

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

UNITED STATES OF AMERICA : CIVIL ACTION  
 : NO. 06-4185  
 v :  
 : CRIMINAL ACTION  
JOEL BERBERENA : NO. 01-00363-BMS-19

**REPORT AND RECOMMENDATION**

JACOB P. HART  
UNITED STATES MAGISTRATE JUDGE

June 26, 2007

This is a pro se Motion to Vacate, Set Aside, or Correct a Federal Sentence, filed pursuant to 28 U.S.C. § 2255, by a defendant currently incarcerated at the Federal Correctional Institution at White Deer, Pennsylvania. After appointing counsel for the petitioner and conducting an evidentiary hearing, I now recommend that the motion be denied.

**Facts and Procedural History**

On June 20, 2003, the defendant, Joel Berberena, pursuant to a written plea agreement, pled guilty to conspiracy to distribute more than 50 grams of cocaine base (“crack”) and more than five kilograms of cocaine, in violation of 21 U.S.C. § 846 (Count I); possession with intent to distribute more than five grams of cocaine base (“crack”), in violation of 21 U.S.C. 841(a)(1) (Count 48); and possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 50).

On October 15, 2003, Judge Schiller sentenced Berberena to 210 months’ imprisonment, five years of supervised release, and he was required to pay a \$300.00 special assessment. Berberena’s trial counsel, Mr. Centrella, filed a timely appeal on his behalf, which the Third Circuit granted pursuant to the Supreme Court’s holding in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005). On September 15, 2005, Judge Schiller re-sentenced him to a reduced term of 150 months’

imprisonment, at which time Berberena was again represented by Mr. Centrella.

On September 14, 2006, Berberena filed this motion pursuant to 28 U.S.C. § 2255, to Vacate, Set Aside, or Correct his Federal Sentence, claiming that counsel was ineffective for failing to file a notice of appeal after the re-sentencing, despite being instructed to do so.

### **Discussion**

The Supreme Court has specifