

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

UNITED STATES )  
Respondent ) Criminal Action No. 97-294-1  
 )  
v. )  
 ) Civil Action No. 01-486  
DONALD RISHELL, )  
Petitioner )

MEMORANDUM

Padova, J.

December , 2001

Before the Court is Donald Rishell's pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255 ("Petition"). For the reasons that follow, the Court denies the Petition in all respects.

**I. Background**

On February 25, 1998, pursuant to a written plea agreement, Petitioner Donald Rishell pled guilty to two counts of wire fraud, two counts of mail fraud, and one count of tax evasion.<sup>1</sup> On December 17, 1998, the date scheduled for sentencing, Petitioner informed the Court that he wanted to withdraw his guilty plea and that he was dissatisfied with counsel. On January 22 and 23, 1999, the Court conducted a hearing to consider the motion to withdraw

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<sup>1</sup>The twenty-seven count second superseding indictment charged Petitioner with 19 counts of wire fraud, four counts of mail fraud, two counts of making false statements to a financial institution, one count of failure to file federal income taxes, and one count of tax evasion. (2d Superseding Indictment.)

the guilty plea. Based on findings made during the hearing, the Court denied the motion. On January 28, 1999, the Court sentenced Petitioner to 38 months incarceration, a \$118,160 fine, three years supervised release, and a \$250 special assessment. Petitioner filed a timely notice of appeal. On October 26, 1999, in an unpublished opinion, the United States Court of Appeals for the Third Circuit affirmed the sentence and the district court's denial of Petitioner's motion to withdraw his guilty plea.

The instant Petition brings the following six grounds for relief<sup>2</sup>:

1. Conviction obtained by Plea of Guilty . . . was unlawfully induced and not made voluntarily or with the understanding of the nature of the charges and consequences of the plea.
2. Conviction obtained by denial of effective assistance of counsel for various errors, including failure to read indictments, failure to discover/use new evidence, etc.
3. Conviction obtained with use of false evidence and gross misconduct by the government.
4. Conviction obtained by the use of false and perjured testimony in 302 statements, grand jury testimony and court testimony.
5. Conviction obtained as a result of errors, abuse of discretion and bias by Judge Padova.
6. Any other grounds set forth in the motion entitling Petitioner to relief.

## **II. Legal Standard**

Section 2255 of Title 28 of the United States Code provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be

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<sup>2</sup>Petitioner twice sought to amend the Petition. Leave to amend was granted on both occasions. Accordingly, the Court has considered all of the asserted grounds as amended.

released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C.A. § 2255 (West Supp. 2001).

Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors. United States v. White, Civ.Act.95-2822, 1995 U.S. Dist. LEXIS 8503, at \*3 (E.D. Pa. June 20, 1995). To prevail on a motion under 28 U.S.C. § 2255, the movant's claimed errors of law must be constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962). Even an error that may justify a reversal on direct appeal will not necessarily sustain a collateral attack. See United States v. Addonizio, 442 U.S. 178, 184-85 (1979). A § 2255 motion simply is not a substitute for a direct appeal. See United States v. Frady, 456 U.S. 152, 165 (1982). A district court has the discretion to summarily dismiss a motion brought under § 2255 in cases where the motion, files, and records "show conclusively that the movant is not entitled to relief." United States v. Nahodil, 36 F.3d 323, 325 (3d Cir. 1994) (citing United States v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992)).

### III. Discussion

#### A. Ground I: Plea of Guilty was not voluntary and knowing

Petitioner first claims that his guilty plea was not voluntary and knowing. A petitioner who seeks habeas corpus relief from a guilty plea takes on a heavy burden. Indeed, "it is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." Mabry v. Johnson, 467 U.S. 504, 508 (1984). In this case, a thorough review of the transcript of Petitioner's change of plea hearing, together with a review of the guilty plea agreement he signed, leaves no doubt that he cannot carry the burden of demonstrating that his plea was invalid because it was voluntary and knowing.<sup>3</sup> See United States v. Byrd, Crim. No. 91-609-2, 1994 U.S. Dist. LEXIS 195, at \*3 (E.D. Pa. Jan. 12, 1994).

The extensive change of plea colloquy reveals that the guilty plea was voluntary and knowing. The Court first advised Petitioner that he was subject to the penalties of perjury. (N.T. 2/25/98 at 3.) Petitioner responded affirmatively to the Court's question

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<sup>3</sup>In this case, disposition without conducting an evidentiary hearing is appropriate. The decision whether to hold an evidentiary hearing on a habeas corpus petition is within the discretion of the trial Court, which must first determine whether the files and records of the case conclusively show that the petitioner is entitled to no relief. See, e.g., Day, 969 F.2d at 41-42; United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989). The files and records of this case make clear that Petitioner is not entitled to relief.

that nobody had instructed or suggested that he respond untruthfully to any of the Court's questions. (Id. at 4.) Petitioner indicated he had ample opportunity to discuss his case with his attorney to his satisfaction. (Id. at 5.) Petitioner told the Court he was satisfied with his representation by Mr. Kelly. (Id.) The Court listed the charges contained in the Second Superseding Indictment, to which Petitioner responded affirmatively. (Id.)

