

held on January 7, 1999.¹ In March of 1995, Officer Dowling, posing undercover as a "wise guy" affiliated with organized crime, was introduced by a confidential informant to the petitioner. See Hearing, 1/7/99. On March 11, 1995, Officer Dowling met with the petitioner and an individual named Chen, apparently an associate of the petitioner, at a diner in Queens. See id. At that meeting, Officer Dowling purchased an ounce of heroin from the petitioner and Chen as a sample. See id. During a second meeting at the same diner on March 16, 1995, Officer Dowling purchased another small sample for \$4500. See id. During April and May of 1995, Officer Dowling engaged in extensive negotiations with petitioner regarding the purchase of two units, or 1.4 kilograms, of heroin. See id. That purchase apparently took place on June 2, 1995, though petitioner was not present for the actual transfer. See Presentence Report at 4. During this entire time period, Officer Dowling maintained his cover as a mob-affiliated "wise guy" without any sign that petitioner was aware of his true identity as a police officer. See Hearing, 1/7/99. According to Dowling, petitioner had no difficulty understanding and communicating in English. See id. Petitioner was arrested on June 2, 1995.

After petitioner's arrest, Douglas A. Morris of the Federal Defender's Office was appointed to represent him. See Petition at 1. However, on or about June 7, 1995, petitioner retained Irving Cohen to represent him. See id. At the first meeting between Cohen and Byun held at the courthouse at the time of a court proceeding, Cohen explained to Byun the

¹ At the hearing, the petitioner denied virtually all of the facts and events set forth below. However, as the court found the petitioner's testimony largely incredible and the testimony of Officer Dowling and Irving Cohen credible, the court has drawn the background facts largely from the testimony of Dowling and Cohen.

substance of the charges against him. See Hearing, 1/7/99. In particular, Cohen explained to the petitioner that he faced a potential sentence of 10 years to life due to the amount of narcotics involved. See id. According to Cohen, the petitioner did not deny his guilt or allude to any defense, but rather expressed his interest in cooperating with the government in order to reduce his sentence. See id. As a result, the government held a proffer session with Byun, at which, according to Cohen and Dowling, the petitioner did not mention any possible defense nor did he claim to have been acting at the behest of the government. See id. After the proffer session, Cohen reviewed the resulting plea agreement with the petitioner to ensure that he understood it. See id.

The petitioner pled guilty on June 29, 1995. At the plea hearing, the petitioner informed the court that he understood English and refused the offer of an interpreter.²

² The court, Cohen, and Byun engaged in the following colloquy regarding Byun's ability to communicate in English and the need for an interpreter:

Cohen: Mr. Byun speaks English but he has an accent. Sometimes it may seem he doesn't understand, but he understands everything. He does not need an interpreter.

Court: Mr. Byun, is that correct, you understand everything that's said to you in English?

Byun: Yes.

Court: Would you feel more comfortable if you had an interpreter present?

Byun: No, that's fine.

Court: This is a very important proceeding. I can't emphasize it enough to you how important it is that you understand everything that I say, so if there comes a moment when you think you don't understand, obviously you'll stop and ask me to repeat what I've said and if you change your mind, and in any way would like to have an interpreter present, we can do that. All right?

Byun: Yes.

Plea Hearing at 2-3.

See Plea Hearing at 3. The court informed the petitioner that if he did not understand anything or simply changed his mind, he could ask for an interpreter at any time. See id. Under oath, the petitioner later advised the court that he had experienced no difficulty communicating with his attorney. See id. at 3-4. At no point during the proceeding did petitioner ask for an interpreter. See id.

The petitioner then attested that he had read the information filed against him, discussed it with his attorney, and understood it completely. See id. at 5. The court reviewed the charge with the petitioner, informing him that "it shows . . . that between approximately February 1st and May 31st of this year in this district and elsewhere, you knowingly and intentionally conspired, that is agreed with other people, or at least one other person to distribute heroin and to possess heroin intending to distribute it." Id. at 5. The court explained to the petitioner the rights that he was waiving, including the right to a grand jury indictment, the right to a trial by jury, the presumption of innocence, the opportunity for cross-examination, the right to testify or not testify, and the right to appeal. See id. at 5-13. The petitioner expressed his understanding of these rights and his willingness to waive them. See id. The petitioner confirmed that he had read and understood his cooperation agreement. See id. at 14. In response to the court's question of what the longest sentence and largest fine he could face under his guilty plea, the petitioner correctly responded "Twenty years" and "A million dollars." Id. at 15-16. Moreover, the petitioner confirmed that he understood that he would "be required to spend the entire term of [his] prison sentence in prison." Id. at 18.

