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

Richmond Division

DAVID F. MOSTELLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Crim. No. 88-0081-R
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

This matter is before the Court on respondent's motion to dismiss petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2255. For the reasons outlined below, this motion is GRANTED.

FACTS

Petitioner, David F. Mosteller, was originally convicted of two counts of Interstate Transportation in Aid of Racketeering, in connection with an attempt to purchase four kilograms of cocaine. This Court sentenced petitioner to one year and one day on the first of two counts, and to a concurrent five year term on the second count. All but six months of this second sentence were suspended.

On October 17, 1988, this Court held a probation revocation hearing. At the hearing, counsel and petitioner essentially conceded five of the seven violations alleged. This Court made a

factual finding that petitioner had violated several terms of his probation, and reinstated the original five year sentence, giving petitioner credit for time served. To allow petitioner to resolve business matters, execution of the sentence was suspended for thirty days, and petitioner was allowed to surrender voluntarily.

Instead of surrendering, petitioner fled to Pennsylvania. There, he assumed the identity of Charles David Alexander. He was in possession of a social security card, American Express card, birth certificate, operator's license, and title to a truck, all in the name of Charles David Alexander. He initially lied to the arresting officers and claimed he was Charles David Alexander.

Petitioner was returned to Richmond, where he plead guilty to the failure to surrender charge. The Court found that petitioner had "willfully impeded or obstructed or attempted to impede or obstruct the administration of justice," and therefore increased the defendant's offense level by two. Pursuant to the Sentencing Guidelines, the Court imposed the maximum term of imprisonment, 27 months, and the minimum fine, \$3,000.00. The Court declined to find that petitioner was unable to pay any fine, in light of petitioner's earning capacity upon release. The Court delayed collection of the fine until petitioner is released from custody.

Petitioner filed a direct appeal with the Fourth Circuit Court of Appeals. That Court considered three issues, and ruled against petitioner on each. First, the Court of Appeals found that revocation of probation was proper. Second, the Court held that the Guidelines mandated the two level upward adjustment, in light

of petitioner's obstruction of justice. Finally, the Court upheld this Court's denial of defendant's motion for a presentence psychiatric report.

#### DISCUSSION

It is academic that petitioner cannot re-litigate issues already addressed by the Fourth Circuit. As the Fourth Circuit noted in Boeckenhaupt v. United States, 537 F.2d 1182, 1183 (4th Cir.), cert. denied 429 U.S. 863 (1976), petitioner "will not be allowed to recast, under the guise of collateral attack" matters addressed on direct appeal. Thus petitioner's claims regarding the correctness of the revocation or the absence of psychiatric review must be rejected.

Further, a petition for a writ of habeas corpus pursuant to 18 U.S.C. Section 2255 must allege error which constitutes a "fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). Thus § 2255 is properly limited to claims which are constitutional in nature, or create serious doubts about the regularity of the initial hearing.

Petitioner's admission of guilt, coupled with the Fourth Circuit's affirmation that probation revocation was proper, vitiates any "fundamental" nature of the claims in petitioner's petition.

Petitioner's claims concerning concurrent versus consecutive sentencing, the propriety of a fine, and abuse of discretion all fail to rise to a constitutional or fundamental level. They are thus inappropriate in a § 2255 petition and should be DISMISSED.

Alternately, review on the merits reveals that petitioner's claims should be DISMISSED.

#### 1. CONCURRENT SENTENCING

Petitioner's argument apparently stems from a misunderstanding of § 5G1.3 of the Sentencing Guidelines. That provision requires a consecutive sentence for crimes committed while imprisoned. Since petitioner was not imprisoned when he jumped bail, this section does not apply.

It is uniformly recognized that concurrent sentencing is at the discretion of the Court. Indeed, in Guideline cases, concurrent sentencing is a departure from the guidelines, which requires separate justification. No such departure was justified here.

Petitioner contends that the two criminal history points added under Guideline Section 4A1.1(d) were incorrectly added, citing United States v. Bell, 716 F.Supp. 1207 (D. Minn. 1989). This Court finds Bell unpersuasive, and prefers to rely upon the explicit wording of Section 4A1.1(d). Many other courts have taken this approach. See United States v. Carroll, 893 F.2d 1502 (6th Cir. 1990); United States v. Wright, 891 F.2d 209 (9th Cir.1989); United States v. Goldbaum, 879 F.2d 811 (10th Cir. 1989); and

United States v. Brown, 729 F.Supp. 1120 (E.D. Va. 1989). Moreover, even Bell acknowledges that this is not an issue of constitutional dimension. Bell, 716 F.Supp. at 1211. It is therefore not an appropriate issue for habeas review.