Petitioner told the Court he entered into a plea agreement with the Government. (Id. at 5-6). Petitioner said he signed the agreement, and verified that it was his signature on the document. (Id. at 15.) Petitioner agreed that nobody had made any threat or promise or assurance other than what was set forth in the plea agreement in order to induce him to plead guilty. (Id. at 15-16.) Petitioner said he understood that by pleading guilty he was giving up his right to challenge the Second Superseding Indictment and the grand jury proceedings. (Id. at 16.) The Court detailed the rights that Petitioner was giving up by pleading guilty, all to which the Petitioner said he understood. (Id. at 15-20.)

Defense counsel represented that the Petitioner had read the Government's trial memorandum.<sup>4</sup> (N.T. 2/25/98 at 23.) Counsel

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<sup>4</sup>Mr. Kelly informed the Court as follows: "If your Honor please, Mr. Rishell and I have both read the Government's trial memorandum, trial brief, and as Your Honor just directed Government counsel to get to the essential points." (N.T. 2/25/98 at 162.)

summarized the evidence against the Petitioner with respect to the counts to which Petitioner was pleading guilty. (Id. at 24-29.) In response to whether Petitioner agreed with the statement of the facts, Petitioner responded, "The way it's written, yes, sir." (Id. at 29.) The Court then held a lengthy dialogue with the Petitioner and counsel to ascertain that there was a factual basis for the guilty plea. (Id. at 29-39.) Petitioner acknowledged that he made false representations to persons involved in the Counts to which he was pleading, as part of the scheme alleged. (Id. at 39.)

Notwithstanding the exchanges at the change of plea colloquy, Petitioner presents a number of specific bases for challenging the voluntariness of the plea. Petitioner's principal arguments are that: he did not understand that he could not withdraw his plea at a later time; he did not understand that he could still be charged with additional related crimes after entering his plea; the second superseding indictment contained counts that were not in the original indictment; the Government failed to turn over Jencks Act and Brady material to the Petitioner; the guilty plea was based on the Assistant United States Attorney's ("AUSA's") trial brief, which contained false information and which Petitioner and Petitioner's counsel never read; and the evidence did not support a finding of an intent to defraud. Petitioner also claims numerous instances of ineffective assistance of counsel, including material

misrepresentations made by his attorneys, as well as prosecutorial misconduct, perjury by witnesses, and judicial bias.<sup>5</sup>

In large part, Ground 1 of the Petition sets forth the same bases for relief that were previously presented by Petitioner in the context of his original motion to withdraw his guilty plea. Each of these claims was rejected.<sup>6</sup> Examining these previously

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<sup>5</sup>Petitioner also presents these claims in grounds 2-6 of the Petition. The Court will consider those allegations in fuller detail in its discussion of these separate grounds, below.

<sup>6</sup>Once accepted, a guilty plea may not automatically be withdrawn at the defendant's whim. See United States v. Martinez, 785 F.2d 111, 113 (3d Cir. 1986). Rather, a defendant must have a fair and just reason for withdrawing a plea of guilty. See Fed. R. Crim. P. 32(e). The courts examine three factors to evaluate a motion to withdraw: (1) whether the defendant asserts her innocence; (2) whether the government would be prejudiced by the withdrawal; and (3) the strength of the defendant's reason to withdraw the plea. United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001) (citing United States v. Huff, 873 F.2d 709, 711 (3d Cir. 1989)). "A shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to impose on the government the expense, difficulty, and risk of trying a defendant who has already acknowledged his guilt by pleading guilty." United States v. Jones, 979 F.2d 317, 318 (3d Cir. 1992), superseded by statute on other grounds as stated in United States v. Roberson, 194 F.3d 408, 417 (3d Cir. 1999).

Petitioner's original motion touched upon numerous alleged defects in his representation, the Government's conduct, and the plea colloquy itself. Petitioner's principal reasons for withdrawing his plea were that he did not understand that he could not withdraw it at any time, he did not understand that the Government could still bring further charges against him, that his untruthful answers at the guilty plea colloquy were "taken care of" by the sidebar conference, that the government acted in bad faith, and that he was not represented by the attorney of his choice at the time he entered his plea. (N.T. 1/22/99 at 194-95.) The Court rejected all of Petitioner's arguments for withdrawal of the plea based on the evidence presented at the hearing on the motion to withdraw and the plea colloquy. (Id. at 195-99.)

addressed claims, the Court determines that Petitioner presents no new argument or evidence that would result in the provision of relief under § 2255.

The Court further determines that with respect to all newly alleged faults that were not previously raised before the Court, summary denial is appropriate on the basis of the existing record. The principal new claims are that the Government failed to turn over Jencks Act and Brady material. With respect to the Jencks Act claim, there could have been no violation by the Government because the Government is not required to turn over such material until after direct examination of the particular witness. 18 U.S.C. § 3500(a)-(b) (1994). As Petitioner entered into a guilty plea, the disclosure requirement was never triggered.

