

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

|                          |   |                 |
|--------------------------|---|-----------------|
| UNITED STATES OF AMERICA | ) |                 |
|                          | ) | Civil Action    |
| vs.                      | ) | No. 11-cv-06351 |
|                          | ) |                 |
| DANIEL EARL EYSTER,      | ) | Criminal Action |
|                          | ) | No. 08-cr-00618 |
| Defendant                | ) |                 |

\* \* \*

APPEARANCES:

FRANK A. LABOR, III, ESQUIRE  
Assistant United States Attorney  
On behalf of the United States of America

DANIEL EARL EYSTER  
Defendant pro se

\* \* \*

O P I N I O N

JAMES KNOLL GARDNER  
United States District Judge

This matter is before the court on defendant's Habeas Corpus Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.

For the reasons expressed in this Opinion, the motion is denied.

FACTS AND PROCEDURAL HISTORY

On October 8, 2008 an Indictment was filed charging defendant, Daniel Earl Eyster, with one count of Sexual exploitation of children in violation of 18 U.S.C. §§ 2251(a)

and (e).<sup>1</sup> On January 14, 2009, a Superseding Indictment was filed charging defendant with one count of Sexual exploitation of children in violation of 18 U.S.C. §§ 2251(a) and (e); and one count of Possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B).<sup>2</sup>

On February 19, 2009 defendant was interviewed by the Pennsylvania State Police concerning the sexual assault of a minor which was unrelated to the formal charges under the Superseding Indictment.<sup>3</sup>

During a change-of-plea hearing on March 17, 2009, I conducted a guilty plea colloquy with defendant, who pled guilty to both counts of the Superseding Indictment.<sup>4</sup>

On April 2, 2009 defendant was interviewed by United States Probation Officer Jason W. Fury, for a Presentence Investigation Report, at Lehigh County Prison in Allentown, Pennsylvania.<sup>5</sup>

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<sup>1</sup> See Indictment filed October 8, 2008 in the United States District Court for the Eastern District of Pennsylvania.

<sup>2</sup> See Superseding Indictment filed January 14, 2009 in the United States District Court for the Eastern District of Pennsylvania.

<sup>3</sup> See Affidavit of Paul M. Smith, Corporal, Pennsylvania State Police, sworn November 18, 2011 at ¶ 6. The Smith Affidavit is attached as Exhibit 3 to The United States' Response to the Defendant's Motion to Vacate, Set Aside, or Correct His Sentence, Under 28 U.S.C. § 2255 (Document 76).

<sup>4</sup> See Transcript of Change of Plea Hearing Before The Honorable James Knoll Gardner, United States District Judge, held March 17, 2009 ("Change of Plea Transcript"), at page 14-15, 56.

<sup>5</sup> See Presentence Investigation Report at ¶ 96.

On July 8, 2009 defendant was sentenced to the maximum statutory sentence of 840 months. Several witnesses testified at the sentencing hearing.<sup>6</sup>

Defendant appealed his sentence to the United States Court of Appeals for the Third Circuit which affirmed his sentence on July 14, 2010.<sup>7</sup> On November 15, 2010 the United States Supreme Court denied defendant's petition for a writ of certiorari.<sup>8</sup>

On October 11, 2011, defendant pro se filed a motion for habeas corpus under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence. On November 11, 2011, the United States' Response to Defendant's Motion to Vacate, Set Aside, or Correct His Sentence Under 28 U.S.C. § 2255 was filed. On January 30, 2012 defendant filed Movant's Reply to Government's Response.

Hence this Opinion.

#### **STANDARD OF REVIEW**

Section 2255 of Title 28 of the United States Code provides federal prisoners with a vehicle for challenging an

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<sup>6</sup> See Transcript of Sentencing Hearing Before The Honorable James Knoll Gardner, United States District Judge, held July 8, 2009 ("Sentencing Transcript") at pages 14-21, 29-59, 77.

<sup>7</sup> See United States v. Eyster, 386 Fed.Appx. 180, 183 (3d Cir. 2010).

<sup>8</sup> See Eyster v. United States, 562 U.S. \_\_\_, 131 S.Ct. 618, 178 L.Ed.2d 448 (2010).

unlawfully imposed sentence. Section 2255 provides, in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be 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 a 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. § 2255(a).

A motion to vacate sentence under section 2255 "is addressed to the sound discretion of the district court". United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). A petitioner may prevail on a section 2255 habeas claim only by demonstrating that an error of law was either constitutional error, jurisdictional error, "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, 82 S.Ct. 468, 471, 7 L.Ed.2d 417, 421 (1962).

#### DISCUSSION

Defendant's habeas motion contains four grounds under which he contends that he is entitled to relief based on ineffective assistance of trial counsel.

To establish ineffective assistance of counsel under the Strickland v. Washington test, defendant must establish two elements: 1) counsel's performance was deficient and 2) defendant was prejudiced by the deficiency. See United States v. Shedrick, 493 F.3d 292, 299 (3d Cir. 2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)).

To establish that counsel's performance was deficient, defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 694. To establish that he was prejudiced, defendant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 697.

