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

KENNETH R. WITHERS	:	CIVIL ACTION
	:	NO. 97-2819
v.	:	
	:	
	:	CRIMINAL ACTION
UNITED STATES AMERICA	:	NO. 94-343

M E M O R A N D U M

Presently before this Court are petitioner's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, and the government's response thereto. For the following reasons, this Court will deny petitioner's Motion. Also before this Court are petitioner's Motion for Leave to File Supplemental Motion Pursuant to 28 U.S.C. § 2255, and the government's response thereto. For the following reasons, this Court will deny petitioner's Motion.

I. Introduction

Between May 1993 and June 3, 1994, then Federal Bureau of Investigation ("FBI") Special Agent Kenneth Withers, assigned to an FBI narcotics squad, planned and committed a theft of narcotics evidence and executed an elaborate narcotics distribution scheme. (PSR ¶¶ 5-37).[1] Withers penetrated FBI security and stole from the FBI's evidence room over 90 pounds of high grade heroin and over 10 pounds of cocaine (street value - $180,000,000), maintained as evidence in pending cases, and left

1. These facts were not contested. Citations to "PSR" refer to the Presentence Report for Withers.

behind as decoys substitute bags of bicarbonate of soda. (PSR ¶¶ 6, 11-12).

Under the alias "Salvatore," Withers offered undetermined amounts of heroin in a sophisticated and detailed mail order/telephone pager/mail drop scheme to distribute narcotics without face-to-face contact with buyers. (PSR ¶¶ 7-10, 24). Withers actually distributed, or attempted to distribute, over 13 pounds of heroin and about 11 pounds of cocaine to dealers in the Philadelphia, New York City and Boston areas, for which he received $77,000. (PSR ¶¶ 16-17).

Withers' conduct potentially compromised several pending narcotics investigations and trials for which the stolen heroin and cocaine was being held as evidence. (PSR ¶ 38). In addition, Withers also "tipped" at least seven suspected drug dealers to ongoing government investigations, endangering the investigating agents, when he improperly accessed internal FBI files to obtain their names and addresses and then solicited by mail to be narcotics customers. (PSR ¶¶ 21-23, 38).

When, on March 30, 1994, Withers was asked to participate in the FBI investigation of "Salvatore," Withers hurriedly left the FBI office and promptly destroyed three kilograms of stolen heroin. (PSR ¶¶ 14, 31-32, 39). After an April 19, 1994, non-confrontational interview with the FBI, Withers disassembled or discarded a screwdriver used in the theft and a telephone pager and typewriter used to effect his narcotics distribution scheme.

Twice after these non-confrontational interviews, on April 20, 1994 and on May 10, 1994, Withers sought the sanctuary of hospitalization — once it was for nausea and once for alleged depression. Both times, Withers failed to inform his doctors about the narrowing FBI investigation or about the specific hallucinatory symptoms which he presently claims started in 1991 but which neither his oncologist nor his relatives corroborate.

Withers was confronted, confessed and arrested on June 3, 1994.[2] During his June 3 meeting with two Special Agents from the FBI, Withers confessed to the theft of heroin and cocaine from the FBI evidence room and provided details as to the planning and completion of the activity and how he had burned heroin at an FBI pistol range. Withers also provided information regarding the location of the narcotics which the government previously did not possess.

In sum, the evidence implicating Withers was overwhelming. It included: (a) Withers' confession to his theft and distribution of heroin and cocaine; (b) the positive identification of Withers' handwriting on applications for mail drops, under an alias, to which Withers' drug dealer customers sent him cash; (c) the location of 29 kilograms of stolen heroin and $66,000 in cash narcotics proceeds in the basement of

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2. In his motion, Withers makes reference to the denial of FBI hardship transfers that he had requested and claims that the Special Agents that he confessed to knew that he had mental health problems at the time of the confession. These allegations are irrelevant for the purposes of Withers' present motions, and they provide no basis for relief.

Withers' grandparents home in Kentucky; (d) the fingerprints of one of Withers' drug dealer customers, Nate Swint, on some of this currency; (e) a mailing receipt in Swint's name found with this currency; and (f) the positive identification of Withers' fingerprints both on evidence tape on the boxes from which the heroin was stolen and on internal FBI documents providing the addresses of suspected drug dealers to whom stolen heroin and cocaine was distributed.

