UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-2023 &
No. 92-2386
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUY SCHNEIDER,

Defendant-Appellant.

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Appeal from the United States District Court for the
Southern District of Texas
(CR H 90 0152 01)

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(November 18, 1992)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.[*]

GARWOOD, Circuit Judge:

This cause is a criminal appeal, and consolidated therewith for purposes of appeal, an appeal from the denial of a *pro se* mandamus petition, of defendant-appellant Guy Jerome Schneider (Schneider). Schneider was charged in a four-count indictment,

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

returned on April 4, 1990, with attempting on February 15, 1990, to destroy by means of an explosive, property being used in an activity affecting interstate commerce, contrary to 18 U.S.C. § 844(i) (count one); failing to pay tax on making firearms, contrary to 18 U.S.C. §§ 5821, 5861(c), and 5871 (count two); possessing unlawfully a firearm which was not registered, contrary to 26 U.S.C. §§ 5861(d) and 5871 (count three); and possessing a firearm which was not identified by a serial number, contrary to 26 U.S.C. §§ 5861(i) and 5871 (count four). On May 25, 1990, Schneider's plea of guilty to the first two counts was accepted; the plea being pursuant to an agreement under which the government would dismiss counts three and four. On September 3, 1990, Schneider was sentenced on counts one and two. Schneider did not appeal, but he subsequently filed a petition pursuant to 28 U.S.C. § 2255. After an evidentiary hearing on December 19, 1991, the district court granted Schneider this out-of-time appeal in which he challenges his sentence and alleges ineffective assistance of counsel. In a separate action, Schneider also brings an appeal of the district court's denial of his *pro se* mandamus petition brought pursuant to 28 U.S.C. §§ 1361, 1821, and 1825, in which he seeks a witness fee for appearing at his own evidentiary hearing in the section 2255 proceeding. Finding no reversible error, we affirm in each case.

**Facts and Proceedings Below**

According to the factual findings of the district court, around midnight on February 14, 1990, Schneider and his associate, Ricky Hutchison (Hutchison), drove their motorcycles to Jennifer Reeves' (Reeves) apartment complex. Schneider gave Hutchison a

home-made pipe bomb and instructed him to tape it to the underside of the gas tank of Reeves' jeep which was parked approximately ten feet from the complex structure.[1] A motorcycle was parked next to the jeep. After Hutchison attached the bomb and lit a delayed fuse, the two of them drove off. The subsequent explosion ruptured the vehicle's gas tank, causing fragmentation. Shrapnel, capable of causing serious bodily injury or death, was found throughout the parking lot and as far away from the vehicle as forty feet.

Alcohol, Tobacco and Firearms (ATF) Special Agent Jimmy D. Brigance (Brigance) was subsequently notified of the explosion. Brigance interviewed Reeves who told him that Schneider had been her boyfriend but her breakup with him had not been friendly. She stated that Schneider had fired shots in the parking lot outside of her apartment, broken out her apartment window, sprayed graffiti on her jeep, and threatened to kill her new boyfriend. On February 16, 1990, Brigance executed a search warrant for Schneider's residence wherein he recovered evidence of the pipe bomb's construction. No one was home, but Brigance left a warrant receipt in the residence.

Schneider subsequently moved out of the apartment and he told his roommate that he should also hide from the ATF agents who were looking for Schneider. He also told another associate to avoid ATF agent Brigance. Schneider remained on the run until he was

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[1] Hutchison planted and set-off the bomb because Schneider told him to and agreed to give him a quarter-pound of marihuana for doing so.

apprehended on April 10, 1990.[2]

Upon arrest, Schneider waived his legal rights and gave Brigance a statement. He first asserted that some Mexicans had bombed Reeves' vehicle. He then admitted that he blew up Reeves' vehicle because she was seeing another boyfriend. He also admitted to fabricating the bomb and to recruiting Hutchison to help him detonate the device. Pursuant to a plea bargain, Schneider then agreed to cooperate in the government's investigation and prosecution of Hutchison in return for the government dropping counts three and four from Schneider's indictment and recommending a twenty-four month sentence for counts one and two combined.