The record is similarly clear with respect to Petitioner's Brady claim. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. Evidence is favorable to an accused under Brady "'if it would tend to exculpate him or reduce the penalty . . . .'" Id. at 87-88. The prosecution must also disclose evidence relevant to the credibility

of crucial prosecution witnesses.<sup>7</sup> See Giglio v. United States, 405 U.S. 150, 153 (1972). Petitioner cites various documents which he describes as "very damaging." Even assuming, however, that the evidence cited by Petitioner was in fact exculpatory, Petitioner's own interpretation of the events relating to his access to the documents reveals that the Government did not withhold any documents from his attorneys. Petitioner notes, for example, that he got documents from his attorneys, including a "very important box" which he received from Mr. Kelly, his attorney at the time of his plea of guilty, four days after the deadline for filing his motion to withdraw his plea. (Reply at 20.) Petitioner also claims that he knew of the existence of documents containing exculpatory information, but was not able to get his hands on them until after making repeated requests to subsequent counsel and the Clerk of Court<sup>8</sup> after learning that his direct appeal was denied. (Reply at 20.) As it is clear from the record that the Government

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<sup>7</sup>It is not clear, however, that the Government is required to turn over Brady material prior to the entrance of a guilty plea. The Third Circuit has not yet decided this issue. United States v. Brown, 250 F.3d at 815 (declining to decide issue because it was clear that the material at issue was not Brady material, comparing United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (Brady applies in guilty plea context), and Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (same), with Matthew v. Johnson, 201 F.3d 353, 360-62 (5th Cir. 2000) (suggesting that Brady may not apply)). The Court assumes, for purposes of this Petition, that there is such a requirement.

<sup>8</sup>As the Clerk of Court would not be in possession of Brady materials, Petitioner must have obtained the documents from his attorneys.

did not improperly withhold any documents it may have been required to disclose, Petitioner's Brady claim affords no relief.

Finally, Petitioner attacks the voluntariness and intelligence of his plea based on instances of misrepresentations, prosecutorial misconduct, ineffectiveness of counsel, and judicial error. The Court will discuss many of these allegations separately in the context of the separate grounds for relief raised by the Petitioner. The Court notes here, however, that Petitioner's plea colloquy, the hearing on Petitioner's motion to withdraw his plea, and the remainder of the record make clear that summary denial of each of these alleged faults as they relate to the voluntariness and intelligence of his plea is warranted. None of Petitioner's arguments or bald assertions of error demonstrates that the plea was involuntary or unknowing on the bases of any of these alleged defects. Ground 1 of the Petition is denied.

B. Ground 2: Plea Invalid because of ineffective assistance of counsel

Petitioner next claims that his plea was invalid as a result of numerous instances of ineffective assistance of counsel. Many of the ineffectiveness allegations here were previously raised by Petitioner in the context of his motion to withdraw his plea. However, Petitioner also raises some new ineffectiveness allegations that have not previously been addressed by the Court.<sup>9</sup>

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<sup>9</sup>The Court may properly consider ineffective assistance of counsel claims raised for the first time under § 2255. See

The Court will consider all of Petitioner's ineffective assistance claims on the merits.

Here, Petitioner claims that his plea was invalid by virtue of ineffective assistance of counsel. Claims of ineffective assistance of counsel are governed by the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). In order to obtain a reversal of a conviction on the ground that counsel was ineffective, the petitioner must establish: (1) that counsel's performance fell well below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceeding. Id. at 687. Counsel is presumed effective, and petitioner must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 686-89. Strickland imposes a "highly demanding" standard upon a petitioner to prove the "gross incompetence" of his counsel. Kimmelman v. Morrison, 477 U.S. 365, 382 (1986); Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir.), cert. denied, 527 U.S. 1050 (1999) ("Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, we have cautioned that it is

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Nahodil, 36 F.3d at 326; United States v. DeRewal, 10 F.3d 100, 103-04 (3d Cir. 1993). A petitioner generally need not show cause and prejudice for failing to raise an ineffective assistance claim on direct review. United States v. Garth, 188 F.3d 99, 107 (3d Cir. 1999).

'only the rare claim of ineffectiveness that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'" ) The voluntariness of a plea in the context of ineffective assistance of counsel depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citing McMann v. Richardson, 397 U.S. 759, 771 (1970)). To show constitutionally deficient performance, the defendant must overcome a strong judicial presumption that "counsel's conduct falls within the wide range of reasonable professional assistance" and "'might be considered sound trial strategy [under the circumstances].'" Strickland, 466 U.S. at 689.

Prejudice requires proof "that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. In the context of a challenge to the voluntariness of a guilty plea, "[p]rejudice results from ineffective assistance of counsel . . . if there was a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but instead would have insisted on proceeding to trial." Nahodil, 36 F.3d 323, 327 (citing Hill, 474 U.S. at 59).

Petitioner alleges a wide range of faults with the performance of counsel that led to his conviction. Petitioner claims

ineffective assistance of counsel with respect to Paula Patrick, Michael Kelly, Harold Jacobi, III, Jack Briscoe, and David Assad, Jr. These allegations of ineffective assistance of counsel range the entire length of his criminal case, from arraignment through his guilty plea, through sentencing. Because Petitioner's conviction was obtained by virtue of his plea of guilty, the Court's attention necessarily focuses on those alleged deficiencies that bear a relationship to the plea. The Court will consider each of the claims in turn.