After the attorneys expressed some disagreement over the applicable sentencing guidelines,³ petitioner attested to his understanding that he could not withdraw his guilty plea even if the correct guideline exceeded the estimates of the government or his lawyer. See id. at 19.

At that point, the petitioner entered a guilty plea and avowed that no one had threatened, forced, or coerced him in any way and that no one had made any promises regarding his sentence to induce his plea. See id. at 20-21. The petitioner then made an allocution in which he admitted transporting a drug sample of heroin from a third party to the officer. See id. at 22-23. As a result of the hearing, the court accepted the guilty plea after finding that the petitioner fully understood his rights and the consequences of his plea and that a factual basis for the plea existed. See id. at 23-24. Finally, the court warned the petitioner and his sureties that the \$100,000 bond would be forfeited if the petitioner did not show up for sentencing. See id. at 24-25.

On July 31, 1997, the court sentenced the petitioner to twenty-two months imprisonment and three years of supervised release. Though the pre-sentence report noted that, in connection with the sale of 1.4 kilograms of heroin, the petitioner "was only present for the preliminary discussions and introduced [a third party] into the scheme to finalize the negotiation and actually produce the drugs," see Pre-Sentence Report at ¶ 14, petitioner's attorney did not object at the sentencing hearing to the Probation Department's determination that Byun should be sentenced on the basis of the 1.4 kilogram sale. See Sent. Hearing at 5.

³ As a result of the amount of narcotics involved in the charges, the government computed the base guideline at level 32. See Plea Hearing, at 18. Petitioner's counsel reserved the right to argue that the petitioner was not criminally responsible for the entire amount of the narcotics charged. See id. at 19; Hearing, 1/7/99.

The petitioner then filed a notice of appeal and engaged Carol James as his appellate attorney. However, prior to the filing of his appeal papers, the petitioner instructed James to withdraw his appeal. See Lerner Letter, 1/8/99, Attachments. The petitioner's appeal was formally withdrawn on December 5, 1997.

On December 8, 1997, Byun filed the instant petition for a writ of habeas corpus with this court pursuant to 28 U.S.C. § 2255. See Orig. Petition. In that petition, Byun sought to vacate his conviction on the ground that his attorney, Irving Cohen, rendered ineffective assistance of counsel in connection with his guilty plea and sentencing. See id. at 5. In particular, Byun argued that Cohen provided ineffective assistance by (1) failing to investigate his claims that all of the charged actions were the result of his attempts to help the government,⁴ (2) misinforming him that he faced a 15-year sentence if he pled not guilty, but he could go home immediately without any prospect of further proceedings if he pled guilty, (3) refusing to arrange for an interpreter, (4) instructing the petitioner to say "Yes" to all the court's questions, and (5) failing to object at the sentencing hearing to the guideline level determined by the government. See Orig. Petition.

⁴ According to Byun's petition and testimony at the January 7, 1999 hearing, he was approached by an undercover officer named Joe – whom he knew to be an officer – and asked to find out whether a third party named Chang was selling drugs. When he told Joe that Chang had heroin, Joe told him to set up a meeting with Chang in Queens. At that meeting, at which Byun was present, Chang delivered a heroin sample to Joe and another undercover officer named Patrick. At the request of Patrick, petitioner set up an additional meeting between Chang and the undercover officers at a diner in Queens. During that meeting, petitioner excused himself from the table and did not witness what transpired. Three months later, petitioner was arrested. See Petition Attachment at 1-3; Hearing, 1/7/99.

This court then assigned Douglas Morris as counsel for the petitioner. Morris subsequently filed an amended petition, adding allegations that the petitioner's plea was taken in violation of Fed. R. Crim. P. 11 and that the government violated its constitutional disclosure obligations under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 130 (1972). See Amend. Petition. However, prior to the habeas hearing, Morris withdrew as counsel for the petitioner. On January 7, 1999, the court held a hearing at which the petitioner, petitioner's original counsel Cohen, and Officer Dowling testified.

II Analysis

A Rule 11 Claim

The U.S. Supreme Court has "strictly limited the circumstances under which a guilty plea may be attacked on collateral review." Bousley v. United States, 118 S. Ct. 1604, 1610 (1998). As a result, "a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." Bousley, 118 S. Ct. at 1610 (quoting Mabry v. Johnson, 467 U.S. 504, 508 (1984)). Moreover, "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." Id.