Schneider pleaded guilty to counts one and two on May 25, 1990. Before accepting his plea, the court advised Schneider that the government's recommendation of a twenty-four month sentence was not binding on the court and that the court could impose a longer sentence. Schneider agreed that he understood this admonition.[3] After setting the date for sentencing, the court was informed that Schneider had sent a threatening letter to Reeves. The court then admonished Schneider that he could be charged with the separate federal crime of obstruction of justice and that the behavior could also be used to increase his total offense level for sentencing purposes.

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[2] By that time, a grand jury had already returned on April 4, 1990, a four-count indictment against Schneider.

[3] The court also warned Schneider that if it imposed a sentence more severe than he anticipated, he was still bound to his guilty plea and could not change it. Schneider indicated that he understood this admonition as well.

On September 3, 1990, after both the government and Schneider's counsel declined to object to the pre-sentence report (PSR), it was adopted by the district court. The district court then determined Schneider's sentence according to the sentencing guidelines.[4] It found that the base offense level was six for the offenses of conviction. The court added fourteen points because Schneider recklessly endangered the safety of others, pursuant to U.S.S.G. § 2K1.4(b)(2). The court also added two points for Schneider's role as supervisor of the offense pursuant to U.S.S.G. § 3B1.1(c) and two points for his obstruction of justice pursuant to U.S.S.G. § 3C1.1. The court subtracted two points for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), resulting in a total offense level of twenty-two. The district court determined Schneider's criminal history category of II by awarding him one criminal history point for each of two misdemeanor convictions.[5] The district court determined that the guideline imprisonment range for Schneider, based on his offense level of twenty and his criminal history category of II, was forty-six to fifty-seven months. No objection was made to these determinations. The court then sentenced Schneider to two concurrent fifty-seven

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[4] The applicable version of the sentencing guidelines is the one in effect on September 3, 1990, the date on which Schneider was sentenced, 18 U.S.C. § 3553(a)(4), namely the 1990 edition of the Federal Sentencing Guidelines Manual.

[5] One conviction was based on a misdemeanor assault in Harris County, Texas, for which Schneider was fined. Apparently the PSR listed the wrong cause number for this conviction. The other conviction was based on a misdemeanor for evading arrest in Harris County, Texas, for which Schneider was assessed a fine and sentenced to three days confinement.

month terms of imprisonment, followed by a three-year term of supervised release, a $3000 fine, and a $100 special assessment.

Schneider did not appeal, but he subsequently filed a petition pursuant to 28 U.S.C. § 2255 alleging that: his criminal history had been miscalculated by using two convictions for which the term of incarceration did not exceed one year; he was not advised that he could appeal his sentence; and his counsel was ineffective because counsel did not object to the use of the two convictions, nor did he advise Schneider of the right to appeal.

The sentencing district court held an evidentiary hearing on these charges on December 19, 1991, in which Schneider testified and was represented by new counsel. Schneider's trial counsel, James Sims (Sims), testified that after the PSR was filed he learned that Schneider had made threats against different witnesses, of which the district court was not yet aware.[6] Sims further testified that he had admonished Schneider several times that for this kind of conduct the government could file criminal obstruction charges against him which could result in consecutive sentences, but Schneider refused to heed the warnings. Sims also stated that he understood that during sentencing an ATF agent was coming to the courtroom to try and intercede in the proceedings based upon a new threat by Schneider. Also, Schneider had told

[6] Schneider at the section 2255 evidentiary hearing essentially confirmed that he had threatened witness Mike Piatowski whom he had told about placing the bomb under Reeves' car. Schneider testified that he sent Piatowski a letter which did "not exactly threaten" him but "[i]t let him know that I wasn't exactly all too happy."

