IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT SANDERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. A. No. 01-603-KAJ
	)	Cr. A. No. 99-12-KAJ
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Robert Sanders, *pro se* Petitioner.

Richard G. Andrews, First Assistant United States Attorney, United States Department of Justice, Wilmington, Delaware. Attorney for Respondent.

March 2, 2004
Wilmington, Delaware

JORDAN, DISTRICT JUDGE

I. INTRODUCTION

Petitioner Robert Sanders has filed with the Court the current motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (D.I. 74.) Sanders is serving his sentence at Federal Prison Camp Allenwood in Montgomery, Pennsylvania. As explained below, the Court will dismiss Sander's 's motion.

II. PROCEDURAL AND FACTUAL BACKGROUND

Sanders pled guilty to conspiracy to distribute heroin in violation of 21 U.S.C. § 841. As a career criminal under U.S.S.G. § 4B1.1, this Court[1] sentenced him to 108 months of imprisonment. The Third Circuit Court of Appeals affirmed his conviction and sentence on direct appeal. *See United States v. Sanders*, No. 99-5653, Unreported Mem. Op.(3d Cir. June 8, 2000)

III. STANDARD OF REVIEW

After conviction and exhaustion, or waiver, of any right to appeal, courts can presume that a defendant stands fairly and finally convicted. *United States v. Frady*, 456 U.S. 152, 164 (1982). However, prisoners in federal custody may attack the validity of their sentences pursuant to 28 U.S.C. § 2255.

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[1]This matter was originally assigned to the Honorable Joseph J. Longobardi, but was reassigned to the undersigned on January 6, 2003.

Section 2255 cures 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).

When reviewing a § 2255 motion, a federal district court must hold an evidentiary hearing only when the petitioner raises an issue of material fact. *See United States v. Essig,* 10 F.3d 968, 976 (3d Cir. 1993). However, a petitioner is not entitled to a hearing if his allegations are conclusively contradicted by the record, or if they are patently frivolous. *Solis v. United States*, 252 F.3d 289, 295 (3d Cir. 2001); *see Gov't of the Virgin Islands v. Forte,* 865 F.2d 59, 62 (3d Cir. 1989). Thus, if the motions, files, and records "show conclusively that the movant is not entitled to relief," then a district court may summarily dismiss a § 2255 motion. *United States v. Nahodil,* 36 F.3d 323, 326 (3d Cir. 1994) (quoting *United States v. Day,* 969 F.2d 39, 41-42 (3d Cir. 1992)).

As explained below, the Court finds that the evidence of record conclusively demonstrates that Sanders is not entitled to the relief sought and that an evidentiary hearing is not required.

IV. DISCUSSION

Sanders asserts four claims in his § 2255 motion: 1) the

enhancement of his sentence as a career offender violated his right to due process because the Government did not file any notice about its intent to seek such status prior to his entering the plea agreement; 2) his attorney provided ineffective assistance of counsel by failing to inform him about the possible career offender enhancement prior to his entering the plea agreement; (3) his guilty plea was involuntary because he would not have entered it had the Government or his counsel informed him about the possible career offender enhancement; and (4) the Court violated the plea agreement by failing to impose the sentence "for the instance offense . . . to run concurrently with any state sentences imposed due to defendant's violation of state probation."[2] (D.I.s 74; 82.)

A. Government's failure to file a notice regarding career offender enhancement

On direct appeal, Sanders argued that his sentence was impermissibly increased under 21 U.S.C. § 851(a)(1) because the Government failed to file a pretrial information notifying

[2]The Government characterizes Sanders' § 2255 claims slightly differently: (1) whether the Government had to file a notice seeking a career offender designation; (2) whether counsel was ineffective for failing to inform Sanders "that he would be sentenced as an offense level 15, criminal history category IV, with a sentencing range of 30-37 months imprisonment, when in fact his guideline level, before consideration of a departure motion based on substantial assistance, was offense level 29, criminal history category VI, with a sentencing range of 151-188 months imprisonment"; and (3) whether the United States breached the plea agreement. (D.I. 81.)

Sanders that he would be sentenced as a career offender. *See United States v. Sanders*, No. 99-5653, Unreported Mem. Op., at 2 (3d Cir. June 8, 2000). The Third Circuit explicitly rejected this assertion, finding that it was not meritorious. *Id.*

Here, Sanders has slightly altered his appellate argument by contending that the Government's failure to file the notice (pursuant to 21 U.S.C. § 851) regarding a possible career offender enhancement violated his right to due process.