Withers was represented by Joseph H. Miller, Esq., First Assistant Federal Defender, a veteran defense attorney. Withers was charged with theft of government property and with the possession with intent to distribute and the distribution of heroin and cocaine. Withers pleaded guilty or stipulated to all twelve counts of the Indictment.[3] Under the Sentencing Guidelines effective November 1, 1994, (PSR ¶ 4), Withers faced a level 38 based on the enormous quantity of narcotics he stole for distribution, United States Sentencing Guidelines ("U.S.S.G.") §§ 2D1.1(a)(3), 2D1.1(c)(3); a two-level upward adjustment for obstruction of justice, U.S.S.G. § 3C1.1; and a three-level downward adjustment for his timely acceptance of responsibility. U.S.S.G. § 3E1.1. (PSR ¶¶ 3, 39-67).

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3. The Indictment filed against Withers included the following charges: Count I - theft of government property in violation of 18 U.S.C. § 641; Count II - possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1); Count III - possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1); Counts IV-IX - distribution of heroin in violation of 21 U.S.C. § 841(a)(1); and Counts X-XII - distribution of cocaine in violation of 21 U.S.C. § 841(a)(1).

Withers sought a discretionary downward departure for diminished mental capacity under Section 5K2.13, citing his depression and alleged mental state related to his Hodgkin's disease. He offered the supporting report and testimony of a respected psychiatrist and lawyer, Dr. John S. O'Brien, II. Dr. O'Brien's resume shows an array of postgraduate training, medical faculty positions and hospital appointments, at prestigious institutions, as well as a variety of presentations and writings.

After review of the defense expert psychiatric testimony and report, the government psychiatric report prepared by experts at FCI Butner (including an undisputed diagnosis of malingering as regards Withers' alleged psychotic symptoms) and hearing other evidence, this Court ruled inapplicable a downward departure for diminished capacity.

Applying the relevant legal standard, that between "significantly" reduced mental capacity and the crime there must be a "contributory link," this Court stated at Withers' sentencing hearing:

> . . . I've considered the briefs submitted by both sides. I've listened carefully to the testimony that's been presented, and I can only conclude that I must deny or overrule your objection based on the defense of diminished mental capacity. I don't think the testimony supports your objection. . . . I'm not suggesting that this defendant has not suffered from some mental problems, some emotional problems, but I don't think that they rise to the level required in order to be considered a diminishment under the Guidelines.
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> * * *

> I doubt if there's any defendant that appears before me in a serious criminal offense who could not make out an element of diminished capacity for doing the kind of act that he did unless he's a calloused, hardened criminal who commits illegal acts without batting an eye.
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> * * *
>
> This was a complex series of actions that he committed, and over a period of time. It was not just a once-and-done situation.

(Resp't Mem. at 6-7; Ex. C at 71a-72a, 81a, 82a).

Withers' total offense level was 39 resulting in a Guideline range of 262 months to 327 months. (PSR ¶¶ 67, 92). This Court imposed a mid-range, 300 month (25 year) sentence. (Resp't Ex. C at 82a-83a).

Withers appealed the denial of that downward departure. On November 17, 1995, the Court of Appeals for the Third Circuit affirmed the denial of that downward departure by memorandum opinion.

Presently Withers has filed two separate motions. Withers moves to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. In this motion, Withers makes two broad ineffective assistance of counsel arguments. First, he argues that counsel did not adequately present a diminished capacity downward departure claim at sentencing. Second, he argues that his plea was involuntary, because counsel would not discuss any matter other than a guilty plea and, in the course of "compelling" Withers' guilty plea, predicted inaccurately that Withers would serve "approximately seventeen years" in jail which

was below the applicable Guideline range as ultimately determined by this Court. Withers has also moved, in his self-styled "Supplemental Motion," for § 2255 relief based on the application of the two-level downward "safety-valve" adjustment under U.S.S.G. § 2D1.1(b)(4) which came into effect by amendment of the narcotics Guideline during the pendency of Withers' direct appeal. The government, in response, generally claims that Withers' current claims for relief are without merit. For the following reasons, the Court will deny Withers' motion to set aside, vacate or correct sentence and Withers' supplemental motion.