Sims that he was going to disrupt the courtroom proceedings. Sims testified that his trial strategy at that point was to have Schneider sentenced as soon as possible so that he would not receive an obstruction of justice charge or other adverse sentencing consequences.

Sims testified that he reviewed the PSR with Schneider, specifically the section concerning Schneider's criminal history. Schneider told Sims that he had pleaded guilty to the assault charge in a justice court in Harris County, Texas. Sims also testified that he believed it was proper to include both misdemeanors in calculating Schneider's criminal history category and that all the enhancements to the base offense level were proper as well.

At the end of the hearing, the district court found that it had failed to tell Schneider of his right to appeal and it granted to him an out-of-time appeal. The district court found the rest of Schneider's claims meritless. Schneider now brings this out-of-time appeal.

On March 19, 1992, Schneider filed with the district court a *pro se* petition for mandamus relief pursuant to 28 U.S.C. § 1361, alleging that he was entitled to a witness fee for appearing at his section 2255 hearing. The district court denied Schneider's petition because he failed to show he had a clear right to witness fees or that the United States Attorney had a clear duty to certify Schneider's status as a witness entitled to fees. Schneider now also appeals the denial of his mandamus petition.

We consolidated the two appeals.

**Discussion**

I. Criminal Appeal

Schneider raises several issues on appeal concerning the determination of his sentence. First, he complains that the district court improperly counted two prior misdemeanor convictions toward determining his criminal history category. Also, Schneider argues that the district court improperly enhanced his base offense level for obstructing justice, supervising the crime, and recklessly endangering the lives of others. Finally, Schneider argues that his trial counsel's failure to object to these matters resulted in ineffective assistance of counsel.[7]

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[7] In a separate *pro se* supplemental brief, Schneider also alleges that the district court erred by not, *sua sponte*, permitting him to withdraw his guilty plea per Fed. R. Crim. P. 11(e)(4), after it had elected to impose a sentence higher than the twenty-four months recommended by the government pursuant to the plea agreement. Usually, issues raised in a supplemental brief are disregarded where the party submitting the brief is already represented by counsel. Fifth Circuit Court Policy 2c.

However, even if we were to consider the brief, we would reject Schneider's argument. Schneider's plea agreement is not governed by the Rule 11(e)(4) provision since the written plea agreement, which he signed, warned him that the judge did not have to accept the government's sentencing recommendation and informed him that the plea agreement was governed by Rule 11(e)(1)(B). This provision allows the district court to reject the sentencing recommendation under the plea agreement without having to give the defendant the opportunity to withdraw his plea. The district court also verbally admonished Schneider that it was not bound by the recommendation and that a sentence greater than Schneider anticipated would not allow him to withdraw his plea.

As Schneider pleaded guilty pursuant to a Rule 11(e)(1)(B) agreement, the district court was not bound by Rule 11(e)(4) to permit withdrawal of the plea upon rejection of the government's sentencing recommendation. *United States v. Clark*, 931 F.2d 292, 296 (5th Cir. 1991). Rule 11(e)(4) is not applicable to Rule 11(e)(1)(B) agreements. *United States v. Bachynsky*, 949 F.2d 722, 728-29 n.5 (5th Cir. 1991).

Schneider's complaints are based on the district court's allegedly improper factual determinations supporting its application of the sentencing guidelines. Generally, a district court's sentencing determination must be upheld "so long as it results from a correct application of the guidelines to factual findings which are not clearly erroneous." *United States v. Alfaro*, 919 F.2d 962, 964 (5th Cir. 1990). However, as to improper sentencing claims involving factual determinations, these matters must be the subject of an objection at the time of sentencing so that the district court can make a finding which can be reviewed on appeal, otherwise the issue is waived. *United States v. Smallwood*, 920 F.2d 1231, 1238 (5th Cir. 1991); *United States v. Mourning*, 914 F.2d 699, 704 (5th Cir. 1990). By failing to raise his complaints below, Schneider's "[i]ssues raised for the first time on appeal are reviewed only for plain error." *United States v. Bleike*, 950 F.2d 214, 219 (5th Cir. 1991).

