

The petition asserts: (1) defendant's counsel was ineffective at sentencing for not challenging (a) the conspiracy conviction as a lesser included offense of continuing criminal enterprise; and (b) the \$100,000 fine given petitioner's inability to pay, petition, at 1, 4; (2) the statute's failure to schedule cocaine base and cocaine as different substances violated the First, Fourth, and Fifth Amendments (due process and equal protection), as well as separation of powers, id. at 23, 28-30; (3) defendant is entitled to a three-point reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b) instead of the two-point reduction given at sentencing, id. at 39; and (4) the court did not make a specific finding that the controlled substance involved was cocaine base rather than cocaine powder, in conformity with Fed. R. Crim. P. 32(c)(1), supplemental memorandum, at 1.

These grounds for relief are ruled on as follows:

1. Ineffective assistance – granted in part and denied in part. An ineffective assistance claim requires –

First, the petitioner must show that his or her counsel's performance was deficient – that, under all the circumstances, the attorney's representation fell below an objective standard of reasonableness. . . . Claimants must identify specific errors by counsel, and we must indulge a strong presumption that counsel's conduct was reasonable.

Second, the petitioner must show prejudice. . . . [A] petitioner must demonstrate a reasonable probability that, but for the unprofessional errors, the result would have been different.

Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992), cert. denied, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed.2d 746 (1993).

a. Lesser included offense – The conspiracy conviction and sentence under Count I will be vacated. See Rutledge v. United States, 517 U.S. 292, 300, 116 S. Ct. 1241, 1246, 134 L. Ed.2d 419 (1996) (§ 846 is lesser included offense of § 848). Re-sentencing is unnecessary: the calculation of defendant's sentence under the guidelines is unaffected,³ excepting the vacating of the \$50 special assessment for Count I.

b. \$100,000 fine – denied. A defendant cannot bring an ineffective assistance claim challenging a fine because the defendant is not "claiming a right to be released" from custody under 28 U.S.C. § 2255. See United States v. Segler, 37 F.3d 1131, 1137 (5th Cir. 1994) ("[I]f counsel's constitutionally insufficient assistance affected the trial court's guilt determination or the sentencer's imposition of a prison term, a prisoner's ineffective assistance of counsel claim falls within the scope of § 2255; if, as here, it relates only to the imposition of a fine, his claim falls outside § 2255"); United States v. Watroba, 56 F.3d 28, 29

³ On Count II, defendant's base offense level is 38. Additions: two levels under § 2D1.2 because the offense involved the distribution of cocaine base near a school and defendant routinely used juveniles in his illegal activities; two levels under § 2D1.1(b) for possession of a dangerous weapon; four levels under § 3B1.1(a) for defendant's leadership role. Subtracting two levels for acceptance of responsibility under § 3E1.1 yields a total offense level of 44, which – with a criminal history category of I – results in a sentence of life imprisonment. U.S.S.G. ch. 5, pt. A.

(6th Cir.) (same), cert. denied, 516 U.S. 904, 116 S. Ct. 269, 133 L. Ed.2d 191 (1995).

2. Failure to schedule cocaine base separately from cocaine powder – denied. Our Court of Appeals has rejected the argument –

We have upheld the constitutionality of the federal drug statutes (21 U.S.C § 841(b)(1) & 846) and the guidelines provisions (U.S.S.G. § 2D1.1) that treat crack cocaine offenses more severely than offenses involving an equal quantity of cocaine powder. See United States v. Frazier, 981 F.2d [92 (3d Cir. 1992)] (holding that distinctions between crack cocaine and cocaine powder for sentencing purposes do not constitute an equal protection violation and that the 100:1 ratio does not constitute cruel and unusual punishment); United States v. Jones, 979 F.2d 317 (3d Cir. 1992) (holding guidelines provisions imposing higher offense levels for offenses involving crack cocaine not to be unconstitutionally vague).

United States v. Alton, 60 F.3d 1065, 1069 (3d Cir.), cert. denied, 516 U.S. 1015, 116 S. Ct. 576, 133 L. Ed.2d 500 (1995); see also United States v. James, 78 F.3d 851, 853 n.2 (3d Cir.) (rejecting due process challenge as meritless), cert. denied, ___ U.S. ___, 117 S. Ct. 128, 136 L. Ed.2d 77 (1996). Defendant's First Amendment claim of a religious right "to exist in an altered state," petition, at 28, his Fourth Amendment claim, and his separation of powers claim are rejected as frivolous.

3. Three-point reduction for acceptance of responsibility – denied. See order, July 19, 1996 (§ 3E1.1 of the 1991 sentencing guidelines did not contain a three-level reduction; amendment 459 adding the extra reduction is not retroactive). Even

if a three-level reduction were allowable, the total offense level of 43 would prescribe a sentence of life imprisonment.

4. Lack of specific findings under Fed. R. Crim. P. 32(c)(1) – denied. This claim is not cognizable under § 2255. See United States v. Hill, 368 U.S. 424, 429, 82 S. Ct. 468, 472, 7 L. Ed.2d 417 (1962) (“[C]ollateral relief is not available when all that is shown is a failure to comply with the formal requirements” of Rule 32). Moreover, at sentencing, petitioner affirmed the portions of the pre-sentence report that described the substance involved as cocaine base, tr. at 9, July 12, 1991. In paragraph 6(b)(1) of his plea agreement, petitioner stipulated that the substance was cocaine base. Cf. United States v. Faulks, 143 F.3d 133, 138-39 (3d Cir. 1998) (defendant’s agreement with government’s account of factual basis for guilty plea supports conclusion that substance involved was cocaine base).

An order accompanies this memorandum.

Edmund V. Ludwig, J.