

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

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 89-003-02
 :
 IGNAZIO ANTONIO MANNINO :

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 89-003-04
 :
 EMANUELE SALVATORE MANNINO :

MEMORANDUM AND ORDER

BECHTLE, J.

JULY 2, 1998

Presently before the court in this 28 U.S.C. § 2255 action are the United States of America's (the "Government") objections to the United States Magistrate Judge's Report and Recommendation, the petitioners Ignazio Antonio Mannino and Emanuele Salvatore Mannino's¹ (collectively, "Petitioners") joint response thereto,² the United States Magistrate Judge's Report and Recommendation and the record. For the reasons set forth below, the court will not adopt the Magistrate Judge's Report and

1. Ignazio Antonio Mannino is commonly known as "Tony" and his brother, Emanuele Salvatore Mannino, is commonly known as "Sal." For the sake of clarity, this court will refer to each Petitioner by his full name throughout the text of this memorandum.

2. Petitioners are raising the identical issues and the they are represented by the same attorney. All motions have been filed jointly.

Recommendation. Because the court finds that Petitioners' sentencing claim is procedurally barred and Petitioners have not shown ineffective assistance of counsel, it will deny the motion without an evidentiary hearing.

I. BACKGROUND

In March of 1986, the Federal Bureau of Investigation ("FBI") learned that, beginning in January 1985, several members of the Sicilian Mafia had chosen New York, New Jersey and Philadelphia as a base for their heroin and cocaine smuggling operation. The FBI began an investigation and as a result, on January 3, 1989, the United States Attorney for the Eastern District of Pennsylvania filed a twenty-count indictment charging Petitioners and sixteen other individuals with a number of offenses related to heroin and cocaine importation and distribution. The court divided the defendants into two groups for trial. In the first trial, the court tried the cocaine importation and distribution defendants: Filippo Filoberto, Salvatore DiMaio, Francesco Badalmenti, Antonio Romano, Salvatore Pilliteri and Frank Sciarrino. The second trial included the heroin importation and distribution defendants: Francesco Gambino, Enzo Varisco, Grace Pulitano Mannino and Petitioners.³

During the trial, the jury heard testimony from a number of

3. Co-defendants Dominic Mannino, Simone Zito, Stefano Zito, Salvatore Inzerillo, and Tomasso Scalici were fugitives from justice. Codefendant Carlo Fodero was tried and acquitted.

persons. Government witness William Kane ("Kane") testified extensively about the conspiracy. The evidence at trial showed the following. Petitioners were born in Sicily and came to the United States in 1975. In 1983, Petitioners returned to Sicily. (Presentence Investigation Report ("PSI") ¶ 82.) The conspiracy began to import heroin from Sicily into the United States around January 1985. (PSI ¶ 3.) In order to import the heroin, the conspirators recruited individuals to fly from Sicily to the United States on commercial airline flights with the heroin strapped to their bodies. Each courier carried two or three kilograms at a time. Generally, more than one courier was on each flight. Often the same courier would then return to Sicily with hundreds of thousands of dollars to pay the Sicilian suppliers. Each courier was paid approximately \$5,000.00. (PSI ¶ 14.) Co-conspirator Stefano Zito became friendly with Kane and confided in him that Ignazio Antonio Mannino was Simone Zito's partner and that Francesco Gambino was Ignazio Antonio Mannino's boss in the heroin smuggling operation. (PSI ¶ 13).

In early 1986, Ignazio Antonio Mannino, his wife, Grace Pulitano Mannino, and Emanuele Salvatore Mannino returned to the United States from Sicily. Simone Zito and his wife also returned to the United States, living with Ignazio Antonio Mannino and Grace Pulitano Mannino for about six months and then moving to a nearby apartment. (PSI ¶ 20.) Ignazio Antonio

Mannino and Simone Zito then coordinated the sophisticated heroin operation from within the United States.⁴ Government witness Salvatore Allegra ("Allegra") testified that between 1985 and March 1986, he personally placed a total of over thirty kilograms of heroin on thirteen couriers. He also testified that Simone Zito, Ignazio Antonio Mannino's partner, supplied that thirty plus kilograms of heroin.⁵ In March of 1986, Italian authorities intercepted a heroin courier attempting to board a plane in Italy en route to the United States.⁶ The Italian authorities then notified United States authorities who intercepted Giovanni DiGrazia as he deplaned at JFK airport in New York. They removed over three kilograms of heroin from DiGrazia's person.⁷ (PSI ¶ 16.) Allegra testified that he personally placed this heroin on the couriers and that Simone Zito supplied the heroin. Some of the heroin imported in this manner was sold by Salvatore DiMaggio

4. The conspirators evaded detection by using a number of different pay phones to communicate with the co-conspirators in Sicily. The evidence showed that they rotated phones and used secret codes and messages to avoid wiretap detection. The conspirators also used evasive driving patterns and techniques to avoid being followed. (PSI ¶ 20.)

5. Because of counsel's objection, the PSI was amended to state that there is no evidence that Ignazio Antonio Mannino or Grace Mannino were participating in the heroin importation at this time. (PSI ¶ 15.)

6. Earlier testimony established that couriers generally carried two or three kilograms at a time.

7. This heroin tested between 52 and 95 percent pure. (PSI ¶ 16.)

to Filippo Ricupa ("Ricupa"). Ricupa testified that between early 1985 and late 1986 he personally sold eighty kilograms of heroin at a price of \$195,000.00 per kilogram. (PSI ¶ 17.)

