

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

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DONATO TELESKO :  
 :  
 : Civil No. 3:96CV419(AWT)  
 v. :  
 : Criminal No. 5:91CR32 (TFGD)  
 UNITED STATES OF AMERICA :  
 :  
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RULING ON AMENDED PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, acting pro se, has filed an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 to vacate and set aside his sentence and conviction. For the reasons discussed below, his petition is being denied.

**I. Facts**

On July 2, 1991, the petitioner, Donato Telesco, pled guilty to a substitute information charging him with one count of conspiracy to possess with intent to distribute in excess of 500 grams of cocaine, in violation of 21 U.S.C. §§ 846. After the guilty plea, the Probation Office prepared a presentence investigation report ("PSR"), in which it concluded that Telesco was a career offender pursuant to U.S.S.G. § 4B1.1. This determination resulted in an offense level of 32, a criminal history category of VI and a sentencing guideline range of 210 to 262 months of incarceration.

At sentencing, Telesco objected to the PSR's classification of him as a career offender on the ground that one of his prior convictions, namely, a 1981 conviction for burglary in the third degree, should not have been counted as a crime of violence. The district court rejected Telesco's argument and sentenced him as a career offender to a term of imprisonment of 210 months.

Telesco subsequently appealed his sentence on the ground that the district court should not have classified his conviction for third degree burglary as a conviction for a crime of violence because the facts of that offense showed that it did not involve actual violence. He claimed that because he did not have two prior violent felony convictions, he should not have been sentenced as a career offender. The Second Circuit rejected his argument and affirmed the conviction and sentence. See United States v. Telesco, 962 F.2d 165 (2d Cir. 1992).

Telesco, proceeding pro se, contends in his amended habeas petition that: 1) his classification as a career offender violated the ex post facto clause, 2) his sentence was incorrect because third degree burglary was not a crime of violence, 3) his guilty plea was coerced, 4) the government did not adhere to the plea agreement, and 5) he received ineffective assistance of counsel.

## II. Discussion

### A. Claims Waived Or Raised on Appeal

The petitioner has waived his claims with respect to violation of the ex post facto clause, a coerced guilty plea, and failure by the government to adhere to the plea agreement because he did not raise them on appeal.<sup>1</sup> "It is well-settled that where a petitioner does not bring a claim on direct appeal, he is barred from raising the claim in a subsequent § 2255 proceeding unless he can establish both cause for the

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<sup>1</sup> In deference to the petitioner's pro se status, the court has also considered whether his counsel's failure to raise on appeal these three issues, which have been waived because they were not raised on appeal, could serve as the basis for a claim of ineffective assistance of counsel. See Part II.B. below. The court concludes that it could not. The petitioner's argument as to violation of the ex post facto clause is in substance his contention that his conspiracy conviction could not be used to trigger the career offender provision. But in making the argument as to the ex post facto clause, he relies on an erroneous interpretation of a November 1, 1995 amendment to the Sentencing Guidelines. See U.S. Sentencing Guidelines Manual app. C, amend. 528 (1995). However, rather than supporting the analysis in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993) and United States v. Bellazerius, 24 F.3d 698 (5th Cir. 1994), the Sentencing Commission rejected that analysis, noting that other circuits, which were subsequently joined by the Second Circuit in United States v. Jackson, 60 F.3d 128 (2d Cir. 1995), had upheld the Commission's definition of "controlled substance offense"; it repromulgated without change Application Note 1 of the Commentary to U.S.S.G. § 4B1.2. See U.S. Sentencing Guidelines Manual app. C, amend. 528 (1995). As to the petitioner's contention that he was induced to enter a guilty plea by a misrepresentation by the government to the effect that it would not push for a career offender enhancement and as to his contention that the government failed to adhere to the plea agreement in this regard, a review of the plea agreement (doc. #13) reveals there is no basis for these claims.

procedural default and actual prejudice resulting therefrom.” Billy-Eko v. United States, 8 F.3d 111, 113-14 (2d Cir. 1993) (citing United States v. Frady, 456 U.S. 152, 167-68 (1982)); see also Campino v. United States, 968 F.2d 187, 190 (2d Cir. 1992). As described above, the only argument made by the petitioner on appeal related to the classification of his prior burglary conviction as a crime of violence. The petitioner did not raise these other claims on appeal, and makes no showing in his petition of cause for not doing so. Thus, the petitioner is barred from making these arguments now.