1. Paula Patrick<sup>10</sup>

Petitioner first claims that Paula Patrick was ineffective because she did not read either of the first two indictments and the second superseding indictment greatly increased the charges from the first two indictments, and that she failed to challenge the second superseding indictment for "greatly increas[ing] the charges in the previous two indictments." (Am. Pet. at ¶ B.) Petitioner essentially argues that the new counts in the second superseding indictment were barred by the statute of limitations. Specifically, the original indictment contained only the mail and wire fraud counts, but did not include the tax evasion count (26 U.S.C. § 7201) and failure to file a federal income tax return count (26 U.S.C. § 7203) in the second superseding indictment. At

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<sup>10</sup>Ms. Patrick represented Petitioner at the time of his initial entry of a plea of "not guilty." Her representation terminated on January 28, 1998.

the time of Petitioner's not guilty plea, the Government informed the Court that the changes in the second superseding indictment were largely technical and did not substantially broaden or amend the original charges.<sup>11</sup> In any case, the charge of tax evasion is governed by a six-year statute of limitations, and as the specific conduct contained in the count took place in 1992, the statutory limitations period had not yet run. See 26 U.S.C.A. § 6531 (West 2001). Therefore, counsel could not have brought a meritorious statute of limitations claim with respect to the new counts.<sup>12</sup> Counsel cannot be ineffective for failing to bring a non-meritorious motion. Mahony v. Vaughn, Civ.Act.No.00-606, 2001 U.S. Dist. LEXIS 428, at \*6 (E.D. Pa. Jan. 19, 2001).

Moreover, even assuming that Petitioner could establish that Ms. Patrick failed to read both of the indictments and that her performance fell below an objective standard of reasonableness, he cannot show that but for her error, he would not have pled guilty.

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<sup>11</sup>"A superseding indictment brought after the statute of limitation has expired is valid so long as the original indictment is still pending and was timely and the superseding indictment does not broaden or substantially amend the original charges." United States v. Ratcliff, 2001 WL 289885 (11th Cir. Mar. 26, 2001) (quoting United States v. Italiano, 894 F.2d 1280, 1282 (11th Cir. 1990)).

The Court need not determine whether the superseding indictment broadened or substantially amended the original charges as Petitioner contends, because the statute of limitations period had not yet expired.

<sup>12</sup>Nor had the statutory period of 5 years for mail and wire fraud run at the time of the second superseding indictment.

Petitioner originally pled not guilty to the second superseding indictment on September 5, 1997, while Ms. Patrick still represented him. Ms. Patrick no longer represented Petitioner when he subsequently changed his plea to guilty as to certain counts of the second superseding indictment. At the change of plea hearing, Petitioner told the Court that he understood which charges were contained in the second superseding indictment, and further that he understood the counts to which he was pleading. (N.T. 2/25/98 at 142-45; 154-59.) Petitioner pled guilty to the count of tax evasion. Accordingly, Petitioner's claims of ineffectiveness as to Ms. Patrick are denied.

2. Michael Kelly<sup>13</sup>

Petitioner alleges numerous errors by Mr. Kelly. These include: (1) failing to file any motions or conducting any investigation; (2) lying about whether Petitioner read the Government's Trial Memorandum prior to the change of plea hearing; (3) conflict of interest; (4) failing to be prepared for trial; (5) failing to file objections to the Presentence Report; (6) waiving attorney-client privilege by testifying at Petitioner's hearing to withdraw plea; (7) failing to attend proffer sessions with the

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<sup>13</sup>Mr. Kelly, of the Defenders' Association of Philadelphia, represented Petitioner at the time of his entry of a guilty plea, on February 25, 1998. The Defenders' Association withdrew representation on December 30, 1998.

government; and (8) failing to obtain computer disks from the government.

It is clear from the record in this case that Petitioner is not entitled to relief on the basis of his ineffectiveness allegations, because it is clear from the record that counsel was not ineffective in the ways alleged by Petitioner. Petitioner's bald assertions as to various misrepresentations made by counsel and the unpreparedness of counsel are unsupported in the record. Petitioner's first four allegations, for example, are all directly contradicted by the record, which includes testimony by Mr. Kelly, as well as the actual plea colloquy. This evidence includes testimony by Mr. Kelly as to the extensive preparation he engaged in, including spending more than 100 hours reviewing evidence and lengthy meetings with Petitioner. (N.T. 1/12/99 at 146-51, 176, 179-81; N.T. 1/22/99 at 8-15.) Mr. Kelly also testified that he was prepared for trial, and that he spent about two-thirds of his time prior to the trial date working on Petitioner's case. (N.T. 1/12/99 at 146-51, 176, 179-81; N.T. 1/22/99 at 15.) By February 10, 1998, he was prepared for trial. (N.T. 1/22/99 at 23.) He also testified that his father's illness did not interfere with his preparation of the case. (N.T. 1/12/99 at 143-44; N.T. 1/22/99 at 62.) At the hearing on Petitioner's motion to withdraw his plea,

the Court concluded that Kelly was "credible", and that Petitioner had committed perjury.<sup>14</sup> (N.T. 1/22/99 at 195-96.)

