 U.S.C. § 846.⁵ He suggests that "cross-contamination" occurred in the government laboratory - and that the government used "one-sided" lab reports. Def. mem. at 4, 6-7. As noted, petitioner has not raised these arguments in relation to his guilty plea previously. In addition to his prior admission, it was reasonably foreseeable that vials would be used for crack, and in any event, petitioner has not

³ The government arrived at this figure by calculating that each crack vial could contain 1/20th of a gram of cocaine base. Govt. mem. at 4.

⁴ On direct appeal, petitioner challenged the denial of a downward departure under Guidelines § 2D1.1, Application Note 14, which permits a downward departure if the offense level based on the amount of controlled substance for which defendant is accountable overstates defendant's culpability. The Court of Appeals affirmed the denial of departure. United States v. Valery Sigal, 107 F.3d 864, 864 (3d Cir. 1997).

⁵ Petitioner concedes that his claim is not "selective prosecution" based on an impermissible factor such as race, religion, or exercise of a constitutional right. Def. mem. at 7.

produced any evidence of "cross contamination." The fact basis of petitioner's guilty plea was not defective.

As to the issue of constitutionally ineffective assistance of counsel -

[T]he defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed.2d 674 (1984), United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997) ("This two-part test [of Strickland v. Washington] is applicable to petitioners who challenge the effectiveness of counsel after the entry of a guilty plea.").

Petitioner bases his ineffectiveness argument on his counsel's not requesting a downward departure under Guidelines § 5K2.0. The factors that petitioner contends warranted a departure under § 5K2.0 include: a previously crime-free life; aberrant nature of criminal behavior; and extraordinary restitution. Def. mem. at 10-12, 14. Although these factors may support a downward departure in a given case, they would have been insufficient here. First, petitioner's "previously crime-free life" is part of the Guidelines' calculation of the appropriate criminal history category.⁶ Second, petitioner's conduct with respect to the

⁶ The presentence report calculated petitioner's
(continued...)

conspiracy cannot be said to have been "aberrant." Our Court of Appeals has described aberrant behavior - "a lack of planning ... a single act that is spontaneous and thoughtless, and no consideration is given to whether the defendant is a first-time offender." United States v. Marcello, 13 F.3d 752, 761 (3d Cir. 1994). Considering its extent and duration, petitioner's offense conduct cannot be characterized as "spontaneous and thoughtless."⁷ Third, petitioner's "restitution" argument refers to amounts forfeited under counts 27 and 42 of the indictment, and amounts required to be paid by him to the IRS in back taxes and penalties. These payments do not constitute restitution - and therefore could not qualify as "extraordinary restitution" not adequately considered by the Guidelines.

Accordingly, none of the presently raised factors, taken separately or in conjunction, would amount to a valid basis for a downward departure in this case.⁸ As a result, the failure of petitioner's counsel to assert them is not equatable with a

⁶(...continued)
criminal history points as zero and a criminal history category of I.

⁷ The offense conduct described in the presentence report covers a three-year period.

⁸ The petition also asserts that a "reduction in sentence" is warranted under § 5C1.2, the so-called "safety valve" provision. However, this section does not form the basis of a downward departure. Rather, it permits a sentence less than a mandatory minimum under certain circumstances not applicable here.

"deficient performance." Strickland, 466 U.S. at 687, Kauffman, 109 F.3d at 190.⁹

Even if his counsel's failure to request a downward departure under § 5K2.0 were, arguably, "deficient," petitioner has not shown a reasonable probability that "the result of the proceeding was fundamentally unfair or reliable." United States v. Washington, 1997 W.L. 327459 at *2 (referring to Strickland, 466 U.S. at 687). Petitioner's sentence cannot be deemed fundamentally unfair because his attorney failed to make a meritless argument in hopes of attaining a further departure. See United States v. Washington, 1997 W.L. 327459, *2 (E.D. Pa. 1997) ("Obviously a defendant cannot show that a proceeding was fundamentally unfair if the underlying claims the attorney failed to raise are meritless, because the outcome of the proceeding would not be different."). Moreover, all of the information as to petitioner's personal history were considered in granting him a considerable downward departure as permitted by the government's § 5K1.1 motion. At some downward departure point, other factors, such as just punishment, will prevent any further departure.

Edmund V. Ludwig, J.

⁹ In evaluating an ineffective assistance claim, an attorney is entitled to "substantial deference" with respect to judgments of strategy. United States v. Kauffman, 109 F.3d at 190. Here, it can be inferred that petitioner's counsel made a strategic judgment that it was not in petitioner's best interests to file a meritless downward departure motion.