## 2. PROPORTIONALITY

Petitioner relies upon United States v. Lee, 887 F.2d 888 (8th Cir. 1989), which requires that a sentence for a failure to appear be proportional to the actual sentence received for the underlying offense, as opposed to the maximum possible sentence.

Lee involved substantially different facts, since the maximum sentence was 15 years, yet only an 18 month sentence was imposed. Here, petitioner received the maximum sentence of five years. Under Guideline Section 2J1.6(b)(2), a five year maximum penalty requires that the offense level be increased by six. This was done in this case. Indeed, Lee explicitly states that its reasoning does not apply to cases where the actual sentence was at or near the maximum allowed. Lee, 887 F.2d at 892 n.6. Petitioner's claim is without merit.

## 3. PSYCHIATRIC STUDY

This argument has been fully considered and rejected by the Fourth Circuit. United States v. Mosteller, No. 88-5174, at 8 (February 20, 1990). This disposes of the issue, and it will not be reconsidered here. A psychiatric evaluation was unnecessary and it was within this Court's discretion to deny defendant's motion.

4. IMPOSITION OF FINE, SUPERVISED PROBATION, AND SPECIAL  
CONDITIONS

Petitioner's arguments essentially amount to a disagreement with this Court about the sentence imposed. Petitioner admits that the fine imposed was the minimum allowed by the Guidelines. Imposition of the fine has been delayed until petitioner is released from custody. Petitioner has demonstrated his ability to earn money. Thus a fine at the low end of the range was entirely appropriate. Moreover, it was entirely within the discretion of the Court.

Given petitioner's history of refusing to comply with probation office requests for financial information, and petitioner's criminal record of larceny, supervised release with limitations on credit lines was also appropriate. Moreover, such restrictions are left to the discretion of the Court, and may not be challenged by a habeas petition. Petitioner's arguments simply show his unwillingness to accept supervised release on the terms required by this Court and the Probation Office. The petition states no claim for relief.

5. ADMISSION OF ILLEGALLY SEIZED EVIDENCE

Petitioner apparently contends that evidence impermissibly seized was admitted at the sentencing hearing. Petitioner plead guilty and does not contest his guilt. At the sentencing hearing, petitioner admitted that he had false identification documents in

his possession. Transcript of March 9, 1989 sentencing hearing, page 18. The petitioner never explicitly states what inadmissible documents were entered into evidence. This Court did not formally receive any exhibits at the sentencing. Instead, the Court heard allocution and the defendant's statement. The petitioner admitted obstructive conduct, including use of an assumed name, which justified the two level enhancement.

Even assuming that the Presentence Report contained evidence obtained in violation of the Fourth Amendment, Petitioner is not entitled to exclusion or habeas relief. First, petitioner has no standing to assert the privacy rights of the dwelling's owner. See United States v. Payner, 447 U.S. 727 (1980). Moreover, the exclusionary rule is not applied at sentencing, if the evidence is reliable. See United States v. Lee, 540 F.2d 1205, 1207 (4th Cir.), cert. denied, 429 U.S. 894 (1976). Since the truth of the evidence was admitted, the evidence was properly received, even assuming it was improperly obtained. Finally, even excluding all evidence in the Presentence Report, petitioner still admits to lying to the arresting officers, and using an assumed name, actions which independently justify application of the two level enhancement.

#### 6. PROSECUTORIAL MISCONDUCT

Petitioner strings together a series of complaints, from the prosecutor's request for a two level enhancement, to the presence of the press at the sentencing, to allege misbehavior on behalf of

the government. The prosecution did no more than present a complete picture to the Court. All of requested enhancements were required by the Guidelines. The government never represented that they would not ask for obstruction. Court proceedings are routinely covered by a reporter. Petitioner's claims are simply frivolous.

CONCLUSION

Petitioner fails to raise any claim which merits a hearing or further review under 28 U.S.C. Section 2255. Instead he presents a number of claims which amount to little more than his disagreements with the sentence imposed. Even assuming all of the facts petitioner alleges, the motion and the files and records of this case show conclusively that the petitioner is entitled to no relief. The petition for a writ of habeas corpus should therefore be DISMISSED WITH PREJUDICE.

Let the Clerk send a copy of this Memorandum Opinion to petitioner and counsel of record.

\_\_\_\_\_  
DATE

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UNITED STATES DISTRICT JUDGE