



upward departure but stated that the court had discretion to consider an upward departure under Federal Sentencing Guidelines § 2K2.17:

It appears that the court has the discretion to consider an upward departure in this case, pursuant to § 2K2.17. That section allows for an upward departure if the defendant possessed a high-capacity, semiautomatic firearm in connection with a crime of violence. The guidelines define a high-capacity, semiautomatic firearm as a semiautomatic firearm that has a magazine capacity of more than ten cartridges. In this case, the weapon used in the assault had a magazine attached to it capable of holding 30 cartridges. In addition, the ten year enhancement under 18 U.S.C. § 924(c)(1)(A)(iii) is based on either the discharge of a firearm, or if the firearm in question is a semiautomatic assault rifle. In this case, both factors apply. Therefore, it appears that the defendant, absent an upward departure, would not suffer any additional punishment for using a high-capacity, semiautomatic firearm that had the capacity to hold 30 rounds. Section 2K2.17 also directs that the extent of any departure should depend on the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case. According to medical reports in this case, the bullet that struck the victim pierced her arm, and entered her abdomen, where it shattered leaving fragments in her abdomen and liver, causing a life-threatening injury. According to a federal firearms instructor, the velocity of the round from a high-capacity, semiautomatic firearm as compared to a .38 revolver, is two to three times as great, significantly increasing the likelihood of serious or life-threatening bodily injury. Thus, it does appear that the type of weapon and ammunition used by the defendant to shoot the victim in this case, contributed to the seriousness of her injuries.

Presentence Report, P. 15, ¶ 90.

The government objected to the Presentence Investigation Report recommending an award of a two-level reduction to the offense level for acceptance of responsibility. It was the government's position that the defendant never accepted responsibility for his criminal conduct, even though he admitted to

the shooting. Defense counsel did not file any objections to the Presentence Investigation Report, but defense counsel did file a Sentencing Memorandum urging a downward departure for mitigating circumstances taking the matter outside the heartland of Guideline cases; ignoring defendant and his family's cries for help for his severe mental illness; failing to diagnose and treat his psychological condition; returning all his guns after they had been confiscated by the police because of a prior incident; and ignoring defendant's increased emotional and psychological instability, in addition to his failed attempts to get help and the return of his weapons. The defendant's Sentencing Memorandum also defended his receiving a two-level reduction for acceptance of responsibility. Not only did defense counsel move for a downward departure pursuant to United States Sentencing Guidelines ("USSG") §5K.20, he objected to the government's request for upward departure on two grounds: 1) the dangerousness of the weapon/use of a high capacity, semiautomatic firearm; and 2) extreme psychological injuries incurred by the victim.

At sentencing on November 2, 2000, after extended argument by the government and defense counsel, Judge Waldman allowed defendant a two level reduction for acceptance of responsibility but granted the government's motion for an upward departure for the use of a high capacity semi-automatic firearm and an upward departure for the victim's extreme pain and suffering, both physical and psychological. Defendant was then sentenced at offense level 23, criminal history category I, to 54 months on Count One and 120

months on Count Three, to run consecutively, plus three years supervised release.

On appeal, the defendant raised two questions: 1) whether the district court properly applied a two-level upward departure pursuant to USSG §5K2.17, for possession of a high-capacity, semiautomatic firearm in connection with a crime of violence; and 2) whether the court properly applied an additional two-level upward departure, pursuant to USSG § 5K2.2, where significant physical injury was inflicted by the defendant. The Court of Appeals answered both questions in the affirmative; it held the District Court did not abuse its discretion in applying the two upward sentencing departures pursuant to USSG §§ 5K2.17 and 5K2.2. 267 F.3d 214 (3d Cir. 2001).

Defendant Philiposian has filed a petition under 28 U.S.C. § 2255, pro se to set aside his sentence for ineffective assistance of counsel; the government has responded and defendant has replied to the government's response. Philiposian argues trial counsel was ineffective for the following reasons: 1) failure to object to the government's motion for upward departures; and 2) failure to file a downward departure motion for aberrant behavior.

#### **DISCUSSION**

A. Defendant's motion is lacking in merit because it is based on three factually erroneous premises:

- 1. Defense counsel failed to challenge the government's request for an upward departure from the United States Sentencing Guidelines pursuant to § 5K2.2.**

The government requested that the court depart upward pursuant

to USSG § 5K2.3 (Docket #53) and defense counsel vigorously argued against it. See Defendant's Sentencing Memorandum (Docket #54), p. 13, ¶ 12.

