

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 98-224-01
v.	:	
	:	(CIVIL ACTION
RAFAEL SANCHEZ	:	NO. 00-4614)
	:	

**ORDER AND MEMORANDUM**

**ORDER**

**AND NOW**, this 21st day of March, 2002, upon consideration of defendant's pro se Motions to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 with Request for Leave to Proceed In Forma Pauperis (Document No. 74, filed September 12, 2000; Document No. 76, filed October 12, 2000); Government's Opposition to Defendant's Motion (Document No. 79, filed August 24, 2001), and the record before the Court, **IT IS ORDERED** as follows:

1. Defendant's Request for Leave to Proceed In Forma Pauperis pursuant to 28 U.S.C. § 1915 is **GRANTED**;
2. Defendant's pro se Motions to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Document Nos. 74 and 76) are **DENIED** for the reasons set forth in the following Memorandum; and,
3. The following requests of defendant, included in his Motions to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 are **DENIED** for the reasons set forth in the following Memorandum:
  - (a) Defendant's request for appointment of counsel;
  - (b) Defendant's request for an evidentiary hearing; and,

(c) Defendant's request for leave to file a Traverse.

**IT IS FURTHER ORDERED** that, because defendant has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not be issued.

### **MEMORANDUM**

#### **I. INTRODUCTION**

On April 30, 1998, a federal Grand Jury issued a three-count Indictment charging defendant, Rafael Sanchez, with (1) conspiracy to distribute one kilogram of heroin in violation of 21 U.S.C. § 846 and (2) possession with intent to distribute and aiding and abetting the possession with intent to distribute more than one hundred grams of heroin in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The third count of the Indictment provided for criminal forfeiture pursuant to 21 U.S.C. § 853.

On August 13, 1998, defendant pled guilty to the charges in the Indictment. Defendant was sentenced, inter alia, to a term of imprisonment of sixty-four months on July 6, 2000. Defendant did not appeal his sentence.

Thereafter, defendant submitted a pro se Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Document No. 74, filed September 12, 2000). Because the Motion was not submitted in the proper form, the Court directed defendant to resubmit the Motion in proper form, which he did on October 12, 2000 (Document No. 76, filed October 12, 2000). The Court subsequently ordered the government, on July 16, 2001,<sup>1</sup> to file a response to

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<sup>1</sup> The more than ten-month delay between defendant's filing and this Court's Order directing the government to respond to the Motion was the result of an unexplained docketing error in the Clerk's office. The Court did not receive defendant's Motion in Chambers until July 13, 2001.

defendant's Motion. The government filed its Opposition to defendant's Motion on August 24, 2001.

Defendant's Motion alleges that his counsel was unconstitutionally ineffective for failing to seek at sentencing a reduced offense level pursuant to U.S. Sentencing Guidelines § 3B1.2 (2001) for defendant's purported mitigating role in the offense.<sup>2</sup> Defendant includes in his Motion four additional requests, that the Court grant defendant in forma pauperis status (which request the Court grants), appoint counsel, permit defendant to file a Traverse to the government's Opposition, and hold an evidentiary hearing.

For the reasons stated below, defendant's pro se Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 is denied. The Court also denies defendant's requests for appointment of counsel, permission to file a Traverse to the government's Opposition, and scheduling of an evidentiary hearing.

## **II. FACTUAL BACKGROUND**

At defendant's change of plea hearing, in establishing a factual basis for the guilty plea, counsel for the government summarized the evidence that the government would have presented at trial. See Aug. 13, 1998, Change of Plea Hr'g Tr. at 31-33. Defendant acknowledged that the government's account of the evidence accurately described his actions, Hr'g Tr. at 34, and the factual history set forth in his Motion mirrors that of the government in most material respects. See Def.'s Mot. at 10-12. In deciding this Motion, the Court relies on only the agreed-upon facts, as follows:

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<sup>2</sup> Defendant refers to a "downward departure" under USSG § 3B1.2. The Court, however, will characterize the subject of defendant's Motion as a reduced offense level.