A prosecutor must provide notice before seeking a statutory enhancement for drug offenses based on prior convictions:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1). However, this notice requirement is only triggered if the defendant is being "sentenced pursuant to a § 851 statutory enhancement – i.e., one that exceeds the statutory maximum embodied in the Guideline's sentencing ranges." *United States v. Escobales*, 218 F.3d 259, 263 (3d Cir. 2000). If the defendant is not sentenced pursuant to a statutory enhancement, then he "is not entitled to rely on the procedural protections contained in § 851 to challenge sentencing determinations such as . . . his 'career offender status' (U.S.S.G. § 4B1.1)." *Id.* citing *United States v. Day*, 969 F.2d 39, 48 (3d Cir. 1992)

Here, Sanders' sentence was enhanced pursuant to U.S.S.G. § 4B1.1.; it was not a statutory enhancement. As such, the notice requirement of 21 U.S.C. § 851 was not even triggered. Because Sanders' due process argument is "inextricably intertwined with his statutory argument," the failure of his statutory argument defeats his due process claim. *See Suveges v. United States*, 7 F.3d 6, at *10 n. 5 (1st Cir. 1993).

Moreover, Sanders' argument lacks factual merit. The record reveals that Sanders did, in fact, have notice of the possible career offender enhancement prior to entering the plea. Sanders' plea agreement was entered in open court on March 31, 1999. On March 8, 1999, the Government sent a letter to Sanders' trial attorney discussing the possible career offender enhancement. (D.I. 81, Ex. A.) Additionally, a memo in the prosecutor's file states "3/18/99 [defense attorney] left a VM [voicemail] - Met with D[efendant] today for 3 hours[,] [defense attorney] convinced he wants to enter a plea, **still concerned about career offender status**." (D.I. 81, Ex. B.)(emphasis added).

Further, the possibility of a career offender enhancement was fully discussed during the change of plea hearing, and the Court explicitly asked Sanders if he understood the implications of the plea agreement:

> COURT: Now, in Paragraph 5, all of the parties, including the government, agree that the career offender status significantly overrepresents the likelihood that you will

commit further crimes and that your offense level should be reduced two levels pursuant to the sentencing guidelines provisions . . . the Court could really reject this agreement between you and the government and maintain your status as a career offender. Do you understand that?

DEFENDANT: Yes.

COURT: And if the Court disagrees with the stipulation between you and the government about - -

DEFENDANT: One thing, Your Honor. Are you saying - - I didn't quite understand that. You said it will reject my - -

COURT: The Court could reject the agreement between you and the government and say I am going to reject the recommendation that I depart from the career criminal - - I mean the career criminal status, and go on and follow the guidelines that are appropriate in the case. I could follow it, or I could reject it.

DEFENDANT: Yes, I understand.

COURT: If I reject the stipulation, there would be no basis for you to withdraw your guilty plea. Do you understand that?

DEFENDANT: Yes.

* * *

COURT: This agreement, we understand, is modified by an agreement between you and the government which would add one additional paragraph . . . At this stage, I want the government to repeat that paragraph for you. Listen very carefully, because at the end, I want to ask you whether you agree with this and agree to be bound by it . . .

GOVERNMENT: The parties agree and understand that the weight of the heroin in this case, including relevant conduct, is consistent with a Level 18 under the sentencing guidelines. The parties further agree that this stipulation does not bind the Court or the presentence officer, and the defendant will not be allowed to withdraw his guilty plea if the Court sets a different offense level. Furthermore, the parties agree and understand that if the defendant is a career offender, that status will control the offense level

determination in this case.

COURT: Now, do you understand that?
DEFENDANT: Can I just say something to him?

COURT: OF course.

(Counsel confers with counsel.)

COURT: Okay. Do you understand that now.

DEFENDANT: Yes.

(D.I. 80 at 13,14,16.)

In short, even if Sanders did not have notice of the possible sentence enhancement prior to the change of plea hearing, he obviously had notice during the plea hearing. Yet, despite numerous opportunities to reject the plea agreement, Sanders willingly and knowingly entered into the plea. Thus, Sanders' claim is meritless.

B. Ineffective Assistance of Counsel

Sanders' second claim is that his counsel "violated [his] Sixth Amendment right to effective assistance of counsel by failing to inform [him] that [his] plea of guilty would 'trigger' Chapter Four enhancements under the 'career offender' provisions." (D.I. 74 at 9.)