II. The Legal Standards

A. Section 2255

In considering a petition for writ of habeas corpus under 28 U.S.C. § 2255, "the appropriate inquiry [is] whether the claimed error of law was 'a fundamental defect which inherently resulted in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" Davis v. United States, 417 U.S. 333, 346 (1974) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

A § 2255 petition is not a surrogate for appeal, nor may it be used to re-litigate matters decided adversely on appeal. United States v. Orejuela, 639 F.2d 1055, 1057 (3d Cir. 1981). Where the record shows that the petitioner is not

entitled to any relief under § 2255, no hearing is necessary. United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989).

B. Ineffective Assistance of Counsel

To obtain habeas relief under the Sixth Amendment on a claim of ineffective assistance of counsel, a petitioner must prove both serious attorney error and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984); see also McNeil v. Cuyler, 782 F.2d 443 (3d Cir. 1986). An attorney is presumed to possess skill and knowledge in sufficient degree to preserve the reliability of the adversarial process and afford his client the benefit of a fair trial. Consequently, judicial scrutiny of an attorney's competence is highly deferential. Strickland, 466 U.S. at 688-89. Courts must "avoid illegitimate second-guessing of counsel's strategic decisions from the superior vantage point of hindsight" and "indulge a strong presumption" that counsel's conduct is reasonable and sound strategy. Id. at 689. Nevertheless, if "from counsel's perspective at the time of the alleged error and in light of all the circumstances" it appears that counsel's actions were unreasonable, the court must consider whether the error had prejudicial effect on the judgment. Kimmelman v. Morrison, 477 U.S. 365, 384 (1986).

As for prejudice, the question is "whether there is a reasonable probability that, absent the errors," the result would have been different. Strickland, 466 at 695; see also United States v. Gray, 878 F.2d 702, 709-13 (3d Cir. 1989). Errors, even many significant errors, will not meet this "highly demanding" standard. Kimmelman, 477 U.S. at 381-82. Speculation as to "whether a different . . . strategy might have been more

successful" is not enough. Lockhart v. Fretwell, 113 S. Ct. 838, 843-44 (1993). The prejudice component focuses on "whether counsel's deficient performance renders the result of the . . . proceeding fundamentally unfair," i.e., deprives the defendant of a "substantive or procedural right to which the law entitles him." Id. at 844.

III. Withers' Section 2255 Motion

As stated previously, Withers advances two broad ineffective assistance of counsel arguments. First, he argues that counsel did not adequately present a diminished capacity downward departure claim at sentencing. Second, he argues that his plea was involuntary because counsel would not discuss any matter other than a guilty plea and, in the course of "compelling" Withers' guilty plea, predicted inaccurately that Withers would serve "approximately seventeen years" in jail which was below the applicable Guideline range as ultimately determined by this Court. Within the context of these broader arguments, Withers makes more specific arguments as to why his counsel was ineffective within the meaning of Strickland. For the following reasons, the Court finds Withers' arguments to be without merit.

A. Withers' Downward Departure Claim

Withers first argues that defense counsel's deployment of a psychiatrist was untimely and inadequate. An examination of the record belies this contention.

With respect to the timeliness of the psychiatric examination, Withers can show no error or prejudice as required

by Strickland. To begin, it is no error to have a defendant examined before sentencing instead of the guilty plea. The government made no argument based on the timing, the Court did not refer to it, and it is unclear logically why an assessment made closer to the time of the arrest would have made any difference in this case.

Moreover, the record indicates that any delay in the examination of Withers was due not to defense counsel's error but, as established on direct examination of Dr. O'Brien, to the fact of Withers' incarceration in Butner, North Carolina for a competency determination and later at several different prison facilities. (Resp't Ex. C). Withers was arrested on June 3, 1994. He was sent to FCI Butner, North Carolina for a competency examination. He was found competent on August 26, 1994, and indicted on August 30, 1994. Upon his return north on September 8, 1994, he was housed at the MCC in Manhattan under restricted conditions and then returned to Butner in October 1994. (Resp't Ex. I). Indeed, as communicated by Mr. Miller to the Probation Office, upon Withers' return from FCI Butner, Mr. Miller had been attempting to secure Withers' psychiatric evaluation since "November of 1994," and it took this Court's Order to effectuate one. (Resp't Exs. D & E). Based on these facts, there simply was no error rising to ineffective assistance in the timing of Withers' psychiatric examination.

In addition to this finding, the Court finds that there was no prejudice from the timing of Withers' examination.