In the instant case, petitioner did not appeal his conviction or sentence. Rather, he requested that his attorney withdraw any appeal she may have filed. See Lerner Letter, 1/8/99, Attachments. The petitioner cannot argue that his Rule 11 claim required further factual development through habeas review, because the Supreme Court has held that "this type of claim can be fully and completely addressed on direct review based on the record

created at the plea agreement." Bousley, 118 S. Ct. at 1610-11. It is well settled that habeas review "will not be allowed to do service for an appeal." Reed v. Farley, 512 U.S. 339, 354 (1994). As a result, the petitioner has procedurally defaulted his Rule 11 claim. Absent a showing of cause and prejudice or fundamental miscarriage of justice, this claim is unavailable for federal habeas review. See Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Petitioner does not allege any cause for his default. He has made no allegations that his appellate attorney rendered him ineffective assistance. Moreover, even were he to claim that he did not sufficiently understand the law at the time he withdrew his appeal, such a claim would not constitute cause. See Chango v. United States, 1993 WL 35708, at *2 (S.D.N.Y. 1993). As a result, this court need not consider the question of prejudice.

In order to sufficiently allege a fundamental miscarriage of justice, a petitioner must demonstrate that the asserted "constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986). Petitioner has alleged that he is factually innocent. However, after hearing testimony from the petitioner and Officer Dowling, the court cannot credit petitioner's allegations of innocence. As a result, the court must rule petitioner's Rule 11 claim procedurally defaulted.⁵

⁵ Even had petitioner not procedurally defaulted his Rule 11 claim, the court would reject it as lacking merit. Petitioner first argues that he was not adequately informed of the nature of the charges against him, as required by Rule 11(c). According to the amended petition, though the court explained that a conspiracy required an unlawful agreement between petitioner and another person, the court erred in not specifying that the other person must be someone other than a government agent and that the petitioner must have acted with criminal intent. See Amend. Petition, Memo of Law at 4-5. However, in his plea allocution, Byun repeatedly avowed that he understood the nature of the charges against him, see Plea Hearing at 5, and that he had discussed the charges with his attorney. See id. Moreover, in his allocution, he effectively expressed his intent to conspire with a third party to provide

B Brady/Giglio Claim

The petitioner has also defaulted his Brady/Giglio claim. As discussed above, the petitioner did not perfect an appeal to the Second Circuit. In his petition, as a basis for the alleged Brady/Giglio violation, petitioner essentially contends that the government *must* be in possession of exculpatory evidence because he claims that he solicited drugs at the behest of government agents. However, the facts underlying the petitioner's claim – essentially his contention of innocence – were equally available at the time that the petitioner withdrew his appeal. As result, the petitioner is procedurally barred from asserting his Brady/Giglio claim. See Gray v. Netherland, 518 U.S. 152, 161-62 (1996). For the reasons stated above, the plaintiff has not presented a sufficient showing of cause and prejudice or a fundamental miscarriage of justice.

narcotics to the government agent. See id. In a case presenting a nearly identical scenario, the Second Circuit held that a defendant was sufficiently informed of the charges. See Luson v. United States, 1998 WL 385772, at *3 (2d Cir. 1998). Petitioner also argues that the court did not comply with Rule 11(f) by making sufficient inquiry to ensure that a factual basis existed for the plea. Generally "[a] reading of the indictment to the defendant coupled with his admission of the acts described in it is a sufficient basis for a guilty plea." Montgomery v. United States, 853 F.2d 83, 85 (2d Cir. 1988). In this case, the petitioner admitted that he approached a third party, obtained a drug sample, and provided it to the undercover agent. See Plea Hearing at 22. At the hearing, the petitioner neither "den[ie]d an element of the offense [nor] generally maintain[ed] his innocence." Godwin v United States, 687 F.2d 585, 590 (2d Cir. 1982). To the extent that the petitioner's allocution suggested the affirmative defense of public authority, the court was not required to anticipate and rule out such a defense. See United States v. Smith, 160 F.3d 117 (2d Cir. 1998). As a result, the allocution constituted a sufficient factual basis to support acceptance of the plea. See Luson, 1998 WL 385772, at *2-4.

