

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

<b>THE UNITED STATES OF AMERICA,</b>	:	
	:	
vs.	:	<b>CRIM. NO. 03-801</b>
	:	
<b>FELIX PEREZ,</b>	:	<b>CIV. NO. 06-2923</b>
	:	
<b>Defendant.</b>	:	

**ORDER & MEMORANDUM**

**ORDER**

**AND NOW**, this 9th day of November, 2006, upon consideration of Petitioner's *pro se* Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 (Document No. 62, filed June 21, 2006); the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 (Document No. 64, filed August 3, 2006); and Petitioner's Reply to Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 (Document No. 67, filed August 14, 2006), for the reasons set forth in the attached Memorandum, **IT IS HEREBY ORDERED** that:

1. The Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 is **GRANTED**;
2. Petitioner's *pro se* Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 is **DISMISSED WITH PREJUDICE**; and,
3. A certificate of appealability will not issue on the ground that petitioner has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2).

**MEMORANDUM**

Petitioner, Felix Perez, filed a *pro se* Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 in which he asks the Court to vacate a sentence imposed on him following a guilty plea on the ground that his counsel was ineffective. The government

moved for dismissal of the petition based on the defendant's waiver of the right to appeal or collaterally challenge the judgment. For the reasons set forth below, the Court concludes that petitioner knowingly and voluntarily waived his right to collaterally challenge the judgement; that enforcing the waiver would not work a miscarriage of justice; and that the waiver precludes petitioner's habeas petition. Thus, the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 is granted and the Petitioner's *pro se* Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 is dismissed with prejudice.

## **I. BACKGROUND**

On December 3, 2003, petitioner was charged by indictment with one count of distribution of 50 grams or more of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(A) (Count Three), and four counts of distribution of heroin in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C) (Counts One, Two, Four, and Five).

On September 28, 2004, petitioner appeared before the Court and, pursuant to a Guilty Plea Agreement, pled guilty to Count Three of the indictment. Because petitioner does not speak English, the change of plea hearing was conducted through an interpreter. (Change of Plea Hearing Transcript at 3). Under the Guilty Plea Agreement, petitioner agreed to, *inter alia*, the following with respect to the right to appeal or collaterally attack his sentence:

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.

- a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.
- b. If the government does not appeal, then notwithstanding the waiver provision set forth above, the defendant may file a direct appeal but may raise only claims that:
  1. the defendant's sentence exceeds the statutory maximum; or
  2. the sentencing judge erroneously departed upward from the otherwise applicable sentencing guideline range.

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

(Guilty Plea Agreement at 6).

During the change of plea hearing, petitioner initially expressed unwillingness to proceed with the guilty plea because it required him to admit to distribution of 124 grams of cocaine base ("crack") whereas petitioner insisted that he distributed only 31 grams of cocaine base ("crack"). With some further discussion, the Government agreed to reduce the drug quantity to 31 grams of base cocaine ("crack"). The Court gave petitioner an opportunity to continue the plea hearing if he wanted additional time to consider the Guilty Plea Agreement, but petitioner stated that he was ready to plead guilty in light of the government's reduction of the drug quantity. (Change of Plea Hearing Transcript at 3-16).

At the time of the guilty plea, the Court engaged in an extensive colloquy with petitioner pursuant to Federal Rule of Criminal Procedure 11. (Change of Plea Hearing Transcript at 31-50). During the colloquy, the Court specifically questioned petitioner as to whether he understood that he was giving "up his right to appeal or to attack his sentence because his lawyer

was not effective . . . .” (Id. at 36-37). Petitioner responded that he understood the limitations that the Guilty Plea Agreement placed on his right to appeal and collaterally challenge his sentence. (Id. at 37-39).

Petitioner was sentenced on February 25, 2006. Based on the reduced drug quantity, the Sentencing Guidelines range was determined to be 57 to 71 months. The Court imposed a sentence of 48 months, nine months below the low end of the Guideline range. Had the drug quantity not been reduced from 124 grams of cocaine base (“crack”) to 31 grams of cocaine base (“crack”), the Sentencing Guidelines range would have been 70 to 87 months.

Petitioner filed a notice of appeal on March 2, 2005. On December 7, 2006, upon motion of the government, the Third Circuit dismissed petitioner’s appeal for lack of appellate jurisdiction based on the appellate waiver in the Guilty Plea Agreement. On that issue, none of the circumstances that would allow petitioner to file an appeal or a collateral attack under the waiver provision in the Guilty Plea Agreement have occurred. The Government has not appealed, petitioner’s sentence did not exceed the statutory maximum for the charged offenses, and the Court did not erroneously grant an upward departure. (See Guilty Plea Agreement at 6).

