

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

UNITED STATES OF AMERICA : CIVIL ACTION  
 :  
 v. : NO. 01-CR-00629-01  
 :  
 HITHAM ABUHOURLAN : (06-CV-00199)

Stengel, J.

March 21, 2006

**MEMORANDUM AND ORDER**

Presently before the Court is Hitham Abuhouran's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255. Abuhouran alleges that he is entitled to habeas relief under the Supreme Court's recent decision in United States v. Booker, 543 U.S. 220 (2005). For the reasons described below, I will deny Abuhouran's petition.

**I. BACKGROUND**

This case is a sequel to an earlier prosecution in this district, in which the government charged Abuhouran with fraudulently obtaining over \$9 million.<sup>1</sup> In this case, the government charged Abuhouran with 17 counts of fraud totaling several million dollars, as well as with efforts to obstruct the first case. On March 27, 2003, Abuhouran entered a guilty plea to one count of conspiracy to commit fraud and obstruction of justice in violation of 18 U.S.C. § 371. Abuhouran and the government agreed that the sentencing range for this second case was between 188 and 235 months. The parties also agreed that the government would move to dismiss the remaining 16 counts if

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<sup>1</sup>The Honorable Louis H. Pollack sentenced Abuhouran to 188 months of imprisonment in the first case.

Abuhouran plead guilty to the conspiracy count. Accordingly, the parties entered into a written plea agreement limiting Abuhouran's sentence to 60 months (the "Plea Agreement").

In exchange for the reduced sentence, Abuhouran agreed to waive the rights to appeal or collaterally attack his conviction or sentence. Specifically, the Plea Agreement provides:

8. In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law.

9. Notwithstanding the waiver provision set forth in paragraph 8 above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence. If the government does not appeal, then notwithstanding the waiver provision set forth in paragraph 8 above, the defendant may file a direct appeal but may raise only claims that:

- a. The defendant's sentence exceeds the statutory maximum; and/or
- b. The sentencing judge erroneously departed upward from the otherwise applicable sentencing guideline range.

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

Plea Agreement ¶¶ 8-9.

The following colloquy at the change of plea hearing between the Honorable James McGirr Kelly and Abuhouran addressed Abuhouran's waiver of the rights to appeal or collaterally attack his conviction and sentence:

THE COURT: If [y]ou make a deal with the government, that's it and the Court sentences you and you are stuck with that sentence [even] if you later find out that there was something that you would have won the case if you had not pled guilty.

Do you understand that?

MR. H. ABUHOURLAN: Yes.

THE COURT: By pleading guilty and waiving those rights I have discussed with you, you cannot come into court later and claim that you weren't guilty or that your rights were violated.

In other words, the way you exercise your rights in a criminal case, as a defendant, is by going to trial and you are waiving that right by pleading guilty.

Do you understand that?

MR. H. ABUHOURLAN: Yes.

THE COURT: This idea to enter a guilty plea, is it a part of your own free will or is someone forcing you to enter a guilty plea in this case?

MR. H. ABUHOURLAN: It's my own free will.

Change of Plea Hearing at 9, 15.

## II. STANDARD OF REVIEW UNDER SECTION 2255

Section 2255 provides federal prisoners with the ability to challenge an unlawfully imposed sentence. Section 2255 provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255. A habeas petition under section 2255 is addressed to the "sound discretion of the court." United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). However, habeas corpus is not a substitute for a direct appeal. See Reed v. Farley, 512 U.S. 339, 354 (1994); United States v. Addonizio, 442 U.S. 178, 184 (1979). An error that justifies reversal on a direct appeal may be insufficient to support habeas corpus relief. Addonizio, 442 U.S. at 185. Instead, a habeas petitioner may only prevail on a section 2255 claim by demonstrating that an error of law was constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962).

### III. DISCUSSION

I will deny Abuhouran's habeas petition for the following three reasons:

(1) Abuhouran waived the right to collaterally attack his conviction and sentence in the Plea Agreement; (2) Abuhouran's habeas petition is untimely; and (3) the Booker case does not apply retroactively to habeas petitions.

#### A. **Abuhouran Waived the Right to Collaterally Attack His Conviction and Sentence By Signing the Plea Agreement.**

First, I find that Abuhouran has waived the right to collaterally attack his conviction. Waivers of appeals are strictly construed by the Third Circuit. United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001). Waivers of appeals are generally permissible "if entered into knowingly and voluntarily, unless there is a miscarriage of justice." Id. at 563. To determine whether there has been a miscarriage of justice, district courts will consider "the clarity of the error, its gravity, its character . . . the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result." Id. at 573 (adopting the case-by-case approach for determining a miscarriage of justice established in United States v. Teeter, 257 F.3d 14, 26 (1st Cir. 2001)). While the Third Circuit has not directly addressed the issue of waiver of the right to collateral attack, other courts in the Eastern District of Pennsylvania have held that the Khattak rule should apply to a

waiver of the right to collaterally attack a federally-imposed conviction. See, e.g., United States v. Chancley, Civ. A. No. 04-4902, 2006 WL 463389, at \*4 (E.D. Pa. Feb. 23, 2006). See also United States v. Fagan, Civ. A. No. 04-2176, 2004 WL 2577553, at \*3 (E.D. Pa. Oct. 4, 2004); United States v. Robinson, Civ. A. No. 04-884, 2004 WL 1169112, at \*9-10 (E.D. Pa. April 30, 2004).

