IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40978
Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Phelmar Ray Toliver,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:94-CV-74 (1:93-CR-291))

March 17, 1995

Before JOHNSON, WIENER, and STEWART, Circuit Judges.[*]

JOHNSON, Circuit Judge:

Phelmar Toliver appeals the denial of his 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. Finding no reversible error, we AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

On April 19, 1993, Phelmar Toliver pled guilty to possession with intent to distribute cocaine in violation of 21 U.S.C. § 841. On July 9, 1993, the district court sentenced him to 120 months in prison and five years of supervised release. Toliver

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

did not appeal his conviction or sentence.

Thereafter, Toliver filed the instant section 2255 motion complaining that he did not receive effective assistance of counsel at sentencing because his attorney did not collaterally attack a prior state conviction used to compute his criminal history category under the Sentencing Guidelines. The district court denied his motion and Toliver timely appealed.

II. DISCUSSION

A. Signature on the Indictment

Toliver complains, for the first time in this appeal, that the indictment was defective because it was signed by an assistant U.S. Attorney instead of the U.S. Attorney. Issues raised for the first time on appeal are not reviewable unless they involve purely legal questions and failure to consider them would result in manifest injustice. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). Moreover, when a challenge to the sufficiency of an indictment is presented for the first time on a collateral review, this Court can consider the challenge "only in exceptional circumstances." *United States v. Armstrong*, 951 F.2d 626, 628 (5th Cir. 1992).

Toliver's claim is frivolous because there are no exceptional circumstances here and no manifest miscarriage of justice. Even if it the indictment was defective for lack of the proper signature, it was still sufficient to charge an offense.[1]

[1] In cases where the attack on the indictment is new as well as collateral, the indictment is entitled to liberal review and will be held sufficient if by any reasonable construction it

Moreover, Toliver pled guilty. This served to waive all nonjurisdictional issues. *United States v. Easton*, 937 F.2d 160, 161-62 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 906 (1992) (concluding that the Rule 7(c)(1) requirement of an indictment signated by "the attorney for the government" is nonjurisdictional). For these reasons, Toliver's claim as to the sufficiency of the indictment fails.

B. Ineffective Assistance of Counsel

The main contention that Toliver makes is that his attorney was ineffective at sentencing because she did not collaterally attack a prior conviction[2] used to calculate his criminal history category under the Sentencing Guidelines.[3] To succeed with an ineffective assistance of counsel claim, Toliver would have to show that 1) his counsel's performance was deficient, and 2) that the deficient performance prejudiced his rights. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). In this case, Toliver cannot show that his counsel's performance was deficient because he was not entitled to make such a collateral

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is understood to charge an offense. *Armstrong*, 951 F.2d at 628.

[2] In this prior state conviction, Toliver pled guilty to possession of a controlled substance. The Texas state court sentenced him to two years in the Texas Department of Corrections. He served his time and was discharged from the sentence in March of 1989, prior to the relevant events in this action. Toliver now claims that his plea of guilty to that charge was fundamentally defective because the essential elements of the offense were not explained to him and if he had known of the fundamental elements he would not have pled guilty.

[3] Without this prior conviction, Toliver's criminal history category would have been III instead of IV and thus his sentencing range would have been lower.

attack on the prior state conviction.

In *Custis v. United States*, ___ S.Ct. ___, ___, 114 S.Ct. 1732, 1738-39 (1994), the Supreme Court determined that a defendant has no constitutional right to collaterally attack a prior state conviction in his federal sentencing proceedings. That *Custis* dealt with an enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and not under the Sentencing Guidelines, is not material. It's broader constitutional ruling in *Custis* is equally applicable to sentencing enhancements under the Guidelines as well. *United States v. Burrows*, 36 F.3d 875, 885 (9th Cir. 1994); *United States v. Killion*, 30 F.3d 844, 846 (7th Cir. 1994), *cert. denied*, No. 94-7327, 1995 WL 21774 (U.S. Jan. 23, 1995); *United States v. Jones*, 27 F.3d 50, 52 (2nd Cir.), *cert. denied*, 115 S.Ct. 377 (1994).