Unless a result of plain error, any erroneous factual findings are only relevant as they apply to Schneider's ineffective assistance of counsel claim. Although this Court does not usually consider ineffective assistance of counsel claims on direct appeal, it will do so where the record below has been sufficiently developed to provide substantial details about the attorney's conduct. *United States v. Bounds*, 943 F.2d 541, 544 (5th Cir. 1991). Here, the district court held an evidentiary hearing that extensively inquired into Sims' conduct.

The issue of ineffective assistance of counsel must be measured by the standards of *Strickland v. Washington*, 104 S.Ct.

2052 (1984). To prevail upon a claim that his counsel's performance was so defective as to require vacation of his sentence, Schneider must satisfy a two-prong test. First, he must show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment; second, Schneider must show that the deficient performance likely prejudiced the defense. *Id.* at 2064. To demonstrate deficiency, Schneider must show that his counsel's actions "fell below an objective standard of reasonableness." *Id.* To demonstrate prejudice, he must show that a "reasonable probability" exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 2068. Failure to make both showings is fatal to Schneider's claim of ineffective assistance of counsel. *Id*. at 2064.

Judicial scrutiny of counsel's performance is highly deferential; the Supreme Court has advised that the reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 2066. This means that the reviewing court must strongly presume that counsel has exercised reasonable professional judgment. *Id.* "[S]econd-guessing is not the test for ineffective assistance of counsel." *King v. Lynaugh*, 868 F.2d 1400, 1405 (5th Cir. 1989).

In the case *sub judice*, Sims testified that he did not object to the PSR because he thought it was accurate and he wanted to bring the sentencing hearing to a speedy conclusion due to Schneider's threats to witnesses and his articulated intention to

disrupt the judicial proceeding. As the Supreme Court noted in *Strickland*, "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* at 2066. In cases such as this, "We must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). Here, counsel's strategy was based on the reasonable goal of shielding Schneider from losing his two-point reduction for acceptance of responsibility and other possible adverse sentencing consequences and from being charged with the separate offense of obstruction of justice. Keeping counsel's strategy in mind, we now turn to Schneider's specific complaints.

*A. Criminal History*

Schneider challenges the district court's calculation of his criminal history category, alleging that the two misdemeanor convictions were erroneously included. Without the addition of either one of the two criminal history points, Schneider would have had a criminal history category of I; with both points, his category was II. Based upon his offense level of twenty-two, this resulted in his sentencing guideline range being forty-six to fifty-seven months, instead of forty-one to fifty-one months. Schneider's sentence was fifty-seven months.

Schneider argues that the assault conviction was improperly included because the case number in the PSR refers to a traffic ticket. However, Schneider never presented evidence supporting his claim. By Schneider's failure to object to the PSR, it was not

plain error for the district court to rely on the PSR's factual description concerning the assault conviction. Furthermore, Sims's having failed to investigate whether the proper cause number was on the report was properly found not to constitute ineffective assistance. Schneider told Sims, and admitted in his brief to this Court, that he was convicted for assault. Sims had no reason to believe that the assault charge was improper and if he had objected, the typographical error would have been corrected, resulting in no change to Schneider's sentence. Schneider further argues that the assault conviction itself is constitutionally invalid because he was not represented by counsel. However, conviction of an uncounseled criminal defendant is constitutionally permissible so long as the defendant is not sentenced to a term of imprisonment. *Scott v. Illinois*, 99 S.Ct. 1158, 1162 (1979); *United States v. Eckford*, 910 F.2d 216 (5th Cir. 1990). Schneider merely received a fine, so the district court properly considered the assault conviction in calculating his criminal history category. *United States v. Smith*, 844 F.2d 203, 208 (5th Cir. 1988). Finally, Schneider (*pro se*) asserts that the assault conviction was improper because he never appeared in court. This was not alleged below, but merely mentioned in passing in Schneider's testimony at the section 2255 hearing. However, Sims testified that Schneider told him "he had . . . pled guilty for an assault in a justice court here in Harris County"; thus, it could properly be found that Sims was led by Schneider to believe there was no reason to suspect his plea was taken other than in open court, and that hence Sims was not ineffective for failing to raise

this matter.