In United States v. Roach, Crim. No. 02-405-04, 2005 WL 1514191, at \*3 (E.D. Pa. June 24, 2005), a habeas petitioner challenged his sentence under the Supreme Court's decisions in Blakeley v. Washington, 542 U.S. 296 (2004) and Booker after waiving the right to collaterally attack his sentence in a plea agreement with the government. In Roach, Judge Surrick noted that the Third Circuit has specifically held that the enforcement of a waiver of appellate rights regarding possible Booker claims does not constitute a miscarriage of justice. Roach, 2005 WL 1514191, at \*3 (citing United States v. Lockett, 406 F.3d 207, 214 (3d Cir. 2005)). Similarly, Judge Surrick held, neither does enforcing a habeas petitioner's waiver of his collateral attack rights, including potential Blakeley or Booker claims, constitute a miscarriage of justice. Id.

In the instant case, Abuhouran knowingly and voluntarily agreed to waive the right to collaterally attack his conviction and sentence as evidenced by the colloquy at the change of plea hearing. In fact, paragraph 8 of the Plea Agreement, which Abuhouran agreed to and signed, contains the same language as the waiver provision at issue in Roach. Moreover, Abuhouran expressly stated at the change of plea hearing that he

understood that by pleading guilty he waived the rights to appeal or collaterally attack his conviction and sentence. Accordingly, I deny Abuhouran's habeas petition as barred by the waiver provision in the Plea Agreement.

**B. Abuhouran's Habeas Petition Is Barred As Untimely.**

Second, I find that Abuhouran's habeas petition is untimely under 28 U.S.C.

§ 2255. A petitioner has one year from the later of the following dates to file a habeas petition under section 2255:

(1) the date on which the conviction became final; (2) the date on which the impediment to making a motion created by government action in violation of the Constitution or laws of the United States is removed, if the defendant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; and (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255. The Third Circuit has held that a judgment of conviction "becomes final" within the meaning of section 2255 on the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari; or (2) the date on which the defendant's

time for filing a timely petition for certiorari review expires." Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999). The time to file a petition for certiorari to the Supreme Court expires 90 days after the disposition of an appeal to the United States Court of Appeals. Id.

In the instant case, Abuhouran's conviction became final on October 29, 2004. The Third Circuit dismissed Abuhouran's direct appeal of Judge Kelly's decision on July 30, 2004. Abuhouran did not file a petition for certiorari to the Supreme Court, and therefore his time to file a petition for certiorari expired 90 days later on October 29, 2004. Abuhouran filed the instant habeas petition on January 17, 2006—more than one year after his conviction became final. I will therefore deny Abuhouran's habeas petition as untimely.

**C. Booker Does Not Apply Retroactively In This Case.**

Third, even if I were to find that neither of the reasons discussed above require denying Abuhouran's habeas petition, his petition is denied because the Booker case does not apply retroactively in this case. In Lloyd v. United States, 407 F.3d 608, 614 (3d Cir. 2005), the Third Circuit determined that Booker does not apply retroactively to cases on collateral review when the underlying conviction became final before January 12, 2005, the date Booker issued. The Lloyd court based its decision on the three-prong test for determining whether a new rule of criminal procedure applies retroactively set forth by the Supreme Court in Teague v. Lane, 489 U.S. 288 (1989). See Lloyd, 407 F.3d at 611.

In this case, Abuhouran's conviction became final on October 27, 2004, more than two months before the cutoff date established in Lloyd. The Booker case, therefore, does not apply to Abuhouran's conviction or sentence, and I will deny his habeas petition under Lloyd. See also United States v. Chernyak, Civ. A. No. 04-4243, 2005 WL 1971878, at \*3 (E.D. Pa. Aug. 12, 2005) (holding that habeas petitioner whose conviction became final before January 12, 2005 could not claim invalid conviction under Booker or Blakeley).<sup>2</sup>

#### **IV. CONCLUSION**

For the reasons described above, I will deny Abuhouran's habeas petition. An appropriate Order follows.

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<sup>2</sup>I note that Abuhouran would not be entitled to the relief he seeks even if Booker did apply to this case. Booker requires district courts to impose sentences that are reasonable under all of the circumstances of the case. See Booker, 543 U.S. at 766. The imposition of a 60 month sentence, where the agreed-upon sentencing range was between 188 and 235 months, is reasonable under the circumstances of this case.

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**ORDER**

**AND NOW**, this 21st day of March, 2006, upon consideration of Abuhouran's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket No. 338), the government's response thereto, and Abuhouran's reply, it is hereby **ORDERED** that the motion is **DENIED**. The Clerk of Court shall mark this case as closed for statistical purposes.

BY THE COURT:

/s Lawrence F. Stengel  
LAWRENCE F. STENGEL, J.