Emanuele Salvatore Mannino contributed to the conspiracy by facilitating the communication between the co-conspirators and by laundering the drug proceeds through a legitimate business account of a pizzeria that he and his brother owned jointly. In order to facilitate communication, he would go to various designated pay phones to receive incoming phone calls from the co-conspirators. He then conveyed that information to other co-conspirators who acted on the information. Grace Pulitano Mannino had a similar and related role in the conspiracy taking coded messages in Italian and English from her home phone.⁸

In the Summer of 1987, Stephen Zito shared detailed information about the heroin importation conspiracy with Kane. At that time, he told Kane that the conspiracy had begun to ship cocaine from the United States to Italy in exchange for heroin from Italy. (PSI ¶ 23.) In July of 1987, Stephen Zito told Kane that Emanuele Salvatore Mannino was in Italy to arrange the shipment of three kilograms of heroin into the United States. He

8. For example, she would take a coded message that "Tony should go to the attorney's office at two o'clock tomorrow." At two o'clock the next day, Ignazio Antonio Mannino would be observed receiving a call at a particular pay telephone. (PSI ¶ 22.)

later told Kane that the shipment had arrived. (PSI ¶¶ 23-24.) Evidence also showed that in 1987, Emanuele Salvatore Mannino was in Sicily arranging the exchange of heroin for cocaine. See United States v. Gambino, 926 F.2d 1355, 1357 (3d Cir. 1991).

Joseph Cuffaro, another Government witness, testified that he was told that, beginning in the Fall of 1987, Ignazio Antonio Mannino and Simone Zito assisted four mafia bosses by arranging the shipment of 570 kilograms of cocaine from Colombia to the Sicilian heroin dealers. The shipment occurred in January 1988. (PSI ¶ 25.)

In October 1987, Simone Zito told Kane that his money was tied up in a three kilogram heroin deal and that he needed to borrow \$25,000.00 to purchase a house. Kane purchased seven ounces of heroin from Simone Zito in exchange for the requested \$25,000.00. On October 22, 1987, Kane gave the cash to Simone Zito and Ignazio Antonio Mannino together. (PSI ¶ 28.)

At that time, Simone Zito told Kane that he and Ignazio Antonio Mannino were partners in the heroin business. Ignazio Antonio Mannino also told Kane that his boss was Francesco Gambino. (PSI ¶ 64.) It also came to light that Emanuele Salvatore Mannino and Simone Zito took orders from Ignazio Antonio Mannino. (PSI ¶ 64.) At that same meeting, October 22, 1987, Ignazio Antonio Mannino offered to "front" Kane one kilogram of heroin. (PSI ¶ 28.) The \$25,000.00 Kane paid Zito

and Ignazio Antonio Mannino was laundered through the pizzeria bank account and then invested in a condominium purchased in the name of Emanuele Salvatore Mannino.

At another meeting on January 7, 1988, Ignazio Antonio Mannino and Simone Zito offered to sell Kane one kilogram of good quality heroin and additional quantities of poor quality heroin. (PSI ¶ 30). On April 1988, the FBI searched a Brooklyn apartment that Ignazio Antonio Mannino, Simone Zito and Salvatore Inzerillo were using. They seized \$12,000.00 and .28 grams of heroin. (PSI ¶ 31.) Robert Reyers testified that Simone Zito confided in him that if the FBI had come the next day, they would have caught them with four kilograms of heroin. Gambino, 926 F.2d at 1359. In the Spring of 1988, at the Cafe Giardino in Brooklyn, Simone Zito offered to sell Kane another kilogram of heroin. When Kane refused, Simone Zito offered him a sample quantity. (PSI ¶ 32.)

On January 3, 1989, the United States Attorney for the Eastern District of Pennsylvania filed a twenty-count indictment against the defendants. On September 2, 1989, after a 29-day jury trial before this court, Ignazio Antonio Mannino was found guilty of conspiracy to import heroin and conspiracy to distribute heroin. Emanuele Salvatore Mannino was found guilty of conspiracy to import heroin, conspiracy to distribute heroin and money laundering. On December 6, 1989, the court held a sentencing hearing for Ignazio Antonio Mannino. He was

represented at the hearing by Charles Carnesi, Esquire ("Carnesi") who also represented him at trial. Carnesi argued that under the Sentencing Guidelines the court should only sentence his client based upon the amount directly attributable to his client, and urged the court not to sentence Ignazio Antonio Mannino more heavily as a leader. After considering the evidence, the arguments of counsel and the PSI, the court found that he was a leader and sentenced him to 27 years imprisonment to be followed by five years supervised release. The court also imposed a \$25,000.00 fine.

On December 7, 1989, the court held a sentencing hearing for Emanuele Salvatore Mannino. He was represented by F. Emmett Fitzpatrick, Esquire, ("Fitzpatrick") who also represented him at trial. Fitzpatrick argued that the court should sentence Emanuele Salvatore Mannino based upon a smaller amount of heroin than involved in the total conspiracy and also asked the court to sentence him leniently because he was a minor participant in the conspiracy. After considering the evidence, argument by counsel and the PSI, the court found that Emanuele Salvatore Mannino was not a minor participant and sentenced him to eighteen years imprisonment to be followed by five years supervised release. The court also imposed a \$25,000.00 fine.

Petitioners and their co-defendants appealed the decision to the United States Court of Appeals for the Third Circuit. On

appeal, Petitioners, who were again represented by their respective trial counsel, did not contest the sentences imposed. On March 4, 1991, the Third Circuit affirmed this court's decision. United States v. Gambino, 926 F.2d 1355 (3d Cir. 1991). On November 1, 1991, the United States Supreme Court denied Petitioners' Writ of Certiorari.

On March 25, 1997, Petitioners filed a joint motion to vacate their sentences and for resentencing pursuant to 28 U.S.C. § 2255. They set forth three reasons why the court should vacate their sentences and resentence them. First, they argue that the court misapplied the "relevant conduct" provisions of the United States Sentencing Guidelines (the "Guidelines") as amended by Amendment 78 and interpreted by subsequent Third Circuit case law. Second, they argue that their respective attorneys were ineffective on direct appeal for failing to raise that sentencing issue. Third, they argue that the court improperly imposed "stand committed" fines.