**2. Defense counsel failed to object to the Government's request for an upward departure pursuant to USSG § 5K2.17.**

Defendant was alerted to the possibility of an upward departure by the Presentence Investigation Report (¶90) and Defendant's Sentencing Memorandum (Docket #54) specifically objected to the government's request (Docket #53) for this upward departure under § 5K2.6 or § 5K2.17.

**3. Defense counsel failed to file a downward motion for aberrant behavior.**

Defendant's Sentencing Memorandum (Docket #54), pages 1-9, argued for a downward departure from the Guidelines in view of all the circumstances, including defendant's behavior, to the extent the argument was not barred by the Sentencing Guidelines.

It is true that defense counsel stated at sentencing in response to a question from Judge Waldman that he had no objection to the Presentence Investigation Report, but, in context, that referred to the factual statements only. Judge Waldman considered the defendant's request for a downward departure (Tr. 12-27). Despite the vigorous argument of defense counsel, Judge Waldman did not think the factors argued by defense counsel justified a downward departure and denied it (Tr. 27). But defense counsel also argued vigorously and successfully that defendant was entitled to a two-level reduction for acceptance of responsibility (Tr. 4-

11). When Judge Waldman considered the government's request for upward departure because of the weapon used by defendant, there was extensive discussion of the evidence regarding the nature of the weapon and the ammunition and whether it increased the likelihood of injury. Despite the objections of defense counsel, Judge Waldman determined that the victim's significant injuries were a direct result of the nature of the weapon and the type of ammunition and allowed a two-level upward departure.

Judge Waldman then permitted the government to argue for an upward departure pursuant to USSG §5K2 for the extraordinary impact the assault had on the victim. Once again, after the government made its argument, defense counsel argued extensively against the upward departure (Tr. 70-74) although it was ultimately allowed by the judge.

B. Upon consideration of the above facts and particularly the transcript of the sentencing hearing (Docket #60), it is obvious that trial counsel was not ineffective.

According to Strickland v. Washington, 466 U.S. 688 (1984), a defendant must satisfy a two-part test to show that counsel was ineffective in violation of the Sixth Amendment. First, he must show that trial counsel's performance was deficient, i.e., defense counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. Id. at 687. Second, defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Philiposian could not show that the result of his sentencing would have been different because trial counsel objected to every upward departure sought by the government and considered by the district court; he also argued vigorously, although unsuccessfully, for a downward departure. In addition to his Sentencing Memorandum (Docket #54) where defendant's positions were well stated with supporting argument, defense counsel argued against the government's position at length at the sentencing hearing (Docket #60). He opposed the district court's grant of the government's motions unsuccessfully so he took a direct appeal; when the district court decision was affirmed by a panel of the appellate court, he petitioned for an en banc hearing.

While not the subject of appeal, prior to sentencing, defense counsel argued in his Sentencing Memorandum (Docket #54) for a downward departure because defendant had never acted out in this manner when he had been depressed in the past and this incident was caused by a psychotic episode beyond defendant's control. The downward departure motion focused on Philiposian's long history of mental illness, his unanswered cries for help, mental health professionals' failure to properly diagnose and treat the defendant and the local police department's return of numerous firearms to Mr. Philiposian two weeks prior to the incident. Trial counsel obviously decided to focus on the totality of the defendant's background because the potential benefits of an all encompassing downward departure motion in conjunction with an insanity defense outweighed the risks of a motion focusing solely on the defendant's

past behavior; Philiposian's history of outbursts and assaults on his family would then have been the center of attention to his detriment. Trial counsel's decision not to file a downward departure motion specifically for aberrant behavior was an exercise of reasonable professional judgment and was not deficient in the totality of the circumstances.

The Court of Appeals has already decided that the upward departures granted by Judge Waldman were not an abuse of discretion so that granting Philiposian's motion under 28 U.S.C. § 2255 and appointing him new counsel would be futile. Philiposian has not carried his burden to show prejudice. His counsel vigorously defended him at both trial and sentencing and was not ineffective. Therefore, the court refuses to hold a hearing as the claim for relief is without merit. See Rule 4B of the Rules governing 28 U.S.C. § 2255.

Furthermore, the defendant has failed to make a substantial showing of a denial of constitutional right so there is no reason to issue a Certificate of Appealability.

An appropriate order follows.