Whenever the defense examination took place, the defense psychiatrist still opined that Withers' suffered from a mental disease, depression, and that it contributed to the crime. Thus, Withers could not have been prejudiced by the timing of his psychiatric examination.

As regards the adequacy of the psychiatrist, Withers alleges: (1) a failure on the part of counsel and the psychiatrist to submit evidence of Withers' diagnosis of Hodgkin's disease, his radiation treatment, his chemotherapy, and his allegedly addictive over-use of prescription pain killers and the psychosis-like side effects of these drugs in terms of hallucinations, disorientation, etc.[4] and (2) failures of the defense psychiatrist to speak with Withers' oncologist or anyone else to corroborate what Withers said. Both of these arguments are without merit.

To begin, the Court finds that Withers' trial counsel did not err in selecting the psychiatrist. Indeed, the defense psychiatrist was well qualified. Dr. O'Brien is both a medical doctor and a lawyer. His resume reflects an array of postgraduate training, medical faculty and hospital appointments, presentations and writings. (Resp't Ex. A). Withers' trial counsel cannot be criticized for his selection of Dr. O'Brien.

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4. This allegedly was accompanied by a failure to submit a "medical record" (a social worker's progress notes) noting that Withers reported hallucinations in May and June 1994, allegedly contrary to an assertion in the government's Butner psychiatric report.

More importantly, the fact of Withers' disease, radiation and chemotherapy treatments and use and alleged use of prescription pain killers was in the record. These facts were in the Butner psychiatric report and, in part, in the testimony of Withers' father at sentencing. (Resp't Ex. B at 4; Ex. C at 15a-18a).

Moreover, whether produced by mental disease or by pain killers, the alleged symptoms Winters cites as dating back to 1991 (hallucinations, anxiety, disorientation, etc.) also were before this Court. They are found in the Butner psychiatric report and alluded to in Dr. O'Brien's report. (Resp't Ex. B at 4,7; Ex. A1 at 2). Thus, both as to the use of prescription drugs and alleged hallucinations, failure of investigation by defense counsel is not an issue. See Gray, 878 F.2d at 710-11.

The overriding fact is that as to these psychosis-like symptoms, a government psychiatrist and psychologist found Withers to be malingering with "a nearly 100% probability." (Resp't Ex. B at 11). The defense expert, Dr. O'Brien, did not "dispute" that diagnosis as regards "the atypical psychotic symptoms [Withers] complained about." (Resp't Ex. C at 64a-65a).

Despite Withers' arguments to the contrary, the progress notes of social worker Caruso are not some form of prior consistent statement which rebut the finding of malingering, for they only relate Withers' statements made in May and June 1994 — after he had been interviewed by the FBI. The Butner psychiatric report found that while Withers claimed to be suffering

hallucinations and amnesiac episodes dating as far back as the summer of 1991, his wife, oncologist, co-workers and parents did not corroborate these symptoms for this period. (Resp't Ex. B at 4, 5). The Butner report also notes that Withers first complained of "violent fantasies" and sought psychiatric treatment in April 1994, only after he was already under investigation and after he had been questioned by the FBI. Id. at 6. The Caruso notes show only that in May and June 1994 — after the FBI interviews began — Withers reported to her the present "fact" of his hallucinations. In other words, the Caruso progress notes essentially duplicate what he told his oncologist in April 1994, and they occur after he had a motive to fabricate having been interviewed previously by the FBI.

That Withers does not like what his own doctor found as regards his alleged psychotic symptoms,[5] or that Withers' doctor testified honestly, of course cannot make out a claim of attorney error. That all experts agreed, or did not dispute, that Withers' alleged psychotic symptoms were really the product of malingering cannot ground an ineffective assistance of counsel claim.