Petitioner's own statements during the plea colloquy also indicate that counsel was not ineffective in the ways now alleged. The government proffered the facts of its case, and the Court held an extensive colloquy with the Petitioner to determine if there was a sufficient basis for the plea. Petitioner acknowledged that those facts were correct and were sufficient to prove him guilty of the counts to which he was pleading, including fraud and tax evasion. More specifically, he agreed to the correctness of the facts he now claims to be false. He was also advised of the essential elements of each crime and the necessity of proof beyond a reasonable doubt. Petitioner stated that he understood the criminal charges, that it was his decision to plead guilty.

Furthermore, the Court concludes there is no basis for Petitioner's allegations of ineffectiveness for failure to perform particular tasks, including failing to file objections to the pre-

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<sup>14</sup>At sentencing, this Court recited several specific instances in which Petitioner committed perjury before the Court, relating both to his guilty plea and to specific facts. (N.T. 1/28/99 at 21-23.) Specifically, the Court found that Petitioner lied "when he testified that he had no idea that the Government would and could prosecute him for additional charges involving advance fee schemes that were not included in the second superseding indictment"; "that he did not know or agree to have any additional charges brought after the guilty plea"; "in his testimony concerning the First Atlanta check which had been fraudulently created"; and "in his testimony that he had not shown that check to Ms. Ellis as a device to mislead Mrs. Ellis to give him the additional \$10,000 in January of 1993." (Id.)

sentence investigation report<sup>15</sup>, failing to move to dismiss the second superseding indictment because of statute of limitations problems<sup>16</sup>, failing to appear at several proffer sessions with the government<sup>17</sup>, breaching attorney-client privilege by testifying at

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<sup>15</sup>Any failures with respect to objections to the pre-sentence investigation report would have no relevance or bearing as to the validity of the guilty plea, because Petitioner would not be able to establish that, absent the failure to object to portions of the PSI, he would not have pled guilty. However, to the extent Petitioner may set forth an ineffectiveness claim with respect to the imposition of his sentence, he has failed to set forth any meritorious bases for objecting to the pre-sentence investigation report. The strongest potential basis Petitioner might have with respect to the sentencing relates to his income and ability to pay a fine and restitution. However, the Court specifically addressed this issue at the sentencing hearing, in light of Petitioner's attempts to argue that he could not pay a fine, and dismissed those contentions.

<sup>16</sup>As discussed above with respect to Ms. Patrick, the statutory period had not yet run with respect to the tax evasion or the mail/wire fraud counts, and so a motion to dismiss on the basis of statute of limitations problems would not have been meritorious. Counsel cannot be deemed ineffective for failing to file a motion that would not have been meritorious.

<sup>17</sup>Mr. Kelly attended the first two of eleven proffer sessions held between the Petitioner and the Government. The purpose of the proffer sessions was to give the opportunity for the Petitioner to cooperate such that the Government might file a motion for downward departure pursuant to U.S.S.G. § 5K1.1. During the third interview, Petitioner agreed to be interviewed without the presence of counsel, with the understanding that he could stop the interview at any time if he wished to consult with Mr. Kelly. (Govt. Resp. at 60 (citing Memo. 105)). Petitioner said he "proceeded [to be interviewed] because he had nothing to hide." (Id.) Petitioner was given a standard proffer letter, which he and Mr. Kelly both signed, that stated that nothing he said could be used against him at a trial in the government's case-in-chief. Although Petitioner claims that he later became "uncomfortable with the questioning," he never stopped the session or requested to speak with his lawyer. (Id.)

the hearing<sup>18</sup>, and failing to obtain computer disks from the government.<sup>19</sup> Moreover, even assuming that counsel's performance was deficient in the ways alleged, Petitioner cannot establish that he was prejudiced by this performance. Petitioner does not explain how any of these alleged failures relate to his plea of guilty, and nothing in the record suggests that Petitioner would not have pled guilty but for his counsel's now allegedly deficient performance, particularly in light of declarations made during his guilty plea colloquy. See Blackledge v. Allison, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."). The Court concludes that it is clear on this record

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<sup>18</sup>Counsel's testimony took place at the hearing to withdraw the plea, after counsel had terminated his representation of Petitioner. Therefore, the testimony did not lead to the plea of guilty. However, to the extent that attorney-client privilege might otherwise have barred Mr. Kelly's testimony, the Petitioner waived this protection by claiming ineffective assistance as one of the bases for withdrawing his plea. See Tasby v. United States, 504 F.2d 332, 335 (8th Cir. 1974).