Moreover, it is now clear that the Sentencing Guidelines do not independently authorize a collateral attack to a predicate state conviction in federal sentencing proceedings. *United States v. Garcia*, 42 F.3d 573, 580 (10th Cir. 1994). In clarifying its position in this regard, the Sentencing Commission has amended the language of Section 4A1.2, and in particular Application Note 6, several times. From 1990-92, Application Note 6 provided that "[s]entences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted." Moreover, a background note, also added in 1990, stated that the "Commission leaves for court determination the issue of whether a defendant may collaterally

attack at sentencing a prior conviction." U.S.S.G. § 4A1.2, comment (backg'd) (Nov. 1990). This language divided the courts as to whether the Guidelines authorized review of prior convictions. *United States v. Isaacs*, 14 F.3d 106, 109 (1st Cir. 1994).[4]

In a 1993 amendment, the Sentencing Commission clarified its position to remove any lingering uncertainty as to its position and address the intercircuit conflict.[5] *United States v. Fondren*, No. 93-50470, 1994 WL 704757 (9th Cir. Dec. 19, 1994). Application note 6 now provides that

> [s]entences resulting from convictions that . . . have been ruled constitutionally invalid in a prior case are

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[4] Several courts, including this Court, interpreted this language as authorizing discretion in the district courts to consider collateral attacks to prior convictions at sentencing. *See United States v. Canales*, 960 F.2d 1311, 1315 (5th Cir. 1992); *United States v. Brown*, 991 F.2d 1162, 1166 (3rd Cir. 1993); *United States v. Jakobetz*, 955 F.2d 786, 805 (2nd Cir.), *cert. denied*, 113 S.Ct. 104 (1992). Other courts, though, found no independent authority under these provisions in the Guidelines for collateral review of predicate convictions at sentencing. *See United States v. Byrd*, 995 F.2d 536, 540 (4th Cir.), *cert. denied*, 114 S.Ct. 2140 (1993); *United States v. Roman*, 989 F.2d 1117, 1120 (11th Cir. 1993) (en banc) (per curiam); *United States v. Hewitt*, 942 F.2d 1270, 1276 (8th Cir. 1991).

[5] The Commission explained the 1993 Amendments as follows:

> This amendment also clarifies the Commission's intent with respect to whether § 4A1.2 confers on defendant a right to attack prior convictions collaterally at sentencing, an issue on which appellate courts have differed. This amendment addresses the intercircuit conflict in interpreting the commentary by stating more clearly that the Commission does not intend to enlarge a defendant's right to attack collaterally a prior conviction at the current sentencing proceeding beyond any right otherwise recognized in law.

U.S.S.G. App. C, amend. 493 (Nov. 1993) (citations omitted).

> not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

U.S.S.G. § 4A1.2, comment. (n. 6) (Nov. 1993). The Commission has thus rejected the more expansive assessments of the authority granted by the Guidelines to consider collateral attacks on prior convictions. *Garcia*, 42 F.3d at 573. Accordingly, those decisions interpreting the Guidelines to grant discretion in the district courts to consider collateral attacks on prior convictions, including our decision in *Canales*, have been superseded by the Commission's latest clarification. *Id.*

In light of the Commission's latest clarification of section 4A1.2, it is apparent now that, under the Guidelines, a court may consider a collateral attack on prior convictions at sentencing only if the right to make such a challenge is otherwise recognized in law. Toliver has not pointed us to any other authority entitling him to make such an attack nor have we found any. Hence, Toliver had no right to mount a collateral attack on his prior conviction at his sentencing hearing and thus, his counsel was not ineffective for filing to do so. Accordingly, Toliver's claim of ineffective assistance of counsel fails.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.