Schneider also objects to the district court's inclusion of his misdemeanor conviction for evading arrest in its determination of his criminal history category pursuant to U.S.S.G. § 4A1.2(c).[8] Since Schneider was confined for only three days, the prior conviction can be considered only if it is similar to conduct involved in "the instant offense." Schneider argues that the conduct concerning evading arrest is not part of "the instant offense," nor is it similar to the conduct resulting in the evading-arrest conviction.

This Court has held that the language "'the instant offense' includes any 'relevant conduct' as that phrase is used throughout the guidelines," and not just conduct that is actually charged in the indictment. *United States v. Harris*, 932 F.2d 1529, 1538 (5th Cir. 1991) (interpreting U.S.S.G. § 4A1.1(d) & (e)). This broad interpretation of the language is consistent with the guidelines' approach generally. *Cf. United States v. Arellano-Rocha*, 946 F.2d 1105, 1108 (5th Cir. 1991). We believe this reasoning is also correct in interpreting section 4A1.2(c). This conclusion appears consistent with other provisions in the guidelines which allow for the consideration of relevant conduct which is not necessarily a

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[8] This section provides in pertinent part, "Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense." U.S.S.G. § 4A1.2(c). The list of prior offenses includes "False information to a police officer" and "Hindering or failure to obey a police officer." *Id.* The parties apparently do not dispute that the evading arrest conviction is similar to these listed offenses.

part of the charged offense. *See e.g.,* section 1B1.3, *Background Commentary* (indicating that "conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range"); section 2D1.2, *Application Note 1* (permitting consideration of uncharged acts relating to a conspiracy to determine the scope of the conspiracy); section 2D1.1, *Application Note 12* (allowing the use of drug quantities and types not specified in the indictment to calculate the base offense level); section 3B1.1, *Introductory Comments* (noting that the defendant's role in the offense is to be determined by considering all relevant conduct, and not just the conduct forming the basis of the conviction). Therefore, the district court did not plainly err in considering evading arrest as part of "the instant offense."

Regarding the similarity between evading and the prior offense, the unobjected to PSR describes Schneider's behavior which resulted in the evading arrest conviction to include supplying a false name to Harris County Constable deputies, fleeing from them, and avoiding apprehension for eight months. In the case *sub judice*, the unobjected to PSR described Schneider's conduct to include moving out of his apartment after finding the search warrant receipt left by an ATF agent, telling two potential witnesses to avoid ATF agents, and remaining "on the run" for several months. By failing to object to the PSR, Schneider cannot now complain about the factual basis for the district court's decision since it was not given the opportunity to make factual findings that could be reviewed by this Court.

It was not plain error for the district court to conclude that the prior evading arrest charge was similar to Schneider's current conduct.

Nor was it unreasonable under *Strickland* for Sims to fail to object to the inclusion of the offense. As noted above, *Harris* and the general thrust of the guidelines support considering the evading arrest conduct as part of "the instant offense." Concerning the similarity of the conduct, this Court has taken a common-sense approach in determining whether offenses are similar. *United States v. Hardeman*, 933 F.2d 278 (5th Cir. 1991). Such an approach, "relies on all possible factors of similarity, including a comparison of punishments . . ., the perceived seriousness of the offense . . ., the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct." *Id.* at 281. Although this approach was held to be applicable where the issue was whether the prior conviction was similar to a listed offense, it would have been reasonable for Sims to conclude that this same approach applied to determining whether the listed offense was similar to the instant conduct. Therefore, it was not unreasonable for Sims to believe that under this common-sense approach the two acts were similar and that an objection would be meritless. Sims reluctance to make such an objection also seems reasonable in light of his trial strategy to end the sentencing hearing as soon as possible.[9]