The Petition was referred to United States Magistrate Judge Welsh for consideration. In her March 20, 1998 Report and Recommendation, Magistrate Judge Welsh reported that the sentencings did not conform to the requirements set forth by subsequent Third Circuit case law, Petitioners' attorneys were ineffective for failing to raise that issue and that the court improperly imposed "stand committed" fines. She recommended that

the court vacate the sentences and resentence Petitioners. On April 3, 1998, the Government filed objections to the Report and Recommendation and on April 27, 1998, Petitioners filed a reply. The court has reviewed the relevant documents and made has made a de novo determination. For the following reasons, the court will not adopt the magistrate judge's report and recommendation. The court will deny the motion and will not amend the sentencing Order. Because the file and records conclusively show that the Petitioners are not entitled to relief, the court will not hold an evidentiary hearing.

II. LEGAL STANDARD

Under the relevant statute,

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C. § 2255. If the court finds that such claim has merit, the court "shall vacate and set the judgment aside and shall

discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255. Further, upon receipt of objections to the magistrate report, the court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). The court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(C).

III. DISCUSSION

Petitioners contend that the sentencing court erred and misapplied the Guidelines by holding them each responsible for the total amount of heroin involved in the conspiracy, including that which was imported and distributed before they joined the conspiracy.⁹ They did not raise this issue on direct appeal, but raise it for the first time in this action. They contend that their respective attorneys were ineffective for failing to raise

9. Petitioners rely on Paragraphs 15 and 62 of the PSI. Paragraph 62 states that "[b]ecause the offense of conviction involved at least 30 kilograms of heroin, the base offense level is 36." Paragraph 15 states that between 1985 and March 1986, Salvatore Allegra handled at least 30 kilograms of heroin. Petitioners argue that these excerpts show that the court sentenced them based upon the amount of heroin Allegra imported and distributed and that the court was in error because this importation and distribution occurred before they joined the conspiracy.

that issue on direct appeal and that the court should consider the issue now.

A. TIMELINESS OF THE PETITIONS

Preliminarily, the court must determine whether these Petitions, filed almost nine years after Petitioners were sentenced, are timely. If they are not, the court may not consider the arguments contained therein.

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective April 24, 1996, amended 28 U.S.C. § 2255 to include a one year statute of limitations for actions filed under 28 U.S.C. § 2255 (codified at 28 U.S.C. § 2244(d)(1)). Federal prisoners whose convictions became final before the effective date of the AEDPA had one year from the date of the AEDPA's enactment to file petitions under 28 U.S.C. § 2255. Burns v. Morton, 134 F.3d 109, 111-12 (3d Cir. 1998) (holding that cases filed on or before April 23, 1997 may not be dismissed for failure to comply with the statute's limitations period). The Petitions presently before the court were filed on March 25, 1997¹⁰ and are therefore timely.

B. THE SENTENCING CLAIM

10. Petitioners are represented by counsel and this is the date on which the motion was actually filed. The Third Circuit has held that, in pro se prisoner cases, these petitions are filed when handed to prison officials for mailing. Burns v. Morton, 134 F.3d 109 (3d Cir. 1998) (citing Houston v. Lack, and Fed. R. App. P. 4(c) regarding same rule as applied to appeals).

1. Procedural Default

Petitioners did not raise the sentencing issue on direct appeal. They raise it for the first time in the Petitions presently before the court. Petitions under 28 U.S.C. § 2255 are not a substitute for direct appeal. Generally, if a petitioner fails to raise an issue on direct appeal, he has procedurally defaulted on that issue--that is he has not followed the proper procedure--and he is precluded from asserting that issue on collateral attack under 28 U.S.C. 2255, unless the petitioner can show "cause" for the default and "actual prejudice" resulting therefrom. United States v. Frady, 456 U.S. 152, 168 (1982).¹¹ See also Bousley v. United States, 118 S. Ct. 1604, 1610 (1998).

Thus, because Petitioners did not raise the sentencing issue on direct appeal, they have procedurally defaulted on that claim and the court may not consider it unless they can satisfy the "cause and prejudice standard."

a. "Cause" under the Cause and Prejudice Standard

"[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort

11. The cause and prejudice standard is intended to "afford the courts an opportunity to resolve the issue shortly after trial, while the evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails on his appeal," thus promoting the accuracy, efficiency and finality of criminal determinations. Murray v. Carrier, 477 U.S. 478, 491 (1986).

to comply with the [federal] procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such objective factors include "that the factual or legal basis of a claim was not reasonably available to counsel" or that "some interference by officials" made compliance impracticable. Id.

Petitioners assert that they have met the "cause" prong in two ways. First, they argue that the issue was novel--that is the legal basis was not reasonably available for counsel to argue. (Mem. Supp. Vacate at 15.) Second, they argue that ineffective assistance of counsel prevented them from raising the issue on direct appeal. (Mem. Supp. Vacate at 16.)

i. Novelty

An attorney may not use the prospect of collateral review as a hedge against the strategic risks he takes in his client's defense. Nor may he ignore procedural rules in the expectation that his clients' constitutional claims can be raised at a later date. Reed v. Ross, 468 U.S. 1, 14 (1983). However, "[w]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim."¹² Id. at 16.

12. Petitioners also attempt to revisit the issue of witness William Kane's credibility and argue that because the Government no longer uses him as a witness, the court's acceptance of his testimony was a "material misapprehension of fact" that violates their right to due process. (Mem. Supp. Vacate at 14.) The jury heard and accepted Kane's testimony and this court will not disturb that finding.