On March 3, 1998, a confidential female informant working with the U.S. Drug Enforcement Administration (“DEA”), met in the Bronx, New York with three men – defendant, and his two co-defendants, Mario DeJesus Mata and Jose Antonio Encarnacion – to negotiate the sale of an amount of heroin. On March 20, 1998, defendant and Encarnacion traveled from New York to Philadelphia to meet with the informant. Defendant and Encarnacion agreed to sell the informant one kilogram of heroin for the price of \$105,000. On March 31, 1998, the informant had a telephone conversation with defendant that was recorded. In that conversation, defendant told the informant that she could pay \$95,000 of the purchase price for the heroin on delivery and the balance of \$10,000 to defendant at a later date. Defendant also told the informant during this conversation that he was attempting to obtain a Pennsylvania license plate for the van that he intended to drive when delivering the heroin.<sup>3</sup>

The informant had another recorded telephone conversation with defendant on April 2, 1998. During that conversation, defendant told the informant that he was prepared to deliver the heroin the next day.<sup>4</sup> In one of the recorded conversations that took place on March 31, 1998, and April 2, 1998, defendant also told the informant that he would be driving to Pennsylvania in

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<sup>3</sup> Although counsel for the government did not describe this evidence during the change of plea hearing, both defendant and the government mention it in their § 2255 filings. See Def.’s Mot. at 11; Gov.’s Opp. at 2.

<sup>4</sup> In its Opposition, the government asserts that defendant and the informant engaged in a second recorded telephone conversation on April 2, 1998, during which conversation defendant told the informant that he could obtain for her anywhere from one to three additional kilograms of heroin during the two weeks following that date. The government did not mention that evidence in establishing a factual basis for the guilty plea at the change of plea hearing. Because defendant does not discuss this particular recorded conversation in his Motion, the Court must treat this fact as disputed. The Court will not, therefore, consider the alleged conversation in its decision on the pending motions.

a 1988 Plymouth Voyager that had a secret compartment where defendant could store the heroin while transporting it.

On April 3, 1998, defendant and Encarnacion drove to the pre-arranged meeting spot, the Neshaminy service plaza on the Pennsylvania Turnpike. Shortly after their arrival, law enforcement officers who were conducting surveillance in anticipation of defendant's and Encarnacion's drug sale, arrested the two men. Upon searching the 1988 Plymouth Voyager in which defendant and Encarnacion had arrived, law enforcement officers found a secret compartment containing, inter alia, approximately 950.1 grams of heroin.

### **III. DISCUSSION**

At sentencing, defendant's counsel, Jeremy Ibrahim, did not request an offense level reduction pursuant to USSG § 3B1.2 for defendant's purported minimal role in the offense. In his pending § 2255 Motion, defendant asserts that his counsel was unconstitutionally ineffective for failing to seek such a reduction.

In order to establish a claim for ineffective assistance of counsel, a convicted defendant must meet the two-pronged requirement set forth in Strickland v. Washington, 466 U.S. 668 (1984). Specifically, defendant must demonstrate that counsel's performance (1) fell below an objective standard of reasonableness, id. at 688, and (2) that counsel's deficient performance prejudiced defendant's case. Id. at 692; see also Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000) (discussing Strickland standard).

The Court concludes that had defendant's counsel sought an offense level reduction under USSG § 3B1.2, the request would not have been a meritorious one. Accordingly, counsel's conduct could not have prejudiced defendant, and defendant cannot establish a successful

ineffectiveness claim under Strickland.

The provision of the Sentencing Guidelines cited by defendant reads as follows:

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

#### USSG § 3B1.2

The Guidelines define “minimal” participants under subsection (a) of this provision as “defendants who are plainly among the least culpable of those involved in the conduct of a group.” USSG § 3B1.2 comment. (n.4). If a defendant exhibits “lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others,” those factors are “indicative of a role as a minimal participant.” Id. A “minor” participant under subsection (b) is a defendant who is “less culpable than most other participants, but whose role could not be described as minimal.” USSG § 3B1.2 comment. (n.5). The Court’s analysis of defendant’s claim “involves a determination that is heavily dependent upon the facts of the particular case.” USSG § 3B1.2 comment. (n.3(C)).

