

IN THE UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 94-41037  
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEONARD EARL SIGLER,

Defendant-Appellant.

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Appeal from United States District Court  
for the Eastern District of Texas  
(1:94-CV-206 (1:90-CR-17-1))

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March 21, 1995

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

Proceeding pro se, appellant Leonard Earl Sigler appeals the district court's denial of his motion to vacate his sentence filed pursuant to 28 U.S.C. § 2255. We affirm.

FACTS

Pursuant to a written plea agreement, Sigler pleaded guilty to an information which charged him with three counts of using a telephone to facilitate the distribution of cocaine. In

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

exchange, the Government agreed to dismiss the three counts contained in a related indictment that charged Sigler with (1) conspiring to possess and distribute cocaine base, (2) possession with intent to distribute and distribution of cocaine base, and (3) the use of a communication facility to facilitate the unlawful distribution of cocaine. In calculating Sigler's guideline range, the probation officer grouped the counts together in order to compute the applicable offense level because the three counts involved the same harm and societal interest. Based on an offense level of 13 and a criminal history category of I, Sigler's guidelines range was 12-18 months. The district court found that the sentencing range failed to consider the total offense behavior and the quantity of cocaine involved in the case. For this reason, the district court departed upward from the guidelines range and sentenced Sigler to 32 months imprisonment on each telephone count to be served consecutively, and to one year supervised release on each count to be served concurrently, for a total of 96 months imprisonment. Sigler did not appeal his conviction or sentence.

Sigler filed this § 2255 motion attacking his sentence and alleging ineffective assistance of counsel. Sigler argued that the sentencing court violated the Guidelines' grouping provisions when the court imposed consecutive sentences on the three convictions. Sigler also contended that his retained counsel rendered ineffective assistance. Sigler challenged his counsel's failure to object to the court's misapplication; his failure to cite from the PSR that the counts were to be grouped; his statement to the court regarding the court's sentencing intentions; and his

counsel's failure to object to the "duplicity of the charges."

The magistrate judge issued a report and recommendation in which the judge recommended that Sigler's motion be denied. The magistrate judge concluded that the misapplication of the guidelines claim was not cognizable under § 2255; that the ineffective assistance claim was without merit because the errors alleged by Sigler were without merit; and that there was no multiplicity as each instance of telephone use constituted a separate offense.<sup>1</sup> Sigler objected to the magistrate judge's report and recommendation. The district court overruled his objections and adopted the magistrate judge's findings of fact and conclusions of law. Sigler appeals.

#### DISCUSSION

##### *Application of Sentencing Guidelines*

Sigler contends in his first two issues that the district court failed to sentence him in accordance with U.S.S.G. § 3D1.2(b) (groups of closely-related counts). Sigler does not challenge the upward departure to 32 months, but rather he asserts as error the imposition of *consecutive* sentences. He essentially interprets § 3D1.2(b) to require the court to treat the three counts to which he pleaded guilty as one offense for sentencing purposes. Under Sigler's reasoning, the sentence imposed on each count should run concurrently rather than consecutively, or if ordered to run consecutively, the entire sentence may not exceed the 4 year

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<sup>1</sup> The magistrate judge interpreted Sigler's claim of duplicity as one of multiplicity given his arguments in support of his claim.

statutory maximum established for a single offense.

Relief under § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Sigler's challenge to the district court's technical application of the Guidelines is not cognizable in a § 2255 proceeding because it could have been raised on direct appeal and does not involve a constitutional issue.<sup>2</sup> Id.

Although these claims are not cognizable under § 2255, we nevertheless turn to address the substance of these allegations as part of the discussion on Sigler's claim of ineffective assistance.

#### *Ineffective Assistance of Counsel*

To prevail on a claim of ineffective assistance of counsel, Sigler must show (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced

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<sup>2</sup> Sigler suggests that under Davis v. United States, 417 U.S. 333 (1974), every asserted error of law can be raised on a § 2255 motion. The Davis Court stated that the mere fact that the error is an error of law rather than an error arising under the Constitution will not preclude collateral review. Id. at 345. The Court also added that "[t]his is not to say, however, that every asserted error of law can be raised on a § 2255 motion." Id. at 346. Because a challenge to a sentencing judge's technical application of the sentencing guidelines or its upward departure may be raised on appeal and does not implicate any constitutional issues, it may not be raised in a § 2255 proceeding. Vaughn, 955 F.2d at 368; United States v. Faubion, 19 F.3d 226, 233 (5th Cir. 1994).

his defense. Strickland v. Washington, 466 U.S. 668, 687-94 (1984). In evaluating such claims, the court indulges in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence." Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988). A failure to establish either deficient performance or prejudice defeats the claim. Strickland, 466 U.S. at 697.