<sup>19</sup>Petitioner claims that Mr. Kelly failed to obtain the disks, which contained information critical to his defense. However, the Government informed counsel that it had informed Petitioner that the disks were available to be returned. (N.T. 12/17/98 at 41-42.) Mr. Kelly testified that he told Petitioner he could have a defense investigator pick up the disks. He noted that, "It was never, ever suggested by Mr. Rishell that those disks were needed for his defense, either for trial, for plea, for sentencing or anything . . . We had boxes of discovery. It's my understanding Mr. Rishell wanted them because they were simply his property." (N.T. 12/17/98 at 43.) Petitioner has not established that the information on these disks was critical, and certainly has not established that by failing to obtain the disks, particularly when counsel had made clear to Petitioner that they were available, counsel had acted in a manner that fell below the objectively reasonable standard so as to be ineffective.

that there is no basis for any of Petitioner's claims of ineffective assistance with respect to Mr. Kelly's representation.

3. Harold Jacoby<sup>20</sup>

Petitioner next alleges that Harold Jacoby was ineffective because he had a conflict of interest. Mr. Jacoby, however, never entered his appearance in the case at any time, and there is no evidence to suggest that Mr. Jacoby ever gave any advice to Petitioner. Petitioner previously alleged this same ineffectiveness in the context of his motion to withdraw his guilty plea, and this Court determined that there was no basis to determine that there was any such conflict, in the context of Petitioner's guilty plea. On appeal, the Court of Appeals for the Third Circuit rejected Petitioner's argument regarding such ineffectiveness, noting:

Rishell concedes that Mr. Jacobi never even entered an appearance for him in the case. In addition, Mr. Kelly - who was Rishell's counsel of record at all times pertinent to Rishell's submission of the guilty plea - testified that he was not aware of any advice being given to Rishell by Mr. Jacobi. Based on the testimony of Mr. Kelly and on the fact that Mr. Jacobi never entered an appearance for Rishell, the Judge did not err in denying Rishell's motion to withdraw his guilty plea.

United States v. Rishell, No. 99-1204, Mem. at 6 (3d Cir. Sept. 30, 1999). The record clearly reflects that there is no basis for an ineffectiveness claim as to Mr. Jacoby. This claim is denied.

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<sup>20</sup>Mr. Jacobi never entered an appearance for Petitioner.

#### 4. Other Claims of Ineffective Assistance

Finally Petitioner also asserts that Jack Briscoe and David Assad, Jr.<sup>21</sup> were ineffective in their capacities as appellate counsel because they failed to preserve certain claims on direct appeal. The Court will discuss this claim under its discussion of Ground 6, as the claim is brought more directly under that ground.

##### C. Grounds 3 and 4: prosecutorial misconduct and use of perjured testimony

Petitioner next claims that the guilty plea was obtained through the use of false evidence, gross misconduct by the government, and false and perjured testimony in court and the grand jury. These include specific allegations that the AUSA lied in Court and that the AUSA suborned perjury. These claims were not previously raised at sentencing or on direct appeal.

When a habeas petitioner fails to present his claims at sentencing or on direct appeal, such claims are procedurally barred from collateral review under § 2255 unless petitioner can demonstrate "cause" excusing the procedural default and "actual prejudice" resulting from the errors of which he complains. See Frady, 456 U.S. at 167-68 (requiring cause and prejudice for collateral relief based on trial errors to which no contemporaneous objection was made nor raised on direct appeal); United States v. Essig, 10 F.3d 968, 976-79 (3d Cir. 1993) (holding that cause and

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<sup>21</sup>Mr. Briscoe and Mr. Assad entered their appearances as defense counsel on December 23, 1998.

prejudice test applies to § 2255 proceedings in which a petitioner seeks relief from alleged sentencing errors not directly appealed). Cause for the procedural default must be an occurrence beyond a petitioner's control that cannot be fairly attributed to him. See McCleskey v. Zant, 499 U.S. 467, 493 (1991) ("In procedural default cases, the cause standard requires petitioner to show ... 'some objective factor external to the defense.'"). Additionally, prejudice must be substantial, such that the integrity of the entire proceeding is infected. See Frady, 456 U.S. at 169-70. When a claim has been waived and petitioner fails to show cause and actual prejudice, the claim must be dismissed without any consideration of the merits. Frady, 456 U.S. at 165-68.

Petitioner has failed to set forth cause or prejudice, either through argument or through evidence, sufficient to allow this Court to consider the claim on its merits. The record clearly does not support these allegations. Having failed to establish cause and prejudice, the Petitioner's grounds 3 and 4 are considered waived for purposes of habeas review, and dismissed.

The Court notes that Petitioner's claims here overlap at least in part with those contained in his first ground for relief attacking the voluntariness of his plea.<sup>22</sup> Insofar as there are any misconduct allegations raised here that may be considered by the

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<sup>22</sup>In light of this Court's obligation to construe pro se submissions liberally, the Court has examined the Petition for all potential grounds for relief.

Court as they relate to the voluntariness of the plea, the Court concludes there is no basis for relief. Petitioner's allegations are nothing more than baseless allegations that are completely unsupported by the clear record.<sup>23</sup>

E. Ground 5: Judicial bias and misconduct

Petitioner next claims that this Court committed various errors demonstrating bias, including its decision to require Petitioner to pay restitution to the victims in the case. The alleged errors are examined for plain error. See United States v. Cefaratti, 221 F.3d 502, 512 (3d Cir. 2000).