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[9] Moreover, further emphasis on the evading arrest conduct here might well have led to denial of the acceptance of

*B. Offense Level Calculation*

Schneider claims that he should not have received the fourteen point enhancement for "recklessly endangered the safety of another" pursuant to U.S.S.G. § 2K1.4(b)(2) because he detonated the bomb at night so as to reduce the danger of an innocent bystander being maimed or killed, and he didn't intend to actually hurt anyone. He argues that he should have instead received only a four-point enhancement for "endangered the safety of another person" pursuant to U.S.S.G. § 2K1.4(b)(5). However, he failed to raise these arguments below so his point of error is subject to the plain error doctrine. As noted in *United States v. Lopez*, 923 F.2d 47 (5th Cir. 1991), "Questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." *Id.* at 50. Schneider had ample opportunity to raise this factual argument with the district court, but failed to do so and his objection is therefore waived. *Smallwood*, 920 F.2d at 1238.

Besides being no plain error by the district court in applying the enhancement, Schneider's counsel was not ineffective by failing to object to the enhancement. The fourteen-point enhancement did not require that Schneider have the specific intent to hurt anyone; he needed only to have been reckless or indifferent to the consequences of his behavior. *See, United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983) (*en banc*) (holding that "jury instructions should not equate recklessness with intent to injure"); *Black's Law*

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responsibility two-point offense level reduction.

*Dictionary* 1142 (5th ed. 1979). Schneider's intentional act of causing the explosion coupled with his callous disregard for the possibility of harm to bystanders sufficed to invoke U.S.S.G. § 2K1.4(b)(2).

Furthermore, the factual basis for the enhancement was reasonable considering that the shrapnel traveled a distance of forty feet and could have easily injured or killed an innocent bystander. Schneider admitted that if people were walking by when the bomb exploded, they could have been hurt or killed. Sims testified that he was certainly "aware of the dangerous potentiality of that type of situation." Considering these facts and Sims' trial strategy, his failure to object, if deficient at all, does not seem so deficient under *Strickland* as to deny Schneider counsel as guaranteed under the Sixth Amendment.

Schneider also complains that he should not have received a two-point enhancement for his status as supervisor of the offense. He claims that since no evidence supports the existence of a criminal enterprise, he cannot be characterized as the supervisor of the offense. This point cannot be reviewed by this Court because he has failed to raise this asserted factual error below. Also, his attorney's failure to object did not rise to ineffective assistance of counsel because the guideline does not apply merely to a criminal enterprise, but rather to any criminal activity. U.S.S.G. § 3B1.1(c) (allowing the enhancement where "the defendant was an organizer, leader, manager, or supervisor in any criminal activity"). This criminal activity can consist of the supervisor and one other participant. *United States v. Vasquez*, 874 F.2d 250,

252 (5th Cir. 1989).

Nor was it error to consider Schneider to be the supervisor of the offense. As pointed out in *United States v. Hinojosa*, 958 F.2d 624, 633 (5th Cir. 1992), the application notes to the section provide that:

> "Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1(c), *Application Note 3*.

Applying these factors, we note that Schneider conceived and planned the offense. He manufactured the bomb and paid Hutchison one-quarter pound of marihuana in return for placing and detonating the bomb. Finally, Schneider directed Hutchison on where and how to place the bomb. All of these facts reasonably indicate that Schneider was the supervisor of the criminal activity. Trial counsel's timely objection, if made, would not have changed the outcome. Given counsel's trial strategy, it was not unreasonable for counsel to fail to make an objection.