Withers has also failed to demonstrate that his trial counsel was ineffective for failing to have Dr. O'Brien speak directly with Withers' oncologist or others in order to

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5. Withers assigns as "error" Dr. O'Brien's professional opinion that Withers did not have difficulty thinking or concentrating or that he could not dispute the finding of malingering. (Withers' Mem. at 7).

corroborate what Withers was telling him or to read the reports of Withers' non-confrontational interviews with the FBI. (Withers' Mem. at 6-7). First, Withers fails to cite any case law for the novel proposition that a well qualified expert's decision as to methodology, with which a defendant later disagrees, can subsequently form the basis of a Constitutional ineffective assistance of counsel claim; Withers' failure is due to the fact that no such proposition is found in the case law. Second, there could have been no help from reading Withers' non-confrontational interviews with the FBI. Withers lied in these interviews and denied involvement in any crimes. Similarly, his oncologist, wife and relatives did not corroborate Withers' claims to have been hallucinating for years, and Withers sought out a psychiatrist only in April 1994, after he was under investigation and had been interviewed by the FBI. The government also cross-examined Dr. O'Brien about these persons directly because their lack of corroboration undermined Withers' diminished capacity claim. Ineffective assistance of counsel error simply cannot be made out under these facts.

Moreover, even if error could be made out, Withers could not demonstrate any conceivable prejudice from the defense use of Dr. O'Brien. Dr. O'Brien provided evidence which supported Withers' diminished capacity claim. Unfortunately, a mountain of evidence proved that Withers' actions over thirteen months were calculated and deliberate, and not the product of

diminished mental capacity, whether produced by mental disease or by pain killers.

At pages fifteen through eighteen of its brief, the government painstakingly summarizes evidence which shows that Withers demonstrated social skills, mental agility and the capacity to make rational decisions and plans in his own interest. His sophisticated criminal activities, including a complex drug distribution scheme, his concealment and destruction of evidence, his financial motive, his concurrent but unrelated theft of ammunition, his support of a mistress and his malingering "'would be difficult for one whose mental capacity was significantly reduced due to mental disease,'" much less suffering from the 13-month hallucination Withers now posits. See United States v. Piervinanzi, 23 F.3d 670, 675, 684-85 (2d Cir. 1994) (departure denied for post-traumatic stress disorder in money laundering case).

Nothing in the actual record indicates that Withers suffered from, at the time of the crimes, a significant inability "to process information or to reason." United States v. Johnson, 979 F.2d 396, 401 (6th Cir. 1991); United States v. Hamilton, 949 F.2d 190, 193 (6th Cir. 1991). Indeed, the record before the Court established that Withers: knew he was engaging in illicit activity; was not manipulated or influenced by others; acted in his self-interest to conceal his crimes during the investigation; had the ability to stop (he did when the investigation closed in); and acted for financial gain at a time he was supporting a

mistress. Given the law of downward departures, see generally Koon v. United States, 116 S. Ct. 2035, 2045 (1996), the high standard for proving diminished capacity, and the defendant's burden of proof in this regard, United States v. Sheffer, 896 F.2d 842, 846 (4th Cir. 1990), there simply was no credible basis for a mental capacity downward departure for Withers on the full and complete record before the Court. Withers can have suffered no prejudice from his attorney's use of Dr. O'Brien.

B. Withers' Guilty Plea Claim

The Court also finds that Withers had effective assistance of counsel and suffered no prejudice regarding his guilty plea.

A "defendant has the right to make a reasonably informed decision whether to accept a plea offer." United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). However, a habeas petitioner seeking to attack the voluntary nature of his guilty plea on the ground of unfulfilled promises or representations by defense counsel faces a "heavy burden." Zilich v. Reid, 36 F.3d 317, 320 (3d Cir. 1994) (petitioner alleges hidden guarantee of probation). The plea colloquy constitutes a "formidable barrier" to collateral attack, and the facts surrounding a plea bargain are subject to a "deferential 'presumption of correctness.'" Id. (citation omitted).

Accordingly, the petitioner must "advance specific and credible allegations detailing the nature and circumstances" of any alleged promises or representations. Id. at 320-21. A

collateral challenge may be "summarily dismissed" where the petitioner's allegations are "inconsistent with the bulk of his conduct, and when he offers no detailed and specific facts" surrounding the agreement. Lesko v. Lehman, 925 F.2d 1527, 1537-38 (3d Cir. 1991).

The essence of Withers' argument about his guilty plea is that it was his lawyer's idea, his lawyer would discuss nothing else, his lawyer induced the plea by saying that Withers would "be required to serve approximately 17 years" in jail (the bottom of the Guideline range as stipulated in his plea agreement was 17.5 years not including an obstruction of justice adjustment to be litigated) and that absent his lawyer's immovable attitude and misinformation, he would have gone to trial for he had nothing to lose and was "getting nothing in return for his plea." (Withers' Mem. at 5-6, 12-14). Withers' own memorandum and exhibits at the guilty plea and sentencing hearings contradict this claim.