Claims of ineffective assistance of counsel are governed by *Strickland v. Washington,* 466 U.S. 668 (1984) and its progeny. The *Strickland* standards apply to uninformed guilty pleas that are alleged to be the result of ineffective assistance of

counsel. *See Hill v. Lockhart*, 474 U.S. 52 (1985). To prevail on an ineffective assistance of counsel claim in a guilty plea context, a petitioner must show that: 1) counsel's performance relating to the plea was deficient, or objectively unreasonable; and 2) the counsel's deficient performance prejudiced the defendant's case because there was a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. *See Strickland,* 466 U.S. at 687, 688; *Hill*, 474 U.S. at 59.

Sanders cannot satisfy either prong of *Strickland*. It is well settled that an attorney's error in predicting a possible sentence does not constitute ineffective assistance under *Strickland* if there was an adequate guilty plea hearing. *See United States v. Torok*, 2000 WL 1100880, at *2 (E.D. Pa. July 26, 2000); *Rodriquez-Amador v. United States*, 2001 WL 1104676, at *5 (D.Del. Sept. 17, 2001). As explained above, the Court held a thorough change of plea hearing, explicitly detailing the possibility that Sanders could be sentenced as a career offender. Sanders explicitly stated that he understood the plea agreement. Consequently, Sanders' ineffective assistance of counsel claim fails.

Moreover, as previously explained, the record reveals that Sanders' attorney did, in fact, inform him of the possible career offender enhancement. Thus, Sanders' has not demonstrated that

his attorney's performance was deficient.

Finally, Sanders has not established the requisite prejudice under *Strickland*. He "must make more than a bare allegation that but for counsel's error he would have pleaded not guilty and gone to trial." *Parry v. Rosemeyer*, 64 F.3d 110, 118 (3d Cir. 1995). The fact that Sanders obtained substantial benefits by pleading guilty refutes his bare conclusory allegation of ineffectiveness. For example, as a result of pleading guilty: 1) the remaining counts of the Indictment were dismissed; 2) he became eligible (and received) a three level reduction for accepting responsibility; 3) the Government filed a substantial assistance motion (which the Court granted); 4) the Government agreed to another two-level reduction from the guidelines for a career offender (which the Court rejected); and 5) the Government agreed to not oppose Sanders' request at sentencing that his sentence be imposed concurrently with any state sentence for violation of probation (which the Court denied). (D.I. 17.)

Accordingly, the Court will dismiss Sanders' ineffective assistance of counsel claim as meritless.

C. Involuntary Plea Agreement

Sanders' third claim is that the failure to inform him about the possible career offender enhancement prior to entering the plea agreement renders his plea involuntary. It is well-settled that:

> the representations of the defendant, his lawyer, and the prosecutor at [a guilty plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). As explained above, Sanders' explicitly stated during the change of plea hearing that he was aware of, and understood, a possible career offender enhancement. Thus, this claim is meritless.

D. The Court violated the plea agreement by refusing to impose his sentence concurrently with state sentence

Sanders' final habeas claim is that the Court violated the plea agreement by refusing to impose the sentence concurrently with any state sentence imposed for his violation of probation.

The Court rejects this claim as meritless because the Court was not bound to follow the recommendation regarding concurrent sentences. Rather, the plea agreement itself clearly states that "[t]he agreement reflected in this paragraph [concerning concurrent sentences] does not bind the Court or the presentence officer. Defendant understands that if the Court disagrees with this stipulation, he will not be allowed to withdraw his guilty plea." (D.I. 17 at ¶6.) Moreover, at his change of plea hearing, Sanders stated under oath that he understood the Court was not bound by this stipulation. (D.I. 80 at 14.) As such, the Court's refusal to follow the Government's

recommendation was a proper exercise of its discretion and did not constitute a breach of the plea agreement.

V. CERTIFICATE OF APPEALABILITY

Finally, the Court must determine whether a certificate of appealability should issue. *See* Third Circuit Local Appellate Rule 22.2. The Court may issue a certificate of appealability only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In the present case, the Court concludes that Sanders' claims are without merit and that reasonable jurists would not find that assessment debatable. Therefore, Sanders has failed to make a substantial showing of the denial of a constitutional right, and the Court will not issue a certificate of appealability.

VI. CONCLUSION

For the reasons stated, the Court concludes that Sanders' § 2255 motion does not assert any grounds for federal habeas relief. Accordingly, the Court dismisses as meritless Sanders' 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. An appropriate order shall issue.

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	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

O R D E R

At Wilmington, this 2nd day of March, 2004, consistent with the memorandum opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Robert Sanders' motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is DISMISSED, and the relief requested therein is DENIED.

2. The Court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

Kent A. Jordan
UNITED STATES DISTRICT JUDGE