Petitioners contend that because Amendment 78 to the Sentencing Guidelines was enacted one month prior to their sentencings the argument based thereon was novel and effectively unavailable to counsel on direct appeal. (Mem. Supp. Vacate at 15.) The court disagrees. Amendment 78 merely clarified the Guidelines language by defining "conduct for which the defendant would be otherwise accountable." USSG § 1B1.3. It was not a substantial break from previous law. Petitioners' attorneys each addressed the issue at length during the sentencing hearing. The issue was not novel and it could have been addressed on direct appeal by Petitioners' competent counsel who were both very familiar with the facts of the case. If it had been addressed on direct appeal it would have received proper consideration at that time.

ii. Ineffective Assistance of Counsel

The second ground Petitioners raise as "cause" is ineffective assistance of counsel.¹³ Petitioners argue that their counsel on direct appeal was ineffective. Because these claims could not have been raised in that appeal, they are properly before the court in this 28 U.S.C. § 2255 action.

Under the Sixth Amendment to the Constitution, a criminal

13. To the extent that Petitioners raise separate and distinct ineffective assistance of counsel claims, other than cause for procedural default, the analysis and result are the same.

defendant has a right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 688 (1984). Under the cause and prejudice standard, ineffective assistance of counsel that rises to a constitutional deprivation can constitute cause. Murray, 477 U.S. at 492.

In Strickland, the Court enunciated a two-prong test that a petitioner must satisfy to prevail on an ineffective assistance of counsel claim. First, the petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. Second, the petitioner must show that he was prejudiced by the deficiency to such an extent that the result of the proceeding is unreliable. Id. It is not enough to show that the error "had some conceivable affect on the outcome of the proceeding." Id. Rather, a successful petitioner must show that but for counsel's errors, the result would have been favorably different. Id. at 693. Failure to make the required showing under either prong of the Strickland test will defeat the claim. Id. at 700.

Because of the inherent difficulty in evaluating counsel's representation, the court must indulge a strong presumption that the conduct falls within the wide range of reasonable assistance. Id. at 689. Under the Strickland test, strategic decisions of counsel are virtually unchallengeable because they normally do

not fall below an objective standard of reasonableness.¹⁴ Id. at 690. In addition, the fact that counsel failed to recognize a claim or failed to raise it generally is not sufficient to constitute ineffective assistance. Murray, 477 U.S. at 486. Counsel's failure to detect a colorable claim is treated the same as a deliberate decision to forgo pursuing such a claim. Murray, 477 U.S. at 492.

Petitioners argue that if the sentencing issue had been raised on direct appeal, the Third Circuit would have vacated the sentence and remanded the case for resentencing. The Magistrate Judge agreed, finding that "to show prejudice, the defendants would have to demonstrate a reasonable probability that if their attorneys had raised Amendment 78 claims on direct appeal, the Third Circuit would have reversed." (Mag. Rep. & Rec. at 5 & 7.) The Magistrate Judge then found that "there is a reasonable probability that, had counsel raised an Amendment 78 claim on direct appeal, the Third Circuit would have reversed and remanded so that Judge Bechtle could make the required findings," and concluded that counsel was ineffective. Id.

This court is compelled to disagree. First, under the first prong of the test set forth in Strickland, counsels' conduct did

14. Petitioners submitted affidavits from counsel stating that the failure to raise the issue was not a strategic decision, but an oversight. Given counsels' familiarity with the case and the issues, the court does not find these affidavits credible. However, it is of no consequence because no prejudice exists.

not fall below an objective standard of reasonableness.

Petitioners were represented by excellent attorneys who zealously represented them at every level of the proceedings and raised every feasible defense. Counsel was aware of the sentencing issue as evidenced by their respective arguments at sentencing. The court cannot conclude that the failure to raise the issue on direct appeal was an oversight. Even if the court did find that it was oversight rather than strategy, that failure does not meet the "objectively unreasonable standard."

The failure to raise the issue, if intentional, was strategic and unchallengeable in this case. Counsel could reasonably have decided that they could not prevail on the sentencing issue and that raising it in the appeal would be futile. The failure to raise the issue, if unintentional, was an oversight that does not rise to constitutionally defective assistance of counsel in this case.

Counsel was not ineffective for failing to raise the issue at sentencing. However, even if Petitioners could show that their attorneys' conduct was unreasonable under the first prong of the Strickland test, under the second prong they cannot show that but for counsel's alleged errors the result would have been favorably different. Even if there were a reasonable probability of reversal and remand as the magistrate judge found, that is not enough under Strickland's prejudice prong. See Strickland, 466

U.S. at 693. There must be a showing that but for counsel's error, the result would have been favorably different.

Petitioners must show not merely that if the issue had been raised reversal and remand would have been likely, but that there is a reasonable probability that the outcome--that is the sentence--would be favorably different. They cannot meet the burden under this prong.

The Guidelines provision under which the court sentenced Petitioners provided that if the amount of heroin involved was ten kilograms or more, the base offense level was 36. (USSG § 2D1.1(c)). Although the PSI referred to thirty kilograms, the applicable Guidelines range within which Petitioners were sentenced applied to ten or more kilograms of heroin. Therefore, if the amount of heroin relevant to Petitioners' conduct was ten kilograms or more, after consideration of all relevant factors, the court would have been within its discretion to sentence Petitioners to a term within the range that reflected the crime committed.