On July 21, 2006, petitioner filed the instant § 2255 motion. In his request for habeas relief, petitioner raises claims of ineffective assistance of counsel in violation of his Sixth Amendment rights. Petitioner argues that his sentence should be vacated because his lawyer failed to: (1) advise petitioner that his appeal had been dismissed; (2) advise petitioner to continue to trial after the government agreed to change the drug quantity at the change of plea hearing, which allegedly evinced tampering of evidence; and (3) advise petitioner of a potential entrapment defense. (Petitioner’s Memorandum of Law in Support of *pro se* Motion to Vacate,

Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 at 5-7).

## II. DISCUSSION

When analyzing the validity of waiver provisions, courts treat waivers of appeal and waivers of collateral attack alike.<sup>1</sup> “An ineffective assistance of counsel argument survives a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself.” United States v. White, 307 F.3d 336, 343 (5th Cir. 2002) (referred to in United States v. Robinson, 2004 WL 1169112, \*3 (E.D. Pa. Apr. 30, 2004)). In the Third Circuit, “waivers of appeals in plea agreements are generally enforceable.”<sup>2</sup> United States v. Fagan, 2004 WL 2577553, \*3 (E.D. Pa. Oct. 4, 2004). As articulated in United States v. Khattak, 273 F.3d 557 (3d Cir. 2001), “waivers of appeals are generally permissible if entered into knowingly and voluntarily,” unless there is “an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver.” Id. at 558, 562 (citing United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001)). Waivers of appeals should be strictly construed. Id. at 562. Applying the foresaid authority, the Court concludes that petitioner knowingly and voluntarily accepted the waiver provision in his Guilty Plea Agreement and that enforcing this waiver would not work a miscarriage of justice. Each of petitioner’s arguments will be addressed in turn.

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<sup>1</sup> See Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999) (referred to in United States v. Robinson, 2004 WL 1169112, \*3 (E.D. Pa. Apr. 30, 2004)). The Jones court noted that, “[w]ith respect to whether “a waiver of the right to bring a collateral attack pursuant to § 2255 bars a challenge based on ineffective assistance of counsel or involuntariness, . . . there is no principled means of distinguishing a § 2255 waiver from a waiver of appeal rights.” Id.

<sup>2</sup> Eleven other circuits follow this rule. Fagan, 2004 WL 2577553 at \*3 (collecting cases).

**A. Petitioner Knowingly and Voluntarily Agreed to the Waiver Provision**

Ineffective assistance of counsel may induce involuntary or unknowing agreement to a waiver provision. Teeter, 257 F.3d at 25 n.9 (citing United States v. Hernandez, 242 F.3d 110, 113-14 (2d Cir. 2001)). When determining whether a defendant’s waiver of appellate rights was knowing and voluntary, the role of the sentencing judge in conducting a colloquy under Federal Rule of Criminal Procedure 11 is critical. See Khattak, 273 F.3d at 563. Under Federal Rule of Criminal Procedure 11, before accepting a plea of guilty, the court must address the defendant personally and determine that the defendant understands the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence. Although petitioner argues that his sentence should be vacated due to ineffectiveness of counsel, petitioner does not argue that ineffective assistance of counsel induced involuntary or unknowing agreement to the waiver provision. (See Petitioner’s Memorandum of Law in Support of *pro se* Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 at 5-7). In Hernandez, 242 F.3d at 112, by contrast, petitioner alleged that he “was mislead [sic] about the consequences of his plea by his then attorney.” Nevertheless, the appellate court held that “the district court was entitled to rely upon the defendant’s sworn statements, made in open court with the assistance of a translator, that he understood the consequences of his plea, had discussed the plea with his attorney, knew that he could not withdraw the plea [and] understood that he was waiving his right to appeal a sentence below 120 months . . . .”<sup>3</sup> Id.

