

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA            )  
  )  
    Plaintiff/Respondent,            )  
  )  
                  v.                    )  
  )  
  )  
RODNEY L. CONYER,                    )  
  )  
  )  
    Defendant/Petitioner.            )  
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James F. Brose, Esquire, Media, Pennsylvania. Counsel for  
Petitioner.

Colm F. Connolly, United States Attorney and Edmond Falgowski,  
Assistant United States Attorney, United States Attorney's  
Office, Wilmington, Delaware. Counsel for Respondent.

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**MEMORANDUM OPINION**

Wilmington, Delaware

Dated: October 7, 2003

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

Petitioner Rodney L. Conyer is an inmate at the Federal Correctional Institution in Jonesville, Virginia. Currently before the court is petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (D.I. 40) On May 12, 2003, an evidentiary hearing was held before this court. The following are the court's findings of fact and conclusions of law.

**II. FINDINGS OF FACT**

**A. Procedural Background**

1. On October 22, 1999, petitioner pled guilty to three counts of bank robbery in violation of 18 U.S.C. § 2113(a). On January 14, 2000, Judge Murray M. Schwartz sentenced defendant to 87 months of imprisonment. (D.I. 31)

2. Conyer filed an appeal with the Third Circuit Court of Appeals on January 26, 2000. (D.I. 32) On October 25, 2000 the Court of Appeals affirmed the judgment of the district court. (D.I. 37)

3. On September 24, 2001, petitioner filed a pro se motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and on February 27, 2003, this court ordered James F. Brose to represent Conyer. (D.I. 40, 51)

**B. Presentence Report**

4. Judge Schwartz's January 14, 2000 sentencing of petitioner was based upon a pre-sentence report prepared on December 27, 1999 by Walter P. Matthews, U.S. Probation Officer. (D.I. 31)

5. The presentence report resulted in a criminal history classification of category IV, based upon a total of nine criminal history points. (Id.)

6. Petitioner's criminal history computation included three points awarded for misdemeanor convictions in the State of Maryland, including convictions for misdemeanor trespassing on October 10, 1990, disorderly conduct and littering on October 24, 1990, and misdemeanor theft on November 3, 1990. Each of these convictions occurred in 1990, when petitioner was nineteen years-old. (D.I. 71)

7. The records indicate that petitioner pled guilty to each of the three misdemeanor charges and received, in each case, a suspended sentence. (Id.)

8. In the case of the misdemeanor theft conviction, petitioner was subsequently found on August 16, 1993 to be in violation of his probation and was ordered to serve six days imprisonment. (Id.)

9. Matthews testified that in preparing the Presentence Report at issue, he relied on a presentence report by the U.S. Probation Office in Maryland. (Id.) That report had

been prepared for a federal sentencing proceeding against petitioner in the United States District Court for the District of Maryland. (Id.)

10. Matthews testified that it is customary to investigate whether a conviction appearing in the criminal history section of a presentence report was uncounseled. (Id. at 27)

11. In investigating Maryland convictions, Matthews was advised of the Maryland state law regarding a defendant's right to counsel. (Id. at 28)

12. Maryland law requires that all criminal defendants appearing before a court without representation be advised of their right to counsel. Md. Ct. R. 4-215(a) (requiring court to advise all criminal defendants of right to counsel); id. at 4-215(b) (requiring court to ascertain in open court whether a criminal defendant appearing without an attorney has voluntarily and intelligently waived his right to counsel). This state law predates petitioner's 1990 convictions.

13. The State of Maryland provided to the U.S. Probation Office "Criminal System Inquiry Charge/Disposition Display" reports ("Maryland Criminal Charge Reports") that are ambiguous as to whether petitioner either had counsel at the time he pled guilty to the misdemeanor convictions or had voluntarily waived his right to counsel. (D.X. 1)

14. Maryland state archivists have been unable to retrieve any transcripts or other records pertaining to the 1990 proceedings, other than the Maryland Criminal Charge Reports.