On June 3, 1994, Withers confessed in the face of overwhelming evidence. Four days later, on June 7, 1994, his lawyer, Mr. Miller, first met with him. However, in social worker Caruso's notes for June 4, 1994, she notes that Mrs. Withers told her that Withers "pleaded guilty to charges." In other words, after confessing to his crimes on confrontation and faced with overwhelming evidence of his guilt, Withers — three days before he met with Mr. Miller — was talking to his wife about pleading guilty.

The notion that Mr. Miller somehow forced Withers to plead guilty, given his June 3 confession, his June 4 statement to his wife and the weight of the evidence is unbelievable. The bald claim that he had nothing to lose by going to trial is equally unbelievable. Indeed, given the overwhelming evidence, Withers' much greater exposure had he gone to trial and the fact that his "chances of acquittal were slim" to non-existent, Day, 969 F.2d at 43, it would have been ineffective assistance not to counsel a guilty plea. By going to trial, Withers would have lost a three-level downward adjustment for timely acceptance of responsibility. That three-level swing alone would have taken him from an offense level of 39, a 21.8 year jail term at the bottom of the range, to one of 42, mandating 30 years to life imprisonment — at least an eight year swing.

Finally, no matter what Withers now "swears," or said to his understandably anxious mother at the time, he certainly could not have thought, and actually does not anywhere assert that he was guaranteed a 17-year sentence. It is true, however, that his plea agreement left him with a bottom-of-the-range sentence of 17.5 years, absent an obstruction adjustment which was to be, and was, litigated at sentencing. It is entirely probable that this information was the basis of whatever he said to, or was heard, by his mother.

However, the evidence clearly indicates that Withers had actual knowledge of a potential sentence higher than 17 years. The Presentence Report expressly stated the Guideline

range to be 262 months to 327 months. At his sentencing, Withers confirmed that he had independently read the PSR, had gone over it with counsel and understood it. Withers also executed a Guilty Plea Agreement which contained stipulations that left Withers at a level 37 absent the two-level upward obstruction adjustment which he ultimately received. Even at the lower level of 37, Withers faced a range of 210 to 262 months, over 17 years. At his guilty plea hearing, Withers stated that he: had discussed the case freely with his attorney; was satisfied with this attorney; understood the Indictment and wanted to plea guilty to it; discussed the plea agreement "fully;" signed the plea agreement; understood that the government was free to make whatever sentencing recommendation it deemed appropriate; and understood that he faced a statutory maximum sentence of life imprisonment and that this Court could sentence him to that term.

Finally, at the change of plea colloquy, Withers was informed several times in various ways that his Guideline range was above 17 years. He explicitly acknowledged that his lawyer's estimate of the Guideline sentence might be less than the Court's ultimate sentence. Thus, even if the legal advice Withers received about his sentence was incorrect — an issue which this Court does not and need not reach — Withers' sentencing guideline range was addressed so clearly in the PSR, the guilty plea agreement and the Court's colloquy, that it cancels out any such alleged advice. The plea was voluntarily made. See Dickerson v. Vaughn, 90 F.3d 87, 92 (3d Cir. 1996).

In sum, Withers' allegations are "inconsistent with the bulk of his conduct," and "he offers no detailed and specific facts" supporting his allegation. Lesko, 925 F.2d at 1537-38. In light of his confession and the other evidence, Withers' guilty plea in reality was a sound tactical move which took years off his potential sentence and provided at least the possibility of a downward departure. On this record, no error of defense counsel, much less prejudice from any error, can be found.

In sum, the Court finds that the record does not support Withers' ineffective assistance of counsel claims. Thus, the Court will deny Withers' § 2255 motion.

IV. Withers' Supplemental Section 2255 Motion

Withers has also moved, in his self-styled "Supplemental Motion," for § 2255 relief based on the application of the two-level downward "safety-valve" adjustment under U.S.S.G. §§ 2D1.1(b)(4) which came into effect by amendment of the narcotics Guideline during the pendency of Withers' direct appeal. For the following reasons, the Court will also deny this Motion.