The sentencing transcript and the PSI to which the court referred clearly show that Petitioners each were personally involved with at least ten kilograms of heroin. The PSI and transcripts also show that they were important actors¹⁵ that

15. While Emanuele Salvatore Mannino was not a leader as his brother was and there was no evidence of his participation in direct sales, he facilitated and participated in the

agreed to participate and did knowingly participate, in a conspiracy that had as its object the importation from Italy and distribution within the United States, of a seemingly limitless supply of heroin. The conspiracy actually did import and distribute quantities of heroin well in excess of thirty kilograms during their participation. Further, the transcript from the six-week trial is replete with references in the testimony and wire intercepts which exhibit the international scope of the conspiracy, Petitioners' involvement therein and the quantities of heroin contemplated and ultimately involved in the conspiracy. Petitioners' knowledge and understanding of the scope is well documented. To perform in this capacity they were fully aware of all of the conspirators' actions. Further, as respects Petitioners, this is not a situation in which one conspirator took an action not fully contemplated by Petitioners as part of their role, or a situation in which they were participating in a small role unaware of the largess of the conspiracy. See U.S.S.G. § 1B1.3, illus.2. The goal of the conspiracy as known, accepted and furthered by Petitioners, was to import and distribute as much heroin as possible. Until they were arrested, Petitioners zealously pursued that goal. The

communication that linked the members of the conspiracy, and he laundered the proceeds after the sales. He fulfilled a very critical role in the success of the importation and distribution conspiracy.

territories involved were vast, the need for effective communication by stealth was essential and Petitioners, for a time, succeeded.

The court sentenced both Petitioners within the applicable Guidelines range.¹⁶ If the court were to resentence Petitioners, the court would refer to the unchanged supporting evidence contained in the same trial transcript and the court would be guided by the same sentencing criteria in resentencing Petitioners to the very sentences imposed on December 6 and 7, 1989. Therefore, under the Strickland test, the prejudice prong cannot be met and Petitioner's ineffective assistance of counsel claim fails. As a result, there is no "cause" to satisfy the "cause and prejudice standard." The court will review the "prejudice" prong of the "cause and prejudice standard."

2. Prejudice under the Cause and Prejudice Standard

As for prejudice, the petitioner has a heavy burden and must show not merely that there was a "possibility of some prejudice," but rather, that an error caused "actual and substantial disadvantage." Frady, 456 U.S. at 170. Even if the court were to find that Petitioners had shown that counsel was ineffective for failing to raise the sentencing issue, Petitioners have not

16. The evidence clearly showed involvement with quantities well in excess of this amount and testimony was received that during the life of the conspiracy it involved hundreds of kilograms of heroin.

shown actual and substantial disadvantage, the second prong of the "cause and prejudice standard." The court will briefly look to the sentencings and the PSI.

a. Petitioners' Sentencings

Petitioners argue that the court improperly sentenced them based on thirty kilograms of heroin imported and distributed prior to the date they joined the conspiracy. (Mem. Supp. Mot. Vacate at 6.)¹⁷

In narcotics cases under the Sentencing Guidelines, the length of the sentence imposed will depend upon the quantity of drugs deemed relevant to the offense. United States v. Collado, 975 F.2d 985, 990 (3d Cir. 1992); USSG § 1B1.3. The sentencing court must first determine the relevant quantity. Next, the sentencing court looks to the drug quantity table located at Guidelines Section 2D1.1, and chooses the base offense level that corresponds to the relevant drug and quantity. The sentencing court then may adjust the base offense level upward or downward to reflect other relevant factors such as the defendant's acceptance of responsibility or his role in the offense. Based upon the sentencing judge's consideration of the relevant factors,¹⁸ he or she then selects a sentence that falls within

17. Guideline Section 1B1.3 provided that when more than 10 kilograms of heroin was involved, the base offense level was 36.

18. Certain conduct with which the defendant is not formally charged may be considered in the determination of the

the applicable guideline range for that level. Collado, 975 F.2d at 990.

The sentencing court often relies heavily upon the PSI. Especially when, as in this case, the court invites counsel to add, delete or change information contained therein that they believe is misstated or incomplete, including the facts that the court will presumably rely upon. If the sentencing court makes no independent finding of fact on the record, the facts contained in the PSI are viewed as the sentencing court's findings of fact. Id. at 990.

Because criminal conduct is often jointly undertaken and an individual's actions taken in furtherance of that activity, when viewed in isolation, may not encompass the full scope of his or her participation, the Guidelines have special provisions that address and authorize "accomplice attribution," or the inclusion of amounts of drugs possessed, distributed, manufactured, sold or otherwise handled by persons other than the defendant in the calculation of his base offense level. Collado, 975 F.2d at 990. The amount of accomplice attribution can greatly affect each participant's sentence.

When Petitioners were sentenced, the relevant portion of the Guidelines, Section 1B1.3, titled Relevant Conduct, read:

applicable guidelines sentencing range. United States v. Baird, 109 F.2d 856, 863 (3d Cir. 1997)(quoting USSG § 1B1.3).

Conduct "for which the defendant is otherwise accountable," as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused." If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable to the defendant."

The United States Sentencing Commission enacted Amendment 78 to define the phrase "conduct for which the defendant would be otherwise accountable." See USSG § 1B1.3. The amendment, also known as amended application note 1 to USSG § 1B1.3, became effective November 1, 1989, and read:

In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others **in furtherance** of the execution of the jointly-undertaken criminal activity that was **reasonably foreseeable** by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither **within the scope of the defendant's agreement** nor was **reasonably foreseeable** in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not involved in establishing the defendant's offense level under this guideline.

USSG § 1B1.3 application note 1 (emphasis added).

