

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

UNITED STATES OF AMERICA                   :     CIVIL ACTION  
  :     (Crim. A. No. 95-296-03)  
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  :  
CARNELL TURNER                             :     NO. 98-CV-5097

**MEMORANDUM & ORDER**

**J. M. KELLY, J.**

**FEBRUARY           , 1999**

Presently before the Court is Carnell Turner's ("Turner") Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence. In consideration of this motion, and the government's response thereto, the Court concludes Petitioner has failed to state any meritorious claim. The Court therefore denies Petitioner all of the relief he demands.

**EVIDENTIARY HEARING**

If a prisoner's § 2255 allegations raise an issue of material fact, the Court is required to hold an evidentiary hearing in order to make findings of fact and conclusions of law, unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. See Walker v. Johnson, 312 U.S. 275, 285 1941; United States v. Costanzo, 625 F.2d 465, 468 3d Cir. 1980. In exercising the discretion of whether to grant such a hearing, the court must accept the truth of the factual allegations, unless they are clearly frivolous on the face of the existing record. Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1980). The court must

decide whether the allegations are material using a two step inquiry. United States v. Essig, 10 F.3d 968, 976-77 (3d Cir. 1993). First, was a petitioner's failure to object a procedural waiver? Id. If there was not a procedural waiver, the court must determine if an error is alleged that is serious enough to permit collateral review under § 2255. Id. Since petitioner must meet both elements, if either element is not met, the Court may dismiss the petition. Review of Turner's petition demonstrates that there is no issue of material fact raised, therefor there is no need to hold a hearing on this motion.

#### **RELITIGATION PROHIBITED**

A prisoner may not use a § 2255 motion as a vehicle to relitigate an issue that has been raised on direct appeal. United States v. DeRwal, 10 F.3d 100, 105 n. 4 (3rd Cir. 1993). Many of the issues raised in Turner's § 2255 Motion were raised and rejected in his direct appeal of his conviction. Consequently, they are inappropriately raised here.

#### **PROCEDURAL DEFAULT**

An issue that could have been raised on direct appeal, but was not, is subject to procedural default. United States v. Frady, 456 U.S. 152, 162-67 (1982). Such claims are waived unless the prisoner can show either actual innocence or cause excusing the procedural default, and actual prejudice resulting from the error. Id. at 168.



## DISCUSSION

Turner alleges that the district court did not have jurisdiction to authorize the installation of a pole camera because the government lacked standing to move for the camera's installation. This issue was raised by one of Turner's co-defendants on a joint direct appeal, consequently it is improperly raised in his § 2255 motion. Because Turner uses this issue to attack the jurisdiction of the Court, the Court shall explain why Turner, in fact, does not have standing to raise this issue as framed in his § 2255 motion. Turner misconstrues the reason for the Government's Motion and implies, as has been argued by several of his co-defendants, that because the government made its request during its investigation, no case or controversy yet existed, and the Court could not find jurisdiction existed under either Federal Rule of Criminal Procedure 57(b) or the All Writs Act, 28 U.S.C. § 1651 (1994). In fact, the government was required to file the application for leave to install the pole camera only because the assistance of a third party was required. Cf. United States v. New York Telephone Co., 434 U.S. 159 (1977)(court may order utility to assist in setting up pen register if government reimburses cost). There is nothing about the installation of a surveillance camera in a public area that deviates from standard investigatory procedures such that a defendant's privacy interests are

implicated, requiring judicial scrutiny.

This argument also leads to the absurd result that no district court could ever entertain any pre-indictment or pre-information government request, presumably even for a search warrant, because the government would not have standing. Under the Petitioner's reasoning, the government would have to complete its investigation before it would have standing to request mechanisms, like pole cameras, to conduct a routine investigation of a target. To the contrary, it is beyond dispute that the government, even in the investigation stage, may request court approval for third party assistance in installing surveillance measures like the pole camera. Accordingly, the Court rejects Petitioner's second argument.

Petitioner next argues his counsel was ineffective at trial and on appeal, alleging a multitude of deficiencies. He claims his counsel failed to adequately investigate the facts of his case and possible defenses, but fails to state which facts his counsel failed to discover or which defenses his counsel failed to raise. He alleges his counsel was ineffective for not recognizing and arguing the jurisdictional issue of whether the government had standing to request the surveillance camera, but again fails to show why that argument has any merit. He finds his trial counsel did not spend enough time with him to understand the complexities of the case or learn enough to

impeach each cooperating co-defendant about his drug use, but ignores the fact that each co-defendant was cross-examined about his use of drugs. He claims his counsel failed to adequately consult with him, but fails to provide what information his counsel never shared with him. The Court finds all of these claims to be vague, unsupported, and without merit.