### Ground One

#### Counsel's Erroneous Advice to Defendant

In his first ground, defendant alleges that his counsel was ineffective in giving defendant erroneous advice which led defendant to enter an involuntary guilty plea. Defendant contends that his plea was based on a prediction from his counsel that the government would seek the statutory minimum sentence. However, defendant alleges that his counsel knowingly

withheld information that the government was, in fact, planning on recommending the statutory maximum sentence.

Defendant alleges that had he known the correct information, he would not have pled guilty; and, because he was not given the correct information, his guilty plea was not a knowing and voluntary plea. Therefore, defendant contends, he received ineffective assistance of counsel.

An erroneous sentencing prediction is not deficient performance when an adequate plea colloquy is administered by the court. Shedrick, 493 F.3d at 299. During an adequate plea colloquy the court clearly notifies the defendant of his maximum potential sentence and the sentencing court's discretion in awarding the sentence. Id. at 300. Any erroneous sentencing predictions by counsel are irrelevant. Id. at 299.

The colloquy ensures that the defendant understood the correct information surrounding the plea and it effectively clears up any misrepresentations that defendant received from other sources. Additionally, the colloquy establishes that the plea entered by the defendant is a knowing and voluntary plea. Id. When administered, the colloquy effectively removes any potential deficiency by counsel concerning predictions regarding sentencing. See id.

In addition to deficient performance, a successful ineffective assistance of counsel claim requires defendant to

demonstrate that he was prejudiced by the deficiency. In a case where the defendant has pled guilty, he must show that his counsel's advice was so grossly erroneous that he would not have pled guilty in the absence of the erroneous advice. United States v. Padilla-Castro, 426 Fed.Appx. 60, 63 (3d Cir. 2011) (citing, Meyers v. Gillis, 142 F.3d 664, 666 (3d Cir. 1998)).

Here, defendant's allegation that he received deficient performance based on his attorney's erroneous sentencing prediction lacks merit because I conducted a thorough plea colloquy during defendant's plea hearing. The colloquy fully advised defendant concerning the terms and conditions of his plea; the maximum and mandatory minimum sentences; his right to plead not guilty; that there was no guarantee what sentence he would receive; and that if anyone told him what specific sentence he would receive, that information was incorrect.<sup>9</sup> Defendant affirmed that he understood each of these matters.<sup>10</sup>

This notification and affirmation effectively apprised defendant that he could be subject to the statutory maximum sentence if he pled guilty and thereby removed any deficiency by defendant's counsel regarding an incorrect sentence prediction.

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<sup>9</sup> See Change of Plea Transcript at pages 14-15.

<sup>10</sup> See Change of Plea Transcript at page 15.

Finally, defendant cannot allege he was prejudiced by grossly erroneous advice because the plea colloquy renders any advice by counsel regarding sentencing calculations irrelevant. Defendant cannot allege he was induced into a certain plea based on erroneous advice he received before the colloquy because he was notified of all information regarding his plea and sentence during the colloquy. Therefore, he cannot allege that he suffered prejudice as a result of the advice from his counsel.

## Ground Two

### Counsel's Presence at Presentence Interview

In his second ground, defendant alleges that his counsel was ineffective for refusing to be present during defendant's presentence investigation report interview in which defendant was questioned about a prior military conviction. Defendant contends that the military conviction affected the calculation of his criminal history score, and thus the length of his sentence. Therefore, defendant claims that he was deprived of effective assistance of counsel because of the responses he gave during this interview during which his counsel was not present.

The Sixth Amendment provides a right to effective assistance of counsel at all critical stages of the proceedings, including prior to trial. See United States v. Tyler, 281 F.3d 84, 96 (3d Cir. 2002). A routine presentencing

interview is not considered a critical stage. Therefore, there is no Sixth Amendment right to counsel during this stage. Id. Because this stage is non-critical, a defendant cannot claim to have received deficient performance of counsel where no right to counsel exists. Id. at 97.

Defendant alleges that his counsel's presence would have stopped the probation officer from questioning him about his prior military conviction. He argues that if the line of questioning had ceased, he would have been subject to a lower sentencing guideline range, and to a lesser sentence. However, this does not constitute deficient performance by counsel because the presentence interview is not a critical stage of the case, and thus defendant is not entitled to the assistance of counsel during that interview.

In addition, defendant cannot demonstrate that he was prejudiced by his counsel's alleged deficiency. Although his military conviction was erroneously included in the presentence report calculation of defendant's criminal history level, for purpose of computing his sentence guidelines, upon review, the United States Court of Appeals for the Third Circuit determined that this error had no effect on defendant's sentence. See United States v. Eyster, 386 Fed.Appx. 180, 182-183 (3d Cir. 2010).

Although there was an error in calculating the criminal history level, the correct criminal history level would have resulted in exactly the same sentencing guideline range. See id. at 183. Therefore, defendant cannot establish that he received ineffective assistance of counsel because his counsel was not present at the presentence investigation report interview.