Schneider finally objects to the two-point enhancement for obstruction of justice which he claims is based on threats to Reeves and others. He argues that, because the record is devoid of any evidence that his letter to Reeves was threatening, and the court found that the additional threats were too late to be considered, the enhancement was improper. Again, he did not object below; the error is waived. Nor can we say that his counsel was ineffective for failing to object. The enhancement was not based

on the letter but rather on Schneider's deliberate evasion of law enforcement agents he knew were looking for him, and the fact that he told two of his associates to hide as well. Although he now disputes these facts, he testified at his section 2255 hearing that he did not inform his attorney, after reviewing the PSR, that the PSR was inaccurate on this matter. Since his counsel had no notice that the PSR might be inaccurate, and in light of Schneider's pattern of obstructionist behavior, it was not unreasonable for Sims to fail to object.

II. Mandamus Appeal

Schneider appeals the district court's denial of his *pro se* mandamus petition seeking to compel certification of his witness fees for appearing at his own section 2255 hearing. This hearing was held on December 19, 1991, when he was in the custody of the Texas Department of Corrections. The district court's denial of the mandamus petition is reviewed under an abuse of discretion standard. *In re Hester*, 899 F.2d 361, 367 (5th Cir. 1990). We find no abuse of discretion.

Schneider argues that he has a right to witness fees under 28 U.S.C. § 1821.[10] He also relies on *Demarest v. Manspeaker*, 111 S.Ct. 599 (1991), where the Supreme Court held that a convicted state prisoner who testified at another person's criminal trial was entitled to witness fees under section 1821 because "the general language 'witness in attendance at any court of the United States'

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[10] This statute provides in pertinent part that "[e]xcept as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section." 28 U.S.C. § 1821(a)(1).

found in subsection (a)(1) includes prisoners unless they are otherwise excepted in the statute." *Id.* at 602.

We have held that to grant mandamus relief, the court must find (1) that the plaintiff has a clear right to the relief sought, (2) that the defendant has a clear duty to do the action in question, and (3) that no other adequate remedy is available. *Green v. Heckler*, 742 F.2d 237, 241 (5th Cir. 1984). The remedy of mandamus is inappropriate in the case *sub judice* because Schneider has no clear right to the relief sought under the statute.

As the United States points out, prisoners seeking witness fees have been subsequently excepted from the statute. Congress has expressly excluded incarcerated persons from entitlement under section 1821:

> "Notwithstanding 28 U.S.C. 1821, no funds appropriated to the Department of Justice *in fiscal year 1992 or any prior fiscal year*, or any other funds available from the Treasury of the United States, shall be obligated or expended to pay a fact witness fee to a person who is incarcerated testifying as a fact witness in a court of the United States . . . ." 105 Stat. 782, 795 (1991) (emphasis added); *see also* 105 Stat. 130, 136 (identical language applicable to 1991 and all prior fiscal years).

This appropriations act was enacted on October 28, 1991 and covered the year ending September 30, 1992. 105 Stat. at 782, 833. Since Schneider was incarcerated during his hearing on December 19, 1991, he cannot receive witness fees from funds appropriated "in fiscal year 1992 or any prior fiscal year."[11] Schneider has failed to show

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[11] Even if Congress had not excepted incarcerated persons from the statute, Schneider likely would not have been eligible for witness fees because he was a witness at his *own* hearing. As the movant, he likely could not receive any witness fees even though he testified at the hearing. *Cf., Todd Shipyards Corp. v. Turbine Serv., Inc.*, 592 F.Supp. 380, 400 n. 24 (E.D. La. 1984),

that he has a right to witness fees, therefore we find no abuse of discretion and affirm the denial of his petition by the district court below.

**Conclusion**

Schneider has failed to demonstrate reversible error in his conviction or in the district court's sentence. Nor has he shown that the district court erred in rejecting, following a full evidentiary hearing, Schneider's claims of ineffective assistance of counsel. Furthermore, Schneider has failed to show any right to witness fees.

In Cause No. 92-2023, Schneider's conviction and sentence are AFFIRMED.

In Cause No. 92-2386, the district court's denial of Schneider's mandamus petition is AFFIRMED.

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*aff'd in part and rev'd in part*, 763 F.2d 745 (5th Cir. 1985) (noting that in civil litigation a person is not entitled to witness fees if he is identified as a party in interest).