Petitioner's alleged errors are numerous, and fall roughly into two categories: (1) errors relating to the guilty plea; and (2) errors relating to the imposition of a fine and restitution. Among the errors are: "Rishell being forced to proceed without counsel after his right to counsel had attached in two sessions relating to ascertainment of counsel; the judge joined in

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<sup>23</sup>Petitioner's claims also appear to suggest a challenge to the plea on the basis that there was no factual basis for the plea, or because he was actually innocent. However, "[i]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." Mabry, 467 U.S. at 508. Thus, while it is appropriate to consider Petitioner's specific claims as they relate to the voluntariness and intelligence of his plea, the plea, once deemed valid, cannot otherwise be collaterally attacked. Id. Moreover, there is no new evidence to support Petitioner's bald claims of innocence. Petitioner relies on his recitation of the facts consisting of unsupported allegations of witnesses, investigators, and attorneys lying and conspiring against him. The "actual innocence" claim is also directly contradicted by Petitioner's own admissions and plea of guilty.

discussions of the guilty plea in the plea colloquy when Rishell took Kelly into the hall and the judge stating these were not make believe proceedings we were entering into which helped to push Rishell to plea guilty; Judge Padova refusing to grant a continuance to get Briscoe and Assad familiar with the case after stating on the Order of 25th of August, 1997 that the failure to grant such a continuance would deny counsel for each of the parties the resonable [sic] time necessary for effective preparation<sup>24</sup>; the judge refusing to allow the appearance of counsel of Rishell's choice, retained counsel, Briscoe and Assad and forcing Rishell to proceed at the December 17, 1998 sentence hearing with counsel Kelly . . ." <sup>25</sup> (Am. Pet. at § E.)

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<sup>24</sup>New counsel for the Petitioner requested a continuance by letter to the Court dated January 28, 1999, one day prior to the sentencing hearing date. The basis for the continuance was a representation by the Petitioner that on or before May 1, 1999, his family and friends intended to deposit the sum of \$118,160 with the court or in a U.S. Attorney escrow account, for the purpose of making full restitution to the victims prior to sentencing. (N.T. 1/29/99 at 5.) The Court denied the request for continuance. (N.T. 1/29/99 at 13.)

<sup>25</sup>As of the initial sentencing hearing on December 17, 1998, Briscoe and Assad had not yet entered their appearances as counsel of record. At that time, Mr. Assad represented to the Court that new counsel and the Petitioner were still working out the retainer, but that they expected everything to be fully taken care of within a week. (N.T. 12/17/98 at 7-8.) The Court asked Mr. Assad if he was prepared to enter his appearance for the Petitioner right away, but Mr. Assad requested an additional week to give an answer, indicating that he was "almost 100 percent certain I can say yes to that. I'm only asking for one week." (Id. at 9.) The Court eventually denied Petitioner's motion for a 90-day continuance to obtain new counsel. (Id. at 35.) However, the Court granted a continuance because Petitioner had not received the presentence

Petitioner's allegations of judicial bias are nothing more than bald assertions, and the record makes clear that Petitioner is not entitled to habeas relief. Petitioner, for example, asserts that the Court was biased because it accepted Mr. Kelly's testimony as credible and rejected the Petitioner's own testimony, when such a conclusion was "not supported by the record." That determination was clearly supported by the record. Petitioner's argument does not assert bias so much as it asserts disagreement with the determination of the Court. Furthermore, none of Petitioner's allegations of error appear to have had any bearing on Petitioner's decision to plead guilty. Rather, Petitioner's allegations in Ground 5 are a series of misinterpretations of the proceedings that, while consistent with Petitioner's own theory of the case in which his lawyers, the witnesses, the prosecutor, and the court were conspired against him, are unsupported by the record.

The record is similarly clear that there was no clear error with respect to the sentencing, specifically, with respect to the Court's imposition of a fine and restitution. With respect to Petitioner's financial ability to pay a fine or restitution, the Court adopted the relevant paragraphs from the presentence investigation report:

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investigation report 35 days prior to the sentencing, and granted Petitioner 5 days within which to file a motion to withdraw his plea. (Id. at 56-58.)

This defendant has not demonstrated an inability to pay a fine. As a matter of fact, the financial information that he has given to probation is insufficient to demonstrate his inability to pay a fine. And the supplemental handwritten information that he recently gave also does not demonstrate an inability to pay a fine.

(N.T. 1/28/99 at 28.) The Court relied on ¶¶ 156-58 of the Presentence Report, which stated:

On December 1, 1998, John D. Mahoney, CPA, who had been contracted by defense counsel to prepare a financial statement on the defendant for the presentence investigation report, issued a letter to defense counsel stating the following: First, he reported that the defendant attended a November 4, 1998 meeting with him with no records or supporting documentation. All of the information provided by the defendant was oral. The defendant told the accountant that he lives in a rented apartment costing \$1,716 per month. The defendant also told the accountant that he owns a 987 BMW, but that this vehicle is in need of repair. Currently, he is using his son's car. He further reported that he has little in the way of cash or personal property, and that he earns \$100 to \$200 per month performing odd jobs. The defendant did not provide the accountant with any requested tax returns, loan or credit card statements, nor did the defendant provide an estimate of his living expenses as requested. Based on this information, the accountant concluded that he could not issue an opinion on the defendant's personal financial situation.

