

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

DEREYK MORRIS :
 :
 v. : CIVIL ACTION
 : NO. 01-3400
 : (Crim. No. 94-111)
 UNITED STATES OF AMERICA :

MEMORANDUM ORDER

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Petitioner was indicted for armed carjacking, conspiracy to commit armed carjacking and using a firearm during and in relation to a crime of violence. Petitioner and a confederate seized an automobile at gunpoint on October 2, 1993. The two perpetrators forced the victim onto the back seat where petitioner's confederate held a gun to his back. Petitioner drove the vehicle to a park where he stopped. He ordered the victim out of the vehicle and onto the ground. Petitioner then shot the victim in the face. As the victim ran away, petitioner fired another shot which struck the victim's right thigh and a third shot which missed him. When the victim made his way to a public road, petitioner ran back to the vehicle and drove away. The victim later identified petitioner from an array of eight photographs as the person who shot him.

Petitioner pled guilty to the charges on May 23, 1994 pursuant to a written plea agreement. He received a three level reduction pursuant to U.S.S.G. §§ 3E1.1(a) & (b). With nine points, petitioner was placed in criminal history category IV. He was sentenced on October 16, 1995 to concurrent terms of 151 months and 60 months of imprisonment for the carjacking and conspiracy respectively, and to a mandatory consecutive term of 60 months of imprisonment for the firearms offense.

Petitioner contends that he should not have received two points each for two juvenile convictions because they were more than five years old. Without those points, petitioner would have been in criminal history category III with a sentencing exposure of 135 rather than 151 months. Petitioner claims that his counsel was ineffective in failing to challenge these points. He also asserts that his plea was not voluntary and knowing because he was not told that his criminal history category could be affected by the juvenile convictions. He does not, however, ask to withdraw the plea and face trial with greater sentencing exposure. Rather, the only relief requested to be resentenced at criminal history III.

Petitioner states that a motion to vacate or correct sentence pursuant to 28 U.S.C. § 2255 is inadequate or ineffective to test the legality of his detention. The reason he

gives is that his claim "is time barred under AEDPA."¹ A § 2255 motion is not inadequate or ineffective because a petitioner is foreclosed from filing such a motion for failure to satisfy procedural requirements including timeliness. See Wofford v. Scott, 177 F.3d 1236, 1245 (11th Cir. 1999); In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997). A petition under § 2241 is not a supplemental remedy to § 2255 and does not provide an escape hatch for prisoners who fail timely to present a claim under § 2255. See Longbehn v. U.S., 169 F.3d 1082, 1083 (7th Cir. 1999); Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996). To hold otherwise would completely undermine the AEDPA limitations period and thwart the thrust of Congress in imposing it.

Insofar as the petition is treated as one under § 2241, petitioner has not demonstrated that § 2255 is inadequate or ineffective. It would also be filed in the wrong court. A § 2241 petition must be filed in the district where the petitioner is confined. See id. Petitioner is confined in Colorado. Insofar as the petition is treated as one under § 2255, it is time barred. It also lacks merit.

¹Petitioner filed a motion to vacate, set aside or correct sentence pursuant to § 2255 which he then voluntarily withdrew to file a more considered petition. The initial motion was filed on July 6, 2001, also well past the one year limitation period.

The two juvenile convictions which petitioner challenges were in fact incurred less than five years before his commission of the carjacking, conspiracy and firearms offenses. This is also beside the point. What is pertinent is that he was confined for more than sixty days on each conviction and was released from confinement less than five years before committing the federal offenses. See U.S.S.G. § 4A1.2(d)(2)(A). The probation officer properly assigned two criminal history points for each of these convictions and defense counsel was not professionally deficient for declining to challenge the PSR in this regard.

Petitioner acknowledged under oath at his plea colloquy that he understood the maximum sentences provided for the offenses to which he was pleading guilty and that the firearms offense carried a mandatory consecutive sentence of five years.² A court is not required to inform a defendant at a plea proceeding about the various factors involved in the calculation of a guideline sentence within the maximum provided by law. See U.S. v. Puckett, 1092, 1099 (4th Cir. 1995); U.S. v. White, 912 F.2d 754, 756 (5th Cir.), cert. denied, 498 U.S. 989 (1990); U.S. v. Thomas, 894 F.2d 996, 997 (8th Cir.), cert. denied, 495 U.S. 909 (1990); U.S. v. Fernandez, 877 F.2d 1138, 1143 (2d Cir.

²Petitioner also acknowledged in writing that he understood that his guideline sentence would ultimately be based on pertinent determinations to be made by the court.

1989). Indeed, given the variables that may affect the calculation of a sentence, it is a "safer practice" to avoid discussion of potential guideline sentences during a plea colloquy. U.S. v. Good, 25 F.3d 218, 223 (4th Cir. 1994).³

ACCORDINGLY, this day of August, 2001, **IT IS HEREBY ORDERED** that petitioner's petition for a writ of habeas corpus is **DENIED** and the above action is **DISMISSED**. A certificate of appealability is not issued.

BY THE COURT:

JAY C. WALDMAN, J.

³Petitioner has not averred that if he knew he ultimately faced a guideline sentence of 151 months as opposed to 135 months, he would have elected to proceed to trial. Given the case against him, this would have been a dubious and most improbable course. Rather, petitioner suggests that even if the questioned juvenile convictions were properly counted, he should be resentenced as if they were not because he was not specifically informed that they could be.