Sigler complains that his counsel failed to object to the court's misapplication of U.S.S.G. § 3D1.2(b) and that a comment made by his counsel during sentencing in fact encouraged the court's error. His claim fails because, for the following reasons, he cannot show that his counsel's performance was deficient.<sup>3</sup>

Failure to Object to § 3D1.2(b)

Section 3D1.2(b) provides that, *for the purpose of determining the offense level*, the court shall group together into a single group all counts involving substantially the same harm.<sup>4</sup>

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<sup>3</sup> The cases cited by Sigler in support of his argument are inapposite. None of the cases is a § 2255 appeal and, with the exception of United States v. Campbell, 878 F.2d 164 (5th Cir. 1989), none of the cases addresses an upward departure by the sentencing court. In Campbell, inquiry was the adequacy of the reason given by the sentencing court for its upward departure. Campbell, 878 F.2d at 165. This court vacated the sentence and remanded to the district court for resentencing largely because the district court had "departed based on a factor already considered in determining Campbell's offense level." Id. at 166. By contrast, Sigler challenges the district court's application of the guidelines but does not challenge the grounds for its departure from the 12 to 18 month range.

<sup>4</sup> The sentencing guidelines in effect as of November 1, 1989, are used because Sigler was sentenced in February 1990.

There is no question that the three telephone counts could be grouped and that the probation officer properly grouped the counts in order to calculate the applicable guidelines range. This does not mean, as Sigler seems to contend, that the court must thereafter treat the three counts as a single offense in sentencing.

As Sigler recognizes, the court may impose a sentence outside the defendant's guideline range, but within the statutory maximum for the offense, if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." U.S.S.G. § 5K2.0; United States v. Lara, 975 F.2d 1120, 1123 (5th Cir. 1992). The district court found that an upward departure was warranted because the three telephone counts failed to reflect fully the 1.88 pounds of crack cocaine and 1.02 pounds of cocaine powder that Sigler possessed when he was arrested.

Despite Sigler's contention, the sentence did not exceed the four year statutory maximum penalty. Each separate use of a communication facility, such as a telephone, is a separate offense. 21 U.S.C. § 843(b) & (c). The district court properly imposed a separate sentence for each of the counts to which Sigler pleaded guilty. Consequently, rather than the 48 month maximum sentence that Sigler argues is the total that could have been imposed, the district court could have departed upward to the statutory maximum of 48 months on each of the three counts, for a total of 144

months.<sup>5</sup> Sigler's sentences of 32 months yielded a 96 month total term of imprisonment, and fell below the statutory maximum for each of the instant convictions.

Under U.S.S.G. § 5G1.2(d) (Sentencing on Multiple Counts of Conviction), when the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, the sentence imposed on one or more of the other counts shall run consecutively to the extent necessary to produce a combined sentence equal to the total punishment. In the instant case, the district court divided the total 96 month punishment equally among the three counts and ran each sentence consecutively. The 48 month statutory maximum on any one count is less than the total 96 month punishment, thus the district court properly imposed consecutive sentences pursuant to § 5G1.2(d).

#### Defense Counsel's Comment During Sentencing

After being fully advised of the court's intention to depart upward, Sigler's counsel made the following comment:

And if we look at the actual guidelines, which are twelve to eighteen months, and stack them one on the other, which I assume that the Court is inclined to do, then that is going to be somewhere between three to four and a half years, only you are going to depart up.

R. 5, 14. Defense counsel's statement at sentencing did not prejudice Sigler. Prior to the disputed statement, the sentencing

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<sup>5</sup> The plea agreement stated that Sigler faced a maximum of 12 years imprisonment as a result of his plea. The court also admonished Sigler during his arraignment that his maximum period of imprisonment was 12 years.

court repeatedly told Sigler and his attorney that it intended to depart upward. Absent the instant plea agreement, Sigler would have faced a sentencing range of between 210-262 months if he had been convicted under the related indictment. The sentence imposed by the court (96 months), nearly twice that suggested by Sigler's attorney (36-54 months), largely adhered to the confidential 120 month sentence which had been recommended by the probation officer.

As noted above, without the plea agreement, Sigler's exposure if convicted as charged would have been 210-262 months -- substantially more than *either* the 12-18 month range under the plea agreement or the actual 96 month sentence imposed. Sigler has failed to show either ineffectiveness or prejudice on the part of his counsel.

#### Sigler's Remaining Arguments

Because the above "errors" cited by Sigler could have been raised on appeal, Sigler suggests that his counsel was ineffective for advising him that there were no nonfrivolous grounds for appeal. As discussed above, there were no guideline application "errors" from which to appeal.

Finally, Sigler implies that defense counsel served his own personal interests, to Sigler's prejudice, by encouraging Sigler to plead guilty. Although we note that this assertion is unsubstantiated, we do not address this concern because Sigler expresses it for the first time on appeal.



#### CONCLUSION

Because there was no error regarding which Sigler's counsel should have objected or appealed, we find neither a deficiency in his counsel's performance nor a showing of prejudice to Sigler. Accordingly, Sigler's claim of ineffective assistance of counsel fails. Sigler's claim of misapplication of the guidelines is not cognizable in this § 2255 appeal. For these reasons, the district court's denial of Sigler's motion to vacate his sentence is AFFIRMED.