Moreover, even if the petitioner's Brady/Giglio claim was not procedurally defaulted, it is meritless. The petitioner has utterly failed to point to any particular exculpatory evidence that the government has not turned over. In response to the petitioner's allegations, the government has advised the court and the petitioner that it has reviewed its files and found "no material or information conceivably exculpatory." Lerner Letter, 12/29/98. As a result, the court must deny the petitioner's Brady/Giglio claim.

C Ineffective Assistance of Counsel Claim

Petitioner has not procedurally defaulted his ineffective assistance claims. According to the Second Circuit, "procedural default rules that traditionally bar prisoners from raising issues for the first time in § 2255 proceedings do not apply to ineffective assistance of counsel claims . . . where such claims depend on 'matters outside of the record on direct appeal.'" Ciak v. United States, 59 F.3d 296, 303 (2d Cir. 1995) (quoting Billy-Eko v. United States, 8 F.3d 111, 113 (2d Cir. 1993)). Proper review of plaintiff's claims that Cohen rendered ineffective assistance by failing to investigate his defenses, misinforming him regarding the potential sentence and the repercussions of pleading guilty, refusing to arrange for an interpreter, instructing the petitioner to answer "Yes" to all of the court's questions, and failing to object to the guideline level suggested by the government requires an exploration of matters outside the record. As a result, petitioner's failure to appeal these claims does not constitute a procedural default. See Salam v. United States, 1997 WL 104962, at *2 (S.D.N.Y. 1997).

However, the petitioner's ineffective assistance claim must be denied. Where a habeas petitioner seeks to overturn a conviction on the ground of ineffective assistance of counsel, he must prove that his counsel's performance fell below an objective standard of reasonableness and that he has been prejudiced by that performance. See Strickland v. Washington, 466 U.S. 668, 694 (1984). In asserting that counsel's performance was deficient, a petitioner must overcome a strong presumption that counsel made appropriate decisions and rendered reasonable professional judgment. See id. at 690. In the context of a guilty plea, the prejudice prong of the Strickland standard is satisfied if "there is reasonable probability that but for counsel's errors, [petitioner] would not have pleaded guilty and would have insisted on going to trial." Tate v. Wood, 963 F.2d 20, 26 (2d Cir. 1992) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Petitioner has made no such showings here.

In his petition and at the January 7 hearing, Byun asserted that he informed his attorney Cohen that all of his actions discussed in his indictment were the result of his knowing cooperation with the government. See Orig. Petition; Hearing, 1/7/99. According to petitioner, he was aware from the outset of his interactions with Officer Dowling that Officer Dowling was a policeman, and he solicited narcotics from "Chang" at Officer Dowling's request in order to aid the government. See id. Despite the fact that he relayed this information to Cohen and asserted his innocence, according to Byun, Cohen did not investigate his potential defense or ascertain the level of evidence. See id. However, in his testimony at the January 7 hearing, Officer Dowling asserted that Byun had no knowledge of his status as a police officer and that he willingly engaged in the sale of narcotics. See id. Moreover, in his testimony, Cohen contradicted Byun, informing the court that petitioner never denied his guilt,

never mentioned that he had been working with the police, and immediately expressed a desire to cooperate with the government to reduce his sentence. See id. Both Dowling and Cohen testified that, at the ensuing proffer session, the petitioner did not deny his guilt or assert that he had been working with Dowling. See id.

After evaluating the testimony of Byun, Dowling, and Cohen, this court credits the testimony of Dowling and Cohen and finds that Byun neither asserted his innocence nor informed Cohen of the potential defense of public authority, but rather requested that Cohen help him cooperate in order to reduce his potential sentence. As a result, Cohen did not perform in a manner that fell below an objective standard of reasonableness in failing to investigate a potential defense of which he was unaware or to pursue discovery of the government's case.

The petitioner's next claim, asserted in his petition and at the January 7 hearing, is that Cohen rendered ineffective assistance by threatening petitioner with a 15-year sentence if he pled not guilty and promising petitioner that he would go home without any danger of further proceedings if he pled guilty. See Orig. Petition; Hearing, 1/7/99. According to petitioner, he pled guilty as a direct result of this misinformation. See id. However, at the January 7 hearing, Cohen categorically denied making any such threat or promise or delivering any such information. See id. According to Cohen, prior to the plea, he explained to the petitioner the sentencing guidelines, the petitioner's potential sentencing exposure, and the potential effects of cooperating with the government and receiving a 5K1.1 letter. See id. Cohen's testimony is corroborated by the petitioner's statements under oath at the plea hearing. At that hearing, Byun attested that he had received no threats or promises to induce his guilty plea, see Plea