15. Matthews testified that it is his practice to send a copy of the presentence report to both the defendant and defendant's counsel prior to sentencing. (Id. at 26)

**C. January 14, 2000 Sentencing**

16. Petitioner was represented by Raymond Radulski during the course of his plea agreement and sentencing in the underlying proceeding before Judge Schwartz. (D.I. 13; D.I. 59 at 17)

17. Prior to a criminal sentencing, Radulski's practice is to meet with the defendant and review the presentence report in detail, paying specific attention to the criminal history calculations. (D.I. 59 at 18)

18. Petitioner and Radulski did meet prior to sentencing to discuss the presentence report. (Id. at 8)

19. Petitioner testified that he told Radulski that he was unrepresented by counsel when he pled guilty to the three misdemeanor charges in Maryland. (D.I. 59 at 9)

20. Petitioner testified that Radulski told him that the uncounseled convictions were something they would raise on appeal. (Id.)

21. Radulski has no recollection as to whether

petitioner had raised the issue of his uncounseled misdemeanor convictions at their presentencing conference. (D.I. 59 at 19-20)

22. Radulski testified that had anything "of potential value in reducing the criminal history" been brought to his attention, he would have raised an objection. (Id. at 19)

23. At the January 14, 2000 sentencing, neither Radulski nor petitioner objected to the presentence report.

### **III. CONCLUSIONS OF LAW**

24. Petitioner raises two grounds for relief. First, that prior uncounseled misdemeanors were improperly used to calculate his prior criminal record score at sentencing. (D.I. 60, at 1) Second, that petitioner's counsel, at the time the plea was entered, rendered ineffective assistance by failing to address this alleged error at sentencing and in his appeal to the Third Circuit. (Id.)

#### **A. Standard of Review**

25. After conviction and exhaustion, or waiver, of any right to appeal, courts are entitled to presume that a defendant stands fairly and finally convicted. United States v. Frady, 456 U.S. 152 (1982); United States v. Shaid, 937 F.2d 228 (5th Cir. 1991).

26. Prisoners in federal custody may attack the validity of their sentences via 28 U.S.C. § 2255. Section 2255 is a vehicle to cure jurisdictional errors, constitutional

violations, proceedings that resulted in a "complete miscarriage of justice," or events that were "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 784 (1979). See also U.S. v. Addonizio, 442 U.S. 178 (1979); United States v. Essig, 10 F.3d 968 (3rd Cir. 1993).

27. "Generally if a prisoner's § 2255 [petition] raises an issue of material fact, the district court must hold a hearing to determine the truth of the allegations." Essig, 10 F.3d at 976. At a hearing under § 2255, the petitioner bears the burden of proof to prove by a preponderance of evidence that he is entitled to relief. See United States v. DiCarlo 575 F.2d 952, 954 (1st Cir. 1978).

28. Prior judicial proceedings are entitled to a presumption of regularity that the proceedings were free of constitutional defect. Parke v. Raley, 506 U.S. 20, 29 (1992) (describing the presumption of regularity as "deeply rooted in our jurisprudence").

29. The presumption of regularity attaches to court records that are silent as to whether the defendant was represented by counsel. United States v. Jones, 332 F.3d 688, 697 (3d Cir. 2003).

#### **A. Sentencing Report**

30. Petitioner asserts that in each of these three

convictions, he was unrepresented by counsel and he did not knowingly waive his right to counsel. (D.I. 59 at 5) Petitioner argues that these convictions were unconstitutional and, therefore, that they may not be considered in a criminal sentencing decision. See United States, ex rel. Fletcher v. Walters, 526 F.2d 359 (3d Cir. 1975).

31. In support of the presumption of regularity, the government relies upon Maryland law which requires that in all criminal proceedings the court is required to provide express notice of the right to counsel. Md. Ct. R. 4-213.

32. Petitioner relies solely on his own uncorroborated testimony as evidence that he was neither represented by counsel nor voluntarily waived his right to counsel.

33. Petitioner argues that the Maryland Criminal Charge Reports corroborate his testimony, because they neither expressly indicate whether petitioner had counsel nor whether he had voluntarily waived his right to counsel. (D.I. 60 at 5-6) To give the ambiguous records this interpretation, however, would ignore the central tenet of the presumption of regularity; specifically, that where records are ambiguous, the state receives the benefit of the doubt. Jones, 332 F.3d at 697.

34. This court does not find petitioner's testimony credible nor his argument persuasive. To conclude otherwise would require this court to find that, in each of the three

misdemeanor convictions at issue, the state district court flaunted long-standing Maryland law. Without extrinsic evidence of judicial irregularity, such a conclusion is unwarranted.