Three years after Petitioners were sentenced, the United States Court of Appeals for the Third Circuit decided United States v. Collado, 975 F.2d 985 (3d Cir. 1992) in which it

interpreted the application note language.¹⁹ In Collado, the Third Circuit held that the "crucial factor in accomplice attribution is the extent of the defendant's involvement in the conspiracy." Collado, 975 F.2d at 992. However, it is not enough to find that the defendant's criminal activity or participation was substantial. Rather, the sentencing court must make a "searching and individualized inquiry" into the circumstances surrounding each defendant's involvement in the conspiracy to ensure that the defendant's sentence accurately reflects his role. Id. at 995.²⁰ The Collado court further noted that while it is appropriate to hold a defendant who exhibits a substantial degree of involvement in the conspiracy accountable for reasonably foreseeable acts committed by a co-conspirator, the same cannot be said for a defendant whose involvement was much more limited. Collado, 975 F.2d at 992. The Collado court found that before the drugs could be attributed to a defendant, the district court must find that the defendant

19. Because the Third Circuit did not create new law, there is no bar to its retroactive application.

20. The Collado court held that the Guidelines require the sentencing courts to consider:

- 1) whether the amounts distributed by the defendant's co-conspirators were distributed "in furtherance of the jointly undertaken activity";
- (2) whether that activity was "within the scope of the defendant's agreement;" and
- (3) whether it was "reasonably foreseeable in connection with the criminal activity the defendant agreed to undertake." Collado, 975 F.2d at 991.

was a member of the conspiracy at the time the transactions occurred because "the relevant conduct provision of the guidelines is not coextensive with conspiracy law . . . [and] in the absence of unusual circumstances . . . conduct that occurred before the defendant entered into an agreement cannot be said to be in furtherance of or within the scope of that agreement."

Collado, 975 F.2d at 996-7.

Petitioners contend that the sentencing court erred with respect to the Collado opinion because the court did not make a searching and individualized inquiry and the court attributed to them amounts involved prior to their participation.

While Petitioners' involvement would most likely meet the "unusual" circumstances Collado speaks to, it is not necessary to address that issue. Without even looking at the trial transcript, the undisputed portions of the PSI and the sentencing hearing transcript demonstrate Petitioners' agreement to participate in a far-reaching conspiracy that they knew had as its object the importation and distribution of heroin in quantities that easily exceeded ten kilograms. The documents also show that amounts in excess of ten kilograms were imported and distributed during their participation. The court will briefly look to each.

Ignazio Antonio Mannino's Sentencing

Ignazio Antonio Mannino was sentenced on December 6, 1989.

He was represented by Charles F. Carnesi, Esquire, at trial, sentencing and on direct appeal. At sentencing, Carnesi argued that the jury could have found that Salvatore Allegra and Simone Zito's activities were a separate conspiracy and were not related to the conspiracy in which Ignazio Antonio Mannino was involved. (IAM Sent. Tr. at 5.) He also urged the court to consider only the amount of heroin to which Stefano Zito testified, rather than the larger amount attributable to the conspiracy. The transcript contains the following discourse:

Carnesi: We believe that the proper guidelines here would be according to the evidence introduced at trial, that Stefano Zito said they were importing--I believe he referred to three kilograms or possibly four. . . .

(IAM Sent. Tr. at 7.) The court disagreed with counsel's proposed relevant amount and referred to the trial evidence and testimony that elucidated the scope and breadth of the conspiracy:

The Court: Paragraph 25 [of the PSI]²¹. . . the government's position is that there was some suggestion of movement of these substances between the United States and Colombia and Sicily, and that suggestion could be part of the

21. Paragraph 25 refers to Ignazio Antonio Mannino's participation in the January 1988 deal in which the conspirators shipped 570 kilogram of Colombian cocaine to the heroin suppliers in Sicily in exchange for heroin. (IAM PSI at ¶ 25.) The Government's witness also testified that he was told that cocaine was being exchanged for heroin and that Emanuele Salvatore Mannino was in Italy for that purpose.

plan. It was introduced as evidence and presumably the jury considered it. To that extent, if the jury considered that, that could possibly have been some sort of a quid pro quo or exchange program; to the extent that your client is accused of it as opposed to the cocaine features of the case substantively, or even the conspiracy that Mr. Varisco was convicted of.

(Sent. Tr. at 8-9.) Carnesi objected to the Government's reliance on Joseph Cuffaro's testimony regarding this 570 kilogram cocaine exchange and Ignazio Antonio Mannino's involvement because Cuffaro conceded on cross-examination at trial that he had "no knowledge of Mr. Mannino doing anything concerned with this trip." (IAM Sent. Tr. at 9.) The Government then recounted Cuffaro's testimony that Ignazio Antonio Mannino was an assistant for one of the bosses involved in the transaction and that Mannino was there "helping somebody." (IAM Sent. Tr. at 10.)²²

Counsel then asked the court to find a base offense level of 34 based upon three to four kilograms and because Ignazio Antonio Mannino was not a boss or supervisor. (IAM Sent. Tr. at 13.) The court then addressed Ignazio Antonio Mannino's role and

22. The court then directed the probation officer to correct the PSI paragraph 25 to read that "beginning in the Fall of 1987, a government witness testified that he was told that Mr. Mannino and Simone Zito had assisted" (IAM Sent. Tr. at 11.)

involvement in the conspiracy and found that "the record as a whole, the direct and cross-examination, all the evidence as a whole, leads the court to that conclusion [that Ignazio Antonio Mannino was in a leadership role]." (IAM Sent. Tr. at 15.) The court accordingly added a four-level increase for the leadership role. It then sentenced him to 27 years imprisonment and five years supervised release. Finding the financial ability to pay, the court also imposed a \$25,000.00 fine.

Emanuele Salvatore Mannino's Sentencing

Emanuele Salvatore Mannino was sentenced on December 7, 1989. He was represented by F. Emmett Fitzpatrick ("Fitzpatrick") at trial, sentencing and on appeal. Like Carnesi, Fitzpatrick also addressed the sentencing issue at the sentencing hearing and urged the court to sentence Emanuele Salvatore Mannino leniently. The sentencing transcript contains the following discourse:

FITZPATRICK: The presentence report does not indicate that the 10-kilo figure comes from any evidence in this court. What they say is that the government has reported that this particular conspiracy involved 10 kilos or more.

THE COURT: Didn't Witness Ricupa speak of a substantial number in excess of 10? His testimony was heard and admissible under oath, and he spoke, I think, in quantities in excess of 60 or 70 kilos over a period of time. There were three kilos that were intercepted at the airport. That may have had nothing to do with Ricupa's product. And there were other references to it.