First, Withers' Motion is out of time. Withers' new § 2255 argument, styled as a "supplemental motion" and filed on or about June 17, 1997, is out of time. Withers' direct appeal was denied on November 17, 1995. Under § 2255 as amended effective April 24, 1996, prisoners have one year from the date that their convictions become final to file a § 2255 motion. 28 U.S.C. § 2255. Even granting Withers one year from the effective date of

the amendment in which to file his motion, which would run until April 24, 1997, Withers' Motion is out of time. Withers filed his "supplemental motion" after April 24, 1997, and, although this motion is self-styled as a "supplemental motion," the motion actually raises an entirely new issue which is somewhat at odds with the arguments raised in his original motion. Thus, Withers has filed a new § 2255 motion which is out of time.

Second, Withers' new argument does not raise a substantive Constitutional error or allege ineffective assistance of counsel. Rather, he claims, almost one and one-half years after sentencing and direct appeal, a two-level mistake in the application of the Guidelines. He did not raise the amendment issue during direct appeal, or in his original § 2255 petition. He offers no "cause" for delay, The issue is thus waived under the cause and prejudice test of United States v. Frady, 456 U.S. 152, 168 (1982); see United States v. Essig, 10 F.3d 968, 976-79 (3d Cir. 1993).

Finally, the safety valve provision cannot apply retroactively to Withers. Withers' crimes ended with his arrest on June 3, 1994. He was sentenced on February 14, 1995. His direct appeal was rejected on November 17, 1995. Effective November 1, 1995 — after Withers' sentencing and while his direct appeal was pending — the narcotics Guidelines were amended to provide that, if certain "safety valve" criteria for first-time offenders were met, a defendant should receive a two-level

downward adjustment. Amendment 515; U.S.S.G. § 2D1.1(b)(4); see 18 U.S.C. § 3553(f); U.S.S.G. §§ 5C1.2; 2D1.1(b)(4), App. Note 7.

The Guidelines direct this Court to apply the Guideline Manual in effect on "the date the defendant is sentenced." U.S.S.G. § 1B1.11(a). The Guideline Manual applicable to Withers — that in effect on the date of his sentencing — did not provide for this safety valve adjustment. Thus, Withers' sentence, as imposed at the time, was correct.

Withers' reading of "sentenced" in Section 1B1.11(a) to mean the date on which all appeals of the sentence are exhausted is illogical, for the sentence must precede the appeal and a Manual must be applied in order to sentence. It is true that, for specified amendments to the Guidelines, a court has discretion to reduce a sentence, when a defendant is serving a lengthy prison term and the guideline range applicable to the defendant has been lowered as a result of the Guideline amendment. U.S.S.G. § 1B1.10(a). However, the safety valve amendment on which Withers relies, Amendment 515, is not listed as one of those to be accorded this retroactive effect. U.S.S.G. § 1B1.10(a), (c); see 18 U.S.C. § 3582(c)(2).

Therefore, a reduction in Withers' prison term based on Amendment 515 simply is "not authorized." U.S.S.G. § 1B1.10(a); compare United States v. Colon, 961 F.2d 41, 44-45 (2d Cir. 1992) (sufficient statutory direction to contrary to preclude post-sentence, retroactive application of the guideline amendment to case pending on direct appeal); United States v. Thompson, 70

F.3d 279, 281 (3d Cir. 1995) (amendment not listed in subsection (c) may not be applied retroactively) with United States v. Marcello, 13 F.3d 752, 756-57 (3d Cir. 1994) (amendment effective during pendency of direct appeal justifies remand only if it is explicitly retroactive).

Thus, the Court will deny Withers' motion for leave to file supplemental motion pursuant to 28 U.S.C. § 2255.

V. Conclusion

Accordingly, for the foregoing reasons, this Court will deny petitioner's motion to vacate, set aside or correct sentence and petitioner's motion for leave to file supplemental motion pursuant to 28 U.S.C. § 2255.

An appropriate Order follows.

Clarence C. Newcomer, J.

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

KENNETH R. WITHERS	:	CIVIL ACTION
	:	NO. 97-2819
v.	:	
	:	
	:	CRIMINAL ACTION
UNITED STATES AMERICA	:	NO. 94-343

O R D E R

AND NOW, this day of December, 1997, upon consideration of petitioner's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, and the government's response thereto, and petitioner's Motion for Leave to File Supplemental Motion Pursuant to 28 U.S.C. § 2255, and the government's response thereto, it is hereby ORDERED that said Motions are DENIED.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.