### Ground Three

#### Counsel's Presence During Interview with Pennsylvania State Police

In his third ground, defendant contends that he was denied effective assistance of counsel during an interview with the Pennsylvania State Police concerning an incident involving the suspected sexual assault of a minor in Schuylkill County, Pennsylvania. While the Sixth Amendment provides a right to effective assistance of counsel at all critical stages prior to trial, this right does not attach until prosecution of a charge is commenced or after the initiation of judicial criminal proceedings. See Tyler, 281 F.3d at 96; McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S.Ct. 2204, 2207, 115 L.Ed.2d 158, 166 (1991).

After an individual is formally charged with a crime, the police may investigate new or additional crimes that were not formally charged. However, the Sixth Amendment right to

counsel does not attach to the investigation of new or additional crimes until after commencement of prosecution or initiation of judicial criminal proceedings for those crimes. McNeil 501 U.S. at 175-176, 111 S.Ct. at 2207-2208, 115 L.Ed.2d at 167.

Here, defendant alleges that his counsel's absence during the state-police interview is deficient performance. However, because the interview concerned an incident unrelated to the charges already filed, and because there was no formal prosecution or commencement of criminal proceedings on the new charges, defendant did not have a Sixth Amendment right to counsel during this interview.

Moreover, defendant cannot show that he was prejudiced by not having the advice of counsel during the interview because throughout the sentencing transcript there is no indication that any information elicited by the Pennsylvania State Police was used in the determination of his sentence.<sup>11</sup> Because this information was not relied upon during sentencing, defendant cannot show that he was prejudiced by any deficiency concerning the state-police interview.

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<sup>11</sup> See Sentencing Transcript at pages 81-93.

#### Ground Four

##### Counsel's Failure to Cross Examine Witness at Sentencing Hearing

In his fourth ground, defendant alleges that his counsel was ineffective for failing to object to testimony by one of the victims, who was a minor, known as BM, during defendant's sentence hearing and failing to properly cross examine the witness. Defendant alleges that BM's entire testimony was false and that his counsel was ineffective for failing to object to, and failing to cross examine, BM's testimony.

Counsel's conduct is considered deficient performance only if it falls outside the wide range of reasonable professional assistance that may be provided in furtherance of the defense. See Strickland 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694 (1984). Reasonable strategic decisions, such as the choice whether to object or cross examine, in furtherance of the defense are decisions which fall within the wide range of actions which provide reasonable professional assistance. See McBride v. Houtzdale, 687 F.3d 92, 102 (3d Cir. 2012). While counsel's strategic decisions may prove unsuccessful, the decision cannot be defective performance as long as the decision is reasonable. Id.

Here, defendant fails to show that his counsel was deficient. While there is no objection to BM's testimony in the

record, there is no indication that counsel's failure to object fell outside the wide range of reasonable professional assistance. While failing to object may have led to a result defendant did not prefer, defense counsel's performance was not defective.

Defendant also contends that counsel failed to effectively cross-examine the witness to impeach the testimony to undermine her credibility. However, the record reflects that defense counsel cross-examined the witness and elicited facts from the witness which were refuted. Furthermore, defendant failed to establish prejudice from BM's testimony because her testimony alone was not outcome-determinative. The record clearly reflects that the sentence was based on many factors, including, but not limited to, the witness's testimony.<sup>12</sup>

#### **CONCLUSION**

For all of the foregoing reasons, I deny defendant's Habeas Corpus Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.

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<sup>12</sup> See Sentencing Transcript at 81-93.

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| UNITED STATES OF AMERICA | ) |                 |
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| DANIEL EARL EYSTER,      | ) | Criminal Action |
|                          | ) | No. 08-cr-00618 |
| Defendant                | ) |                 |

**O R D E R**

NOW, this 13th day of April, 2014, upon consideration of the following documents:

- (1) Habeas Corpus Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed by defendant Daniel Earl Eyster pro se on October 11, 2011 (Document 71);
- (2) The United States' Response to Defendant's Motion to Vacate, Set Aside, or Correct His Sentence Under 28 U.S.C. § 2255, which response was filed November 11, 2011 (Document 76);
- (3) Movant's Reply to Government Response which reply was filed by defendant Daniel Earl Eyster pro se on January 30, 2012 (Document 79);
- (4) Transcript of Change of Plea Hearing Before The Honorable James Knoll Gardner, United States District Judge, held March 17, 2009;
- (5) Transcript of Sentencing Hearing Before The Honorable James Knoll Gardner, United States District Judge, held July 8, 2009;
- (6) Indictment filed October 8, 2008 in the United States District Court for the Eastern District of Pennsylvania (Document 7);
- (7) Superseding Indictment filed January 14, 2009 in the United States District Court for the Eastern District of Pennsylvania (Document 25); and

(8) Presentence Investigation Report prepared May 22, 2009 and revised June 22, 2009;

and for the reasons set forth in the accompanying Opinion,

IT IS ORDERED that the defendant's Habeas Corpus Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed on October 11, 2011 is denied.

IT IS FURTHER ORDERED that a certificate of appealability is denied.

IT IS FURTHER ORDERED that the Clerk of Court shall close this matter for statistical purposes.

BY THE COURT:

/s/ JAMES KNOLL GARDNER  
James Knoll Gardner  
United States District Judge