. . . .

The conspiracy for which your client stands convicted, as it was tried before this jury and with the evidence that was heard before this jury, clearly and plainly allows the break point of 10 kilos in this sentence calculation to be exceeded.

(ESM Sent. Tr. at 11-13.) The court then gave the Government an opportunity to address the issues raised by Fitzpatrick:

SEIGEL: The involvement of the defendant. . . went back to the summer of 1987, when he was in Italy, and there was testimony through William Kane that he was in Italy to further the conspiracy, the importation conspiracy, by making arrangements to bring the heroin in. . . . And his involvement in the conspiracy, by the government's evidence, continued well beyond that when we show this defendant's participation in going to the pay phones and, as clearly the jury found, based upon their verdict, that activity was related to the conspiracy.

. . . .

It is the government's position very strongly--that Salvatore Mannino was at the inner core of this conspiracy. He was not in a leadership role like his brother was and like some others were. . . . However, his participation is not minor or minimal in that his participation was of a long duration. . . . To the extent that the jury found that those telephone calls at the pay phones were related to the importation, this defendant was getting the very essence of the information of the conspiracy by going to those pay phones. He was relied upon very heavily by his brother and Simone Zito to pass messages, to go to Sicily, to make the arrangements. . . . This defendant, although not having the responsibility of his brother or Simone Zito or Francesco Gambino, was involved day in and day out, as the surveillance evidence and the electronic evidence showed.

(ESM Sent. Tr. at 19-20.) The court agreed that Emanuele Salvatore Mannino's role was substantial and critical to the conspiracy.

THE COURT: The heart of the distribution

conspiracy is communication. . . . particularly when symbols and codes and special rules are involved, communication is at the heart of it. And your client was involved in that feature of it. In many ways, those who maybe handed it from place to place, under certain circumstances, those persons who were flown here and actually touched the material . . they could be more minimally involved than the person who is affiliating everyone together through communication.

(ESM Sent. Tr. at 20.) The court then referenced the PSI and asked counsel whether there were issues to be addressed in addition to those addressed in the PSI. (ESM Sent. Tr. at 22.) The court recounted that the base offense level was 36 and the guideline range was between 188 to 235 months imprisonment. It then sentenced Emanuele Salvatore Mannino to 216 months (eighteen years) imprisonment and five years of supervised release. After finding the ability to pay, the court also imposed a \$25,000.00 fine. (ESM Sent. Tr. at 24.)

The record reflects that the court made a searching and individualized inquiry into each Petitioners' involvement. The court referenced its reliance on the PSI and the PSI shows the Petitioners involvement in even greater detail.

The PSI

Because the PSI, with a few small changes, reads the same for each Petitioner, the court will only review it once, as it relates to both Petitioners. The PSI first gives background

information. See PSI ¶ 3 (stating that in 1983, Ignazio Antonio Mannino and Emanuele Salvatore Mannino left the United States and went to Sicily and that shortly thereafter, the conspiracy began to import heroin into the United States from Sicily). The PSI details Petitioners' positions within the conspiracy. See PSI ¶ 13 (referring to William Kane's testimony that Stefano Zito told him that Ignazio Antonio Mannino was Simone Zito's partner in the heroin smuggling operation, that Francesco Gambino was Ignazio Antonio Mannino's boss and that Emanuele Salvatore Mannino assisted Simone Zito and Ignazio Antonio Mannino); PSI ¶ 22 (Emanuele Salvatore Mannino's role of receiving and disseminating information and laundering money). The PSI addressed the scope of the conspiracy by showing the transactions (both before Petitioners joined--showing anticipation, and after they joined--showing actual conduct) quantities and methods. See PSI ¶ 14 (referring to quantities and method of the importation of the heroin from Sicily into the United States); PSI ¶ 15 (referring to Allegra's testimony that between 1985 and March 1986, he placed at least 30 kilograms of heroin on couriers, and that Ignazio Antonio Mannino's partner, Simone Zito, supplied this heroin);²³ PSI ¶ 16 (referring to the March 1986 courier

23. Because of counsel's objections on the basis that there was no direct evidence that Ignazio Antonio Mannino was involved, the PSI states that there is no evidence that he or his wife, Grace Pulitano Mannino, were participating in the heroin importation at this time. (PSI ¶ 15.)

interception in Italy);²⁴ PSI ¶ 17 (the DiGrazia interception with over three kilograms of heroin in New York); PSI ¶ 18 (Ricupa's testimony as part of the conspiracy that between early 1985 and the end of 1986, he sold eighty kilograms of heroin).

The PSI also details the duration of the conspiracy and Petitioners' knowledge and involvement. See PSI ¶ 20 (referring to evidence that when Petitioners returned to the United States from Sicily, Simone Zito and his wife lived with his partner Ignazio Antonio Mannino for about six months, and from that time forward, Ignazio Antonio Mannino and Simone Zito coordinated the heroin operation from within the United States); Id. (referring to the conspirators' use of numerous pay phones and coded messages to communicate with the co-conspirators as well as the use of evasive driving techniques). The PSI also addressed each Petitioner's involvement. See PSI ¶¶ 21, 25, 26, 28, 30 (referring to Ignazio Antonio Mannino's direct sales and his leadership role); PSI ¶¶ 23-24 (referring to the conspiracy's cocaine for heroin exchange and Emanuele Salvatore Mannino's presence in Italy to arrange the shipment of three kilograms of heroin into the United States); PSI ¶ 25 (referring to testimony that, beginning in the Fall of 1987, Ignazio Antonio Mannino and Simone Zito assisted four mafia bosses in arranging the shipment

24. Although the PSI does not state the amount of heroin that was removed from this courier, testimony established that each courier generally had two to three kilograms on them.

of 570 kilograms of cocaine from Colombia to the Sicilian heroin dealers);²⁵ PSI ¶ 22 (referring to Emanuele Salvatore Mannino's role as relater of messages); PSI ¶ 29 (referring to Emanuele Salvatore Mannino's money laundering role).