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<sup>3</sup> In Hernandez, 242 F.3d at 112, the court examined the ineffectiveness assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984). Because petitioner does not argue that his ineffective assistance of counsel claims induced him to agree to the waiver provision unknowingly or involuntarily, the Court need not engage in Strickland analysis in this

In this case, the Court engaged in extensive colloquy with petitioner regarding his waiver of his right to appeal or collaterally attack his sentence. (Change of Plea Hearing Transcript at 35-50). During the colloquy, the Court specifically questioned petitioner as to whether he understood that he was giving “up his right to appeal or to attack his sentence because his lawyer was not effective . . . .” (Id. at 36-37). Petitioner responded that he understood these limitations. (Id. at 37-39). Accordingly, the Court discharged its responsibilities under Federal Rule of Criminal Procedure 11, and petitioner’s waiver of his right to collaterally attack was knowing and voluntary. See United States v. Buchanan, 2005 WL 408043, at \*2-3 (E.D. Pa. 2005); Fagan, 2004 WL 2577553, at \*4.

**B. Enforcing the Waiver Provision Does Not Work a Miscarriage of Justice**

In determining whether a waiver provision would work a miscarriage of justice, the Third Circuit has endorsed the approach established by the First Circuit in Teeter, 257 F.3d 14. Khattak, 273 F.3d at 563. Under this approach, the court must weigh several factors when deciding whether to relieve a defendant of his waiver, including “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. Teeter noted that a miscarriage of justice can occur where “the plea proceedings were tainted by ineffective assistance of counsel.” 257 F.3d at 25 n.9. For instance, “[j]ustice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself--the very product of the alleged

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case.

ineffectiveness.<sup>4</sup> Robinson, 2004 WL 1169112, \*3 (E.D.Pa. 2004) (citing Jones, 167 F.3d at 1145). However, the bounds are narrow in which the courts have held an ineffective assistance of counsel claim to constitute a miscarriage of justice sufficient to invalidate a waiver provision.

The court in United States v. Joiner, 183 F.3d 635 (7th Cir. 1999) noted that “the waiver of a right to appeal does not completely foreclose review, because the right to appeal survives where the agreement to waive is involuntary or where the trial judge relied on a constitutionally impermissible factor (like race) or where the sentence exceeds the statutory maximum.” Id. at 645 (citing Jones, 167 F.3d at 1145). Nevertheless, the Joiner court held that petitioner’s “claim of ineffective assistance of counsel does not fall within the narrow confines of Jones” because the claim was “exactly the sort . . . he knowingly and intelligently waived his right to present by proceeding as he did in the district court.”<sup>5</sup> Id.

Petitioner’s ineffective assistance of counsel claim relates neither to the negotiation of the waiver nor to any other situation in which a court has found miscarriage of justice sufficient to invalidate a waiver provision. Rather, petitioner argues that his sentence should be vacated because his lawyer failed to: (1) advise petitioner that his appeal had been dismissed; (2) advise petitioner to continue to trial after the government agreed to change the drug quantity at the change of plea hearing;<sup>6</sup> and (3) advise petitioner of a potential entrapment defense.

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<sup>4</sup> As the court explained in Jones, 167 F.3d at 1145, “[t]o hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation.”

<sup>5</sup> The court in Jones, 167 F.3d at 1145 was “[m]indful of the limited reach of this holding” and “reiterate[d] that waivers are enforceable as a general rule . . . .”

<sup>6</sup> There is no evidence that the government would have agreed to reduce the drug quantity to 31 grams of cocaine base (“crack”) had petitioner proceeded to trial. (See Change of Plea

Accordingly, the Court finds that enforcing the waiver provision in the Guilty Plea Agreement would not work a miscarriage of justice.

Because petitioner knowingly and voluntarily accepted the waiver provision in his Guilty Plea Agreement and enforcing this waiver would not work a miscarriage of justice, petitioner is precluded from collaterally attacking the judgment in this case. Thus, the Court need not engage in analysis under Strickland v. Washington, 466 U.S. 668 (1984) to address petitioner's ineffective assistance of counsel claim.

### **III. CONCLUSION**

The Court concludes that petitioner knowingly and voluntarily accepted the waiver provision in the Guilty Plea Agreement and that enforcing this waiver would not work a miscarriage of justice. Therefore, petitioner is precluded from collaterally attacking his sentence. Petitioner's claims of ineffective assistance of counsel do not alter this outcome because none of these claims establish that the waiver provision is invalid. Accordingly, the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 is granted and the Petitioner's *pro se* Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 is dismissed with prejudice.

**BY THE COURT:**

/s/ Honorable Jan E. DuBois  
**JAN E. DUBOIS, J.**

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Hearing Transcript at 3-16.)