35. Therefore, this court finds that there is insufficient evidence to sustain petitioner's argument that his misdemeanor convictions were obtained in violation of the Sixth Amendment. Even if this court were to find sufficient evidence to sustain petitioner's argument, § 2255 would not afford the petitioner relief as a matter of law.

**B. Collateral Review under 28 U.S.C. § 2255 of Prior Convictions Used for Sentencing Enhancement**

36. Section 2255 provides habeas corpus relief to prisoners in custody who have received a sentence in violation of the constitution or in excess of the maximum authorized by law. 28 U.S.C. § 2255.

37. The Supreme Court has held, however, that a "defendant may not collaterally attack his prior conviction through a motion under § 2255, unless he claims that conviction was obtained in violation of the right to counsel **and he raised that claim at his federal sentencing proceeding.**" Daniels v. United States, 532 U.S. 374, 375 (1974) (emphasis added).

38. Even if petitioner's claim in the present case satisfied the first prong of Daniels, it fails to satisfy the second. Petitioner did not enter an objection to the inclusion

of the 1990 misdemeanor convictions at his federal sentencing proceeding. (D.I. 33 at 6) Consequently, any objection to the inclusion of his 1990 misdemeanor convictions in his presentence report is waived.

39. Petitioner relies largely on a recent Supreme Court decision to argue otherwise. In Alabama v. Shelton, the Court held that in any criminal case in which there is a suspended sentence that may result in a period of incarceration, Sixth Amendment guarantees attach. 535 U.S. 654, 674 (2002) (“[A defendant] is entitled to appointed counsel at the critical stage when his guilty or innocence of the charged crime is decided and his vulnerability to imprisonment is determined.”). Petitioner, therefore, contends that his prior alleged uncounseled misdemeanor convictions were unconstitutional and, therefore, his criminal history classification under the federal sentencing guidelines should be reassessed. The holding in Shelton, however, is inapposite to the present case for two reasons. First, Shelton involved a direct appeal, whereas petitioner in the present case is attempting a collateral attack on a prior conviction. Second, as has previously been discussed, Maryland prior to Shelton, and at the time of petitioner’s misdemeanor convictions, already recognized a criminal defendant’s right to counsel.

### **C. Ineffective Assistance of Counsel**

40. In an apparent effort to overcome Daniels, petitioner's complaint claims ineffective assistance of counsel at trial. (D.I. 40 at 5)<sup>1</sup> At the May 12, 2003, evidentiary hearing held by this court, petitioner testified that while reviewing his presentence report with Radulski, petitioner raised the issue that he was unrepresented by counsel for the 1990 misdemeanor convictions. (D.I. 59 at 9).

41. Petitioner alleges that Radulski indicated that he would "look into it and it may be an issue we could bring up on appeal." Id. Radulski's alleged failure to raise an objection to the presentence report thus forms the basis for petitioner's claim of ineffective assistance of counsel.

42. The government contends that to obtain relief based upon a trial error to which no contemporaneous objection was made, the petitioner must satisfy the cause and prejudice test. (D.I. 62 at 5-6); see United States v. Frady, 456 U.S. 152, 167 (1982).

43. Ineffective assistance of counsel may in some cases serve as a cause under Frady, but the Supreme Court has held that generally there must be "some objective factor external to the defense." Murray v. Carrier, 477 U.S. 478, 488 (1986).

44. In this case, petitioner has offered no evidence

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<sup>1</sup> The court notes, however, that petitioner's post-hearing briefs fail to address this issue. (D.I. 60, 63, 65)

of external objective factors affecting the ability of his defense counsel to raise these objections at his federal sentencing. Consequently, even if this court were to believe that petitioner raised these concerns with Radulski, that alone could not support a finding that Radulski's failure to object satisfies the cause requirement of the Frady test. See Murray, 477 U.S. at 488.

45. Consequently, this court finds as a matter of law that, even if petitioner's 1990 misdemeanor convictions were obtained in violation of his Sixth Amendment rights, § 2255 does not provide for collateral review of those prior convictions, since the issues were not properly raised in the sentencing proceeding. Therefore, petitioner's motion to correct his sentence is denied.