The quantities and knowledge thereof are also referenced in the PSI. See PSI ¶ 28 (referring to Simone Zito's statement to Kane in October 1987 that his money was tied up in a three kilogram heroin deal; Kane's October 22, 1987 purchase of seven ounces of heroin from Simone Zito in exchange for \$25,000.00; Kane's payment to Simone Zito and Ignazio Antonio Mannino together; and Ignazio Antonio Mannino's offer to "front" Kane a kilogram of heroin); PSI ¶ 30 (reference to Ignazio Antonio Mannino and Simone Zito's January 7, 1988, offer to sell Kane one kilogram of good quality heroin and additional quantities of poor quality heroin); PSI ¶ 32 (the Spring of 1988 offer to sell Kane a kilogram of heroin and give him a sample quantity); PSI ¶ 31 (reference to the FBI's seizure of \$12,000.00 and .28 grams of heroin and fact that it would have been four kilograms if executed the next day).

Upon reading the sentencing transcript and the PSI, it is clear that the sentencing court made a searching and

25. While the cocaine is not part of this conviction, it evidences the sophistication of the conspiracy, its international scope and the quantities of drugs that the conspiracy, and Petitioners as members thereof, were importing and distributing.

individualized inquiry into the circumstances surrounding each petitioner's involvement in the conspiracy. It is also clear that Petitioners were properly held responsible for at least ten kilograms of heroin. A very narrow reading of the evidence that was referenced in the PSI and at the sentencings includes the following quantities:²⁶ approximately six kilograms of heroin removed from couriers at Italian and United States airports in March of 1986; three kilograms of heroin that Emanuele Salvatore Mannino arranged the shipment of in July 1987; the three kilogram deal that Simone Zito's money was tied up in during October 1987; seven ounces of heroin sold to Kane in October 1987; one kilogram of heroin offered by Ignazio Antonio Mannino to Kane on October 22, 1987; one kilogram of good heroin Ignazio Antonio Mannino offered to sell Kane on January 7, 1988; unspecified additional quantities of poor quality heroin he offered to sell Kane on the same date; .28 grams of heroin seized in April 1988; four kilograms of heroin that were in the apartment the next day; one kilogram of heroin that Simone Zito offered to sell Kane in Spring of 1988 at the Cafe Giardino; and the undisclosed quantity offered on that date as a sample.

This does not include the portion of Ricupa's eighty kilograms of heroin imported and distributed after Petitioners

26. Additionally, the trial transcript contains references to quantities and transactions that are not contained herein.

entered the conspiracy in 1986 (between early 1985 and the end of 1986 Ricupa, as part of the conspiracy, sold eighty kilograms) that could be attributed to Petitioners or the amount of heroin that was exchanged for the hundreds of kilograms of cocaine from Colombia, or the amount of heroin that was sold to reap the monetary proceeds that were recovered by the FBI. Nor does it include any of the thirty kilograms that Allegra testified about that is at the heart of Petitioners' argument. Given the history, as well as the breadth, the span and the complexity of the conspiracy, it is obvious that the unknown quantities are large. It is also clear that the amount of heroin the court attributed to Petitioners at sentencing, in reality, underrepresents their actual involvement rather than overrepresents it as Petitioners contend.

Thus, the sentencing court complied with the requirements set forth in Section 1B1.3 of the Guidelines and case law set forth in United States v. Collado, 975 F.2d 985 (3d Cir. 1992). For these reasons, even if Petitioners' had not procedurally defaulted on their claims, their claims would fail on the merits.

C. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Petitioners appear to raise ineffective assistance of

counsel not only as cause for procedural default as addressed at length above, but also as a separate ground for relief. The court has addressed the standard for ineffective assistance of counsel above as well as the conduct. For the same reasons set forth in that portion of this memorandum, the court will not grant the motion as it relates to that claim.

D. STAND COMMITTED FINES

Petitioners also ask the court to amend the sentencing order to delete any reference to the imposed fines as "stand committed." The 1984 Sentencing Reform Act abrogated stand committed sentences. United States v. Bauer, 19 F.3d 409, 412 (8th Cir. 1994). Because Petitioners were sentenced thereafter, "stand committed" sentences, including fines, could not be imposed upon them. The final orders in Petitioners' sentencings, the judgment and commitment orders, do not designate or refer to the fines as "stand committed." See Judgment and Commitment Orders at 5. Because the judgment and commitment orders do not contain the language Petitioners seek to have amended, the court will deny the motion.

IV. CONCLUSION

Because Petitioners have shown neither cause nor prejudice, their improper sentencing claim is procedurally barred. Petitioners have also failed to show a separate ineffective

assistance of counsel claim. Therefore, the court will not adopt or approve the magistrate judge's report and recommendation. The court will deny the Petitions without an evidentiary hearing.

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

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 89-003-02
 :
 IGNAZIO ANTONIO MANNINO :

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 89-003-04
 :
 EMANUELE SALVATORE MANNINO :

ORDER

AND NOW, TO WIT, this day of July 1998, upon consideration of petitioners Ignazio Antonio Mannino and Emanuele Salvatore Mannino's motion to vacate their sentences under 28 U.S.C. § 2255, the Government's response thereto, the Magistrate Judge's Report and Recommendation, the Government's objections thereto, petitioners' response and the record, IT IS ORDERED:

- (1) the Magistrate Judge's Report and Recommendation is NOT APPROVED or ADOPTED; and
- (2) said Petitions are DENIED without an evidentiary hearing.

LOUIS C. BECHTLE