Hearing at 7, that he had discussed with Cohen the sentencing guidelines and their implications on his case, see id. at 17-18, and that he understood that he would be required to serve the entire term of imprisonment to which he was sentenced. See id. at 18. When asked by the court if he was aware of the maximum sentence that could be imposed as a result of his guilty plea, the petitioner affirmatively responded "20 years."⁶ See id. at 15. The petitioner's statements under oath at his plea hearing are entitled to a "strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 74 (1977). As a result, this court finds that Cohen neither threatened petitioner with 15 years imprisonment if he pled not guilty nor promised petitioner he would face no prison time if he pled guilty. Rather, relying upon Cohen's testimony and the petitioner's statements at the plea hearing, the court finds that Cohen properly consulted the petitioner regarding the potential sentence triggered by his guilty plea.

The petitioner's next claim – that Cohen refused to arrange for an interpreter – is also contradicted by Cohen's testimony and by petitioner's statements at his plea hearing. At the plea hearing, Cohen informed the court that the petitioner speaks English with an accent, but understands English perfectly. See Plea Hearing at 2. Byun then informed the court that he understood everything said to him in English, refused the offer of an interpreter, agreed to ask the court to repeat anything he did not understand, acknowledged the court's offer to find him an interpreter if he changed his mind, and stated that he had experienced no difficulty communicating with his attorney in English. See id. at 2-4. At the January 7 hearing, Cohen denied ever refusing to provide petitioner with an interpreter, and both Cohen and Officer

⁶ Similarly, when asked if he was aware of the maximum fine possible, petitioner responded affirmatively "One million dollars." Plea Hearing, at 16.

Dowling testified that Byun speaks excellent English, though with an accent. As a result of Byun's own statements at the plea hearing and the testimony of Cohen and Officer Dowling at the January 7 hearing, this court finds that Cohen did not provide ineffective assistance by not providing an interpreter.

Petitioner's next claim – that Cohen counseled him to respond "Yes" to all the court's questions – is also belied by the record of the plea hearing. At that hearing, the petitioner answered "No" to some questions and provided substantive answers to many others. During his allocution, the petitioner delivered an extended description of his actions. As stated above, petitioner's statements under oath are entitled to a presumption of verity. Moreover, Cohen again categorically denies the petitioner's allegations. The court finds that Cohen did not coach the petitioner to respond affirmatively to the judge's questions. As a result, petitioner's ineffective assistance claim must be denied.

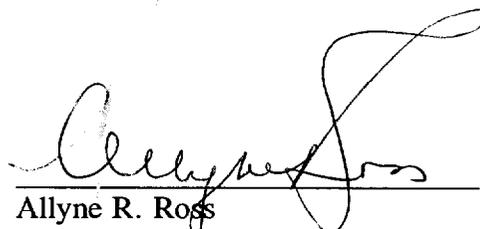
Finally, the petitioner argues that Cohen rendered ineffective assistance at the sentencing hearing by failing to challenge the government's determination that the petitioner was responsible for the sale of 1.4 kilograms of heroin. However, during his testimony at the January 7 hearing, Cohen testified that he made a strategic decision not to challenge the government's determination. See Hearing, 1/7/99. According to Cohen, after reviewing the government's 5K1.1 letter, which detailed evidence of Byun's involvement in other narcotics transactions, he held significant concerns that a Fatico hearing would have increased rather than reduced Byun's sentence. See id; 5K1.1 Sentencing Letter, 6/16/97. In order to prevail on an ineffective assistance claim, a defendant must overcome the presumption that, under the circumstances, the challenged action of counsel "might be considered sound . . . strategy."

Strickland, 466 U.S. at 689. After hearing the testimony of Officer Dowling regarding the petitioner's involvement in narcotics trafficking and reviewing the 5K letter, this court finds that Cohen's decision not to pursue a Fatico hearing was a sensible strategic decision that falls well within the range of reasonable representation. See United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987) (strategic decisions generally do not form a basis for an ineffective assistance of counsel claim). As a result, the court must deny petitioner's final ineffective assistance claim.

CONCLUSION

For the reasons stated above, the petition for a writ of habeas corpus is DENIED. As petitioner has not made a substantial showing of the denial of a federal constitutional right, a certificate of appealability is not warranted. See 28 U.S.C. § 2253, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214. The Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.



Allyne R. Ross
United States District Judge

Dated: January 13, 1999
Brooklyn, New York

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