Defendant alleges in his Motion that he was a “minimal” participant and, therefore, would have been eligible for a reduction of four offense levels. The Court concludes, however, that under established Third Circuit precedent, defendant would not even have qualified for the lesser two-level reduction as a “minor” participant. If defendant was not a “minor” participant,

by definition, he could not have been a “minimal” participant.

The Third Circuit has explained that “a defendant’s eligibility for ‘minor participant’ status turn[s] on whether the defendant’s ‘involvement, knowledge and culpability’ w[as] materially less than those of other participants.” United States v. Brown, 250 F.3d 811, 819 (3d Cir. 2001) (quoting United States v. Headley, 923 F.2d 1079, 1084 (3d Cir. 1991)). In determining whether a defendant meets this standard, the Court must consider “(1) the defendant’s awareness of the nature and scope of the criminal enterprise; (2) the nature of the defendant’s relationship to the other participants; and (3) the importance of the defendant’s actions to the success of the venture.” Id. (citing Headley, 923 F.2d at 1084) (other citations omitted). Importantly, in drug cases like this one, “[t]he fact that a defendant’s participation in a drug operation was limited to that of courier is not alone indicative of a minor or minimal role.” Headley, 923 F.2d at 1084 (citing United States v. Buenrostro, 868 F.2d 135, 138 (5th Cir. 1989)).

Defendant argues that an offense level reduction would have been appropriate in this case for the following reasons: (1) the heroin did not belong to him; (2) he was hired solely as a courier; (3) he derived less profit than his co-conspirators; (4) he did not supply the drugs in this case; (5) he did not know the actual source of the drugs; and (6) he did not arrange for the drugs to be sold or to whom they would be sold.

The Court finds that defendant’s arguments, for the most part, lack support in the record.<sup>5</sup>

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<sup>5</sup> For example, in light of defendant’s negotiation of the payment terms for the sale of the heroin, the Court concludes that defendant’s role in the transaction was more than that of a mere courier. Moreover, defendant’s assertion that he derived less profit from the drug sale than did his co-defendants is irrelevant; none of the conspirators derived any profit from the sale at issue because law enforcement officers confiscated the drugs before the sale was accomplished.

Even accepting these asserted facts as true, however, the Court concludes that defendant could not have established that he was a “minor” participant as the Third Circuit has defined that term. The Court reaches this conclusion because defendant actively participated in negotiating the terms of payment. Additionally, defendant secured a vehicle with a secret compartment to allow covert transportation of the heroin. These facts demonstrate that defendant’s conduct was important to “the success of the venture,” Brown, 250 F.3d at 819, in that the criminal enterprise would not have “succeeded” unless defendant was able to transport the drugs and receive payment for them. In light of these facts, defendant cannot show involvement, knowledge, or culpability that “w[as] materially less than those of other participants.” Id.

Accordingly, the Court concludes that defendant could not have established that he had a minor role in the offense. Defendant’s inability to establish that he had a “minor” role in the offense means, a fortiori, that defendant cannot establish that he had a “minimal” role in the offense because such a finding necessitates that defendant was less culpable than a “minor” participant. Defendant’s claim that his counsel was ineffective in not seeking an offense level reduction under USSG § 3B1.2 on such grounds must therefore fail.

Because the issues in this case are straightforward and capable of resolution on the record, and because defendant’s claim is clearly non-meritorious, the Court will deny defendant’s request for counsel. See Watson v. United States, 1997 WL 667152, at \*4 (E.D. Pa. Oct. 3, 1997) (quoting Reese v. Fulcomer, 946 F.2d 247, 264 (3d Cir. 1991)) (“[A] district court does not abuse its discretion when it chooses not to appoint counsel because the issues in the case are ‘straightforward and capable of resolution on the record.’”). For these same reasons, the Court will deny defendant’s requests for an evidentiary hearing and for permission to file a Traverse.

**IV. CONCLUSION**

For the foregoing reasons, the Court denies defendant's pro se Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, as well as defendant's requests for appointment of counsel, an evidentiary hearing, and leave to file a Traverse.

**BY THE COURT:**

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**JAN E. DuBOIS, J.**