

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE HERRON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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MEMORANDUM AND ORDER  
06-C-304-S  
04-CR-049-S-01

Petitioner Willie Herron moves to vacate his sentence pursuant to 28 U.S.C. §2255. Respondent filed its response on July 11, 2006. Petitioner was granted an extension until August 30, 2006 to file his reply which has not been filed to date.

FACTS

On March 17, 2004 a grand jury in the Western District of Wisconsin returned a one-count indictment charging Willie Herron with distributing more than five grams of cocaine base in violation of 21 U.S.C. §841(a)(1). Petitioner entered a guilty plea to the single-count indictment on June 10, 2004. At the plea hearing the United States proffered that the lab test identified the cocaine base as a hard, chunky, off-white substance. Petitioner did not object.

At the hearing the Court asked petitioner if he was fully satisfied with the counsel, representation and advice given to him

by his attorney. He replied that he was. Petitioner also testified that he had fully discussed the charge and the case in general with his attorney.

A presentence report was prepared recommending that petitioner's relevant conduct drug quantity involved 117.62 grams of cocaine base. On August 25, 2004 the Court sentenced petitioner to 188 months under the Sentencing Guidelines or in the alternative a discretionary sentence of 188 months using the Guidelines as advisory.

Petitioner appealed his sentence. He did not dispute that the substance involved was crack cocaine but argued that the punishment for crack cocaine was too severe relative to the punishment for powder cocaine. The United States Court of Appeals affirmed Herron's judgment of conviction. See United States v. Herron, 139 Fed. Appx. 750 (7<sup>th</sup> Cir. 2005).

On June 2, 2006 petitioner filed his motion to vacate his sentence pursuant to 28 U.S. C. § 2255.

#### MEMORANDUM

Petitioner claims that his counsel was ineffective because he failed to challenge the finding that the substance involved was crack cocaine. Three types of issues cannot be raised in a 28 U.S.C. § 2255 motion: issues that were raised on direct appeal absent a showing of changed circumstances; non-constitutional

issues that could have been raised but were not raised on direct appeal and constitutional issues that were not raised on direct appeal unless defendant demonstrates cause for procedural default as well as actual prejudice from the failure to appeal. Prewitt v. United States, 83 F.3d 813, 816 (7<sup>th</sup> Cir. 1996). Issues raised and decided on direct appeal may not be raised again in a 28 U.S.C. § 2255 motion pursuant to the "law of the case". See Daniels v. United States, 26 F.3d 706, 711-12 (7<sup>th</sup> Cir. 1994).

The Court addresses the merits of petitioner's claim that his trial counsel was ineffective because he failed to object that the substance was not established to be crack cocaine.

To demonstrate ineffective assistance of counsel, petitioner must show that his counsel's representation fell below an objective standard of reasonableness and the deficient performance so prejudiced his defense that it deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 688-94 (1984). In the context of a guilty plea defendant must show that but for the deficient advice of counsel he would have insisted on proceeding to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Where a petitioner is challenging his sentence he must show that but for counsel's action or inaction he would have received a shorter sentence. Glover v. United States, 531 U.S. 198 (2001).

At the plea hearing the government indicated that a lab test showed that the substance was a hard, chunky, off-white substance

which is consistent with the description of crack cocaine in the Guidelines. Any challenge by petitioner's counsel of this finding would have been frivolous and would have likely jeopardized petitioner's qualification for an acceptance of responsibility reduction in the Guidelines. Further, petitioner testified under oath that he was satisfied with the representation by his counsel. The performance of petitioner's counsel was not deficient.

In addition petitioner has not shown that absent his counsel's decision he would have received a lesser sentence. Accordingly, petitioner was not denied effective assistance of counsel and his motion to vacate his sentence under 28 U.S.C. § 2255 will be denied.

Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his motion under 28 U.S.C. § 2255 must be denied. See Newlin v. Helman, 123 F.3d 429, 433 (7<sup>th</sup> Cir. 1997).

ORDER

IT IS ORDERED that petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 is DENIED.

Entered this 6<sup>th</sup> day of September, 2006.

BY THE COURT:

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JOHN C. SHABAZ  
District Judge