



improper jury instructions, and erroneous sentencing. It asserts (1) that trial counsel was ineffective for (a) failing to investigate defendant's prior conviction on February 28, 1984 in the Philadelphia Court of Common Pleas (No. 2836-2839); (b) not objecting to the prosecutor's false statement in his closing argument that Cornish had been convicted of a firearms violation; © permitting Cornish to stipulate to a prior conviction and that the gun moved in interstate commerce; (2) that there was no jurisdiction to try defendant because the government failed to demonstrate an interstate commerce nexus; (3) that the jury charge directed a verdict of guilty by incorporating the parties' stipulations; and (4) that defendant's prior conviction for third-degree robbery is not a violent felony under the U.S. Sentencing Guidelines.

The above-listed grounds for relief are rejected for the following reasons:<sup>1</sup>

1. Ineffective assistance of trial counsel

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<sup>1</sup>Defendant's § 2255 petition is not time-barred. Under the Antiterrorism and Effective Death Penalty Act of 1996, a "1-year period of limitation shall apply to a motion under this section . . . [from] the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255; see also Burns v. Morton, 134 F.3d 109, 111-12 (3d Cir. 1998) (holding that "federal inmates who wish to file motions to vacate, set aside, or correct their sentences under 28 U.S.C. § 2255 must adhere to a one-year period of limitation"). "[A] pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court." Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). On August 7, 1997 defendant's sentence became final. On August 6, 1998 defendant delivered his petition to prison officials, who mailed it the following day. Pet., certificate of service.

a. Failure to investigate defendant's prior state conviction -

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).

Petitioner claims that his 180-month sentence would be reduced to 108 months if his unconstitutional conviction in state court were not used as an enhancement. According to defendant, counsel should have inquired into his February 1984 conviction because his state court attorney failed to file an appeal.

"[A] prisoner may attack his current sentence by habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence." Young v. Vaughn, 83 F.3d 72, 78 (3d Cir. 1996). An attack on a state conviction under § 2255 must satisfy the requirements of § 2254 petitions - such as exhaustion of state remedies and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See United States v. Gaylor, 828 F.2d 253, 254-55 (4th Cir. 1987) (holding that § 2255 petitions require exhaustion). But see Brown

v. United States, 610 F.2d 672, 675 (9th Cir. 1980) (holding that § 2255 petitions do not require exhaustion).

A presumption of regularity attaches to final judgments. See Parke v. Raley, 506 U.S. 20, 29, 113 S. Ct. 517, 523, 121 L. Ed. 2d 391 (1992).<sup>2</sup> To this extent, it cannot be said that defendant's counsel acted unreasonably in not questioning the prior state court conviction.

Moreover, defendant cannot demonstrate prejudice; challenging the conviction would have been futile. He failed to exhaust his state court remedies by not seeking collateral relief in state court. See Lambert v. Blackwell, 134 F.3d 506, 513 (1998) (restating rule that habeas petitioner must exhaust state remedies); see also 42 Pa. Con. Stat. Ann. §§ 9541-46 (West 1998) (providing for collateral review of criminal conviction). Furthermore, defendant is not entitled to an evidentiary hearing. See 28 U.S.C. § 2254(e)(2) (prohibiting evidentiary hearings where, as here, defendant has not developed the factual basis for the state court claims, with certain inapplicable exceptions).

b. Failure to object to the prosecutor's false statement in closing argument that defendant had been convicted of a firearms violation – The prosecutor made no such statement. Tr. at 123-142, 157-165 (prosecutor's closing arguments and rebuttal arguments).

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<sup>2</sup>Relying on Parke, the Tenth Circuit held that defense counsel's failure to "investigate defendant's prior convictions" is not "ineffective assistance because prior convictions are presumed valid." United States v. Cox, 83 F.3d 336, 341 (10th Cir. 1996).