Turner argues his counsel failed to raise or preserve issues on direct appeal, specifically a "jurisdictional and constitutional" argument, that Congress acted unconstitutionally when it declined to equate the penalties for distributing crack cocaine and powder cocaine. Turner did not raise this issue on direct appeal and has not shown either actual innocence or cause. In addition, every court of appeals that has considered this argument has rejected it, under rational review, in consideration of Congress's reasons for providing a higher penalty for distributing crack cocaine: crack cocaine is more addictive, more available, and associated with more violence than powder cocaine. See, e.g., United States v. Hanna, 153 F.3d 1286, 1289 (11th Cir. 1998); United States v. Washington, 127 F.3d 510, 517 (6th Cir. 1997), cert. denied, 118 S. Ct. 2348 (1998); United States v. Burgos, 94 F.3d 849, 877 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 708 (1997); United States v. Teague, 93 F.3d 81, 85 (2d Cir. 1996), cert. denied, 117 S. Ct. 708 (1997); United States v. Carter, 91 F.3d 1196, 1198 (8th Cir. 1996); United

States v. Jackson, 84 F.3d 1154, 1161 (9th Cir.), cert. denied, 117 S. Ct. 445 (1996). The Court finds these courts of appeals' reasoning to be persuasive, and concludes the sentencing guideline is constitutional. Therefore, Bullock has also failed to show actual prejudice.

Petitioner also argues his counsel was ineffective because he failed to object to the government's use of cooperating witnesses, and demands that the Court exclude the testimony these witnesses provided. Turner also alleges prosecutorial misconduct, which the Court understands to relate to the testimony of the cooperating witnesses. In support of this claim, Petitioner relies upon the reasoning underlying United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), which the Tenth Circuit vacated pending rehearing en banc just nine days after it issued its opinion. The en banc Tenth Circuit has now rejected the panel decision. United States v. Singleton, No. 97-3178, 1999 WL 6469 (10th Cir. Jan. 8, 1999). In fact, no circuit has come even vaguely close to adopting its reasoning and the panel decision has been roundly criticized. See United States v. Eisenhardt, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998) ("the chances of either or both the Fourth Circuit and the Supreme Court reaching the same conclusion as the Singleton panel are . . . about the same as discovering that entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns").

Petitioner's claim, therefore, lacks any precedential support. The Court therefore concludes this basis for claiming ineffective assistance of counsel also is without merit.

Petitioner's penultimate ineffective assistance of counsel claim is that his counsel was deficient for not requesting a hearing to prove the substance he conspired to distribute was crack. Turner refers to this required hearing as a "James hearing," which is usually a reference to United States v. James, 576 F.2d 1121 (5th Cir. 1978), which requires a court to hold a pre-trial hearing to determine the existence of a conspiracy and a connection to each defendant as a prerequisite to the admissibility of co-conspirator statements. Specifically, Turner claims, on the authority of the Sentencing Guidelines, that the government did not prove the substance at issue was crack cocaine. A D.E.A. chemist did testify that cocaine base is a form of cocaine made by heating cocaine hydrochloride mixed with sodium bicarbonate or sodium carbonate, and that the street term for the cocaine base is "crack." (N.T. 2/14/96 at 90-91.) Petitioner also ignores the extensive testimony of his co-defendants, who each testified that he received crack. (See N.T. 2/15/96 at 110-13, 119-20 (testimony of Anthony Thomas); N.T. 2/15/96 at 168-71, 173, 176 (testimony of Troy Robinson). Further, Petitioner's argument lacks merit on a second ground: so long as sufficient proof exists that the substance at issue was crack cocaine,

testimony regarding the specific analysis of the substance, although preferred, is not required. United States v. Dent, 149 F.3d 180, 190 (3d Cir. 1998); United States v. Roman, 121 F.3d 136, 141 (3d Cir. 1997), cert. denied, 118 S. Ct. 722 (1998). Cf. United States v. Brooks, No. 97-1367, 1998 WL 785933, at \*8-\*9 (10th Cir. Nov. 12, 1998); United States v. Jones, No. 97-5222, 1998 WL 770238, at \*12 (6th Cir. Nov. 6, 1998); United States v. Brown, 156 F.3d 813, 816 (8th Cir. 1998); United States v. Taylor, 154 F.3d 675, 685 (7th Cir. 1998). Therefore, the Court finds, as it did at trial, that the government satisfied its burden of proof in this respect, and also finds that Petitioner has failed to state a valid ineffective assistance of counsel claim.

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  :     :  
  :     :  
WILLIAM L. TURNER                         :     NO. 98-CV-5023

**O R D E R**

AND NOW, this            day of February, 1999, in consideration of  
Petitioner's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside,  
Or Correct Sentence By A Person In Federal Custody, and the  
government's response thereto, it is ORDERED

1. The Motion To Vacate, Set Aside, Or Correct Sentence By  
A Person In Federal Custody (Doc. No. 645) is DENIED; and

2. No probable cause exists for a certificate of  
appealability.

BY THE COURT:

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JAMES MCGIRR KELLY