(Presentence Investigation Rept. ¶ 156.) The Probation Officer handling the case also stated that: "Based on the above information, the defendant has not demonstrated an inability to pay a fine within the stated guideline range or restitution." (Id. ¶ 158.) Petitioner did not object to this part of the report at sentencing. (N.T. 1/28/99 at 14, 28.)

The Sentencing Guidelines provide that the "court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a). The defendant has the burden of proving his or her inability to pay. See United States v. Carr, 25 F.3d 1194, 1212 (3d Cir.) (citing U.S.S.G. § 5E1.2(a)), cert. denied, 513 U.S. 1086 (1995). Here, there was a clear factual basis for the Court to conclude that Rishell had not established an inability to pay a fine or restitution. As the record is clear that there was no plain error involved with respect to any of the rulings, statements, or actions taken by the Court, Petitioner's fifth ground is denied.

F. Ground 6: Other grounds for relief - ineffective assistance of appellate counsel

Finally, Petitioner argues that his appellate counsel, David Assad and Jack Briscoe, were ineffective in handling his direct appeal, because they failed to raise certain arguments that he has now raised in the instant Petition. On appeal, counsel raised the following six issues:

1. The change of plea colloquy was defective . . . in that it did not contain a "factual basis" or foundation asserted from defendant himself.
2. The sidebar conference during the change of plea colloquy was defective . . . in that defendant did not participate on additional sentencing issue agreements that were directly opposite to his understanding of the plea that was

confirmed in writing . . . by his attorney prior to the hearing.

3. Defendant suffered from a personality disorder that affected his ability to knowingly, voluntarily, and intentionally enter a plea.
4. Rishell was the victim of a conflict of interest by Harold Jacoby, Esquire.
5. The evidence showed that Defendant did in fact obtain a loan commitment for an alleged victim contradicting the government's erroneous and false assertion that he did not complete a legitimate deal in the 1990's . . .
6. The government acted in bad faith by not filing a downward departure motion despite substantial cooperation from defendant.

Resp. Mem. Ex. 78a-79a (Respondent's Brief TOC). The Third Circuit rejected all six claims and affirmed his conviction and sentence.

Petitioner has failed to establish that his appellate counsel's decision not to include certain issues in the appeal was ineffectiveness rather than sound trial strategy. "One element of effective appellate strategy is the exercise of reasonable selectivity in deciding which arguments to raise." Buehl, 166 F.3d at 173. "[A] competent appellate attorney could have reasonably concluded that he was unlikely to convince" the appellate court of the merits of the additional arguments raised by the Petitioner. Contrary to Petitioner's assertion in his supplemental memorandum, counsel did raise some of the alleged ineffectiveness issues, such as the conflict of interest issue with respect to Mr. Jacoby. Many of the "claims" that were not brought relate to Petitioner's claims that Mr. Kelly lied. In light of the district court's explicit

finding that Mr. Kelly's testimony at the hearing was credible and that the Petitioner himself had committed perjury, and in light of the lack of any evidence aside from the Petitioner's own testimony supporting the allegations that Mr. Kelly lied, the Court cannot conclude that the decision by appellate counsel to leave certain claims out of the appeal was not sound appellate strategy. Moreover, none of the additional claims which Petitioner suggests his appellate counsel should have brought on direct appeal are meritorious.<sup>26</sup> Counsel cannot be deemed ineffective for failing to raise non-meritorious arguments. Mahony, 2001 U.S. Dist. LEXIS 428, at \*6.

Accordingly, to the extent Petitioner attempts here to raise an ineffective assistance of appellate counsel claim, the Court denies the claim.

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<sup>26</sup>Petitioner asserts that:

None of Rishell's requests were honored for the direct appeal even though they included financing commitments, loans charged as advance fees and income for tax evasion, lies of Kelly, no pre trial motions, questions on statute of limitations, basis to challenge search warrants, question on when Rishell learned about no downward departure which Kelly lied about, Rishell's hearing problem documented in PSR, requests for pre trial motions which Kelly lied about, requests for Brady and Jencks material which Kelly lied about, two pound box of material sent to J.C. Bradford from Rishell which Kelly lied about, Kelly's lies about targets in the Navy Yard, Kelly not available for many of the proffer sessions which was denial of counsel at a critical stage as AUSA Reed tried to elicit inculpatory statements from Rishell, conflicts of interest with Jacobi and Kelly and errors and abuse of discretion by Judge Padova.

Pet. Supp. Mem. at 3.

#### **IV. Conclusion**

For the reasons stated above, the Court concludes that Petitioner is not entitled to relief for any of the grounds raised in his Petition. Accordingly, the Petition is denied in all respects.

An appropriate Order follows.