c. Permitting defendant to stipulate to an interstate commerce nexus for the gun and to a prior conviction – Counsel’s recommendation to stipulate to two elements of the crime were tactical decisions and, as such, entitled to considerable deference. See Strickland v. Washington, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674 (1984) (noting the strong presumption of effective assistance as to trial strategy); United States v. Chavez-Marquez, 66 F.3d 259, 263 (10th Cir. 1995) (counsel’s decision to stipulate to a prior conviction requires “highly deferential” review); Hakeem v. Beyer, 990 F.2d 750, 763 (3d Cir. 1993) (decision to stipulate to the testimony of an absent witness “involved trial strategy and is entitled to deference”); Grady v. United States, 929 F.2d 468, 470 (9th Cir. 1991) (stipulation that defendant violated parole was a “tactical decision that [does] not give rise to an ineffective assistance of counsel claim”). Given the overwhelming evidence that the handgun in question, a Colt revolver, had traveled in interstate commerce and that defendant had a prior felony conviction, his attorney’s representation did not fall below an objective standard of reasonableness.<sup>3</sup>

What is more, defendant cannot show that the stipulations affected the outcome. As the government points out, “it is well known that Colt firearms are manufactured in Connecticut.” Gov’t

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<sup>3</sup>One advantage of defense counsel’s strategy was that the government agreed not to adduce evidence as to the nature of the prior offense at trial.

br., at 12 (citing five federal cases that note the origin of Colt firearms). Also, a firearms examiner from the Philadelphia Police Department testified that defendant's Colt revolver was manufactured in Connecticut. Tr. At 42. As to defendant's criminal record, it is a matter of public record and was uncontroverted.

2. Lack of jurisdiction to try defendant – Given the evidence of interstate nexus, see supra ¶ 1, there is no basis for this contention.

3. Directing a verdict in the jury charge – According to petitioner, "the district court's instructions 'constructively amending' the charge were in effect a 'directed verdict.'" Def's br., at 38. In essence, petitioner maintains that the jury instructions, by referring to the stipulation as to the prior conviction and the expert testimony that the handgun traveled in interstate commerce, amounted to a directed verdict.

Our Court of Appeals rejected this argument on direct review. See Cornish, 103 F.3d at 303-07. "A section 2255 petition is not a substitute for an appeal, nor may it be used to relitigate matters decided adversely on appeal." Virgin Islands v. Nicholas, 759 F.2d 1073, 1074 (3d Cir. 1985); see also United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993) ("Section 2255 generally 'may not be employed to relitigate questions which were raised and considered on direct appeal.'" (quoting Barton v. United States, 791 F.2d 265, 267 (2d Cir. 1986))).

In addition, defendant did not object to the jury instructions at trial. See Cornish, 103 F.3d at 303. Defendant is entitled to collateral review only if he can demonstrate cause for and prejudice resulting from the default. Moscato v. Federal Bureau of Prisons, 98 F.3d 757, 761 (3d Cir. 1996). On appeal, it was held that "the district court's jury instruction could not have seriously affected the fairness, integrity or public reputation of the judicial proceedings." Cornish, 103 F.3d at 306. The court concluded that the jury instruction was not plain error and was harmless beyond a reasonable doubt. See id. As a result, Cornish cannot demonstrate prejudice. See United States v. Frady, 456 U.S. 152, 166, 102 S. Ct. 1584, 1593, 71 L. Ed. 2d 816 (1982) (holding that cause and prejudice standard is "a significantly higher hurdle" than plain error standard).

4. Third-degree robbery as a violent felony under the Sentencing Guidelines – On direct review, an offense under 18 Pa. Con. Stat. Ann. § 3701(a)(1)(v) was held to be a "violent felony" as a matter of law. See Cornish, 103 F.3d at 307-09. Defendant may not relitigate this claim collaterally. See supra ¶ 3 (effect of prior appeal on collateral review). Defendant's assertion that the rule of lenity should apply is belated, as this argument was not raised previously. See id. (effect of default on collateral review). In any event, "the doctrine that ambiguities in criminal statutes must be resolved in favor of lenity is not applicable here since there is no ambiguity to resolve." United States v. Sherman, 150 F.3d 306, 318 (3d Cir. 1998).

Accordingly, the petition must be denied.

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Edmund V. Ludwig, J.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	NO. 94-378
ANTHONY CORNISH	:	(NO. 98-CV-4193)

O R D E R

AND NOW, this 26th day of October, 1998 defendant Anthony Cornish's petition to vacate, set aside, or correct sentence, 28 U.S.C. § 2255 (1998), is denied.<sup>1</sup>

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Edmund V. Ludwig, J.

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<sup>1</sup>There does not appear to be probable cause for a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (1998).