On appeal, Telesco’s only claim was that the district court erred in sentencing him as a career offender because third degree burglary was not a crime of violence. The Second Circuit, however, rejected his claim and affirmed the conviction and sentence. See Telesco, 962 F.2d 165. Because the Second Circuit denied this claim by Telesco regarding his status as a career offender, he is barred from raising the same claim again in his § 2255 motion. The Second Circuit has held that “section 2255 may not be employed to relitigate questions which were raised and considered on direct appeal.” United States v. Jones, 918 F.2d 9, 10 (2d Cir. 1990) (quoting Barton v. United States, 791 F. 2d 265, 267 (2d Cir. 1986)). Thus, because this claim was previously raised by the petitioner, and subsequently rejected by the Second Circuit, the petitioner may not use his 2255 motion to relitigate this issue.

**B. Ineffective Assistance of Counsel**

Telesco claims that his counsel was ineffective in failing to argue on appeal, first, that his conspiracy conviction could not be used to trigger the career-offender provision pursuant to U.S.S.G. § 4B1.1, and second, that his prior burglary conviction was improperly classified as a crime of violence.

Claims of ineffective assistance of counsel can be raised for the first time in a § 2255 motion. However, a person challenging his sentence on the basis of ineffective assistance of counsel bears a heavy burden. First, he must show that counsel's performance "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984); United States v. Torres, 129 F.3d 710, 716 (2d Cir. 1997). In making such an evaluation, great deference is to be given to counsel's judgment:

Because of the difficulties inherent in making an evaluation [of effectiveness], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689 (quotations omitted). See United States v. Zackson, 6 F.3d 911, 919 (2d Cir. 1993); United States v. Eisen, 974 F.2d 246, 265 (2d Cir. 1992). Second, a

petitioner must show that the errors, if any, prejudiced his defense. “[T]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993); Torres, 129 F.3d at 716.

A petitioner must satisfy both prongs of the Strickland test to demonstrate ineffective assistance of counsel. If the petitioner has failed to satisfy one prong, the court need not consider the other. Strickland, 466 U.S. at 697.

As to his first contention, the petitioner’s claim that the instant drug conspiracy conviction could not trigger the career-offender provision of the Sentencing Guidelines is without merit. The applicable version of Application Note 1 to Section 4B1.2 of the Sentencing Guidelines stated that a “controlled substance offense” under Section 4B1.1 included “the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.” U.S. Sentencing Guidelines Manual § 4B1.2, cmt. n.1 (1990). In United States v. Jackson, 60 F.3d 128, 132-33 (2d Cir. 1995), the court held that, despite the fact that the elements of a conspiracy are different from an underlying crime, it is “more relevant that

Congress has manifested its intent that drug conspiracies and underlying offenses should not be treated differently: it imposed the same penalty for a narcotics conspiracy conviction as for the substantive offense" (citing 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.")). This view is "fully consistent with the purpose behind § 994(h) to impose 'substantial prison terms ... on repeat violent offenders and repeat drug traffickers.'" Id. at 133 (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 175 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3358)(citing United States v. Kennedy, 32 F.3d 876, 889 (4th Cir. 1994)(noting that by "including conspiracy as a career offender offense, the [Sentencing] Commission ensured that persons engaged in a collective drug distribution scheme would receive the same treatment as individual violators of similarly serious drug trafficking laws.")).

The petitioner's second contention is that his counsel failed to raise on appeal the issue of whether his prior burglary conviction was improperly classified as a crime of violence. However, as described above, this issue was, in fact, raised on appeal.

The petitioner has failed, with respect to both

contentions, to satisfy either prong of the Strickland test. As to the petitioner's first contention, there was no reasonable basis in then existing law to raise a claim based on the petitioner's contention that his conspiracy conviction could not be used to trigger the career offender provision and existing law was clearly to the contrary, and as to his second contention, Telesco's counsel raised on appeal the issue of classification of his prior burglary conviction as a crime of violence. Thus, the professional performance of Telesco's counsel did not fall below an objective standard of reasonableness. See Reed v. Ross, 468 U.S. 1, 15 (1984)(when there is "no reasonable basis in existing law" to raise a claim, "it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim.") In addition, since the law is settled contrary to Telesco's positions, he has not established that he suffered prejudice from any act or omission of his counsel. Therefore, the petitioner has failed to state a meritorious claim of ineffective assistance of counsel.



**III. Conclusion**

For the reasons stated above, the petitioner's Amended Petition for Writ of Habeas Corpus (Doc. #41) is hereby DENIED.

It is so ordered.

Dated at Hartford, Connecticut on this 27th day of February, 2001.

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Alvin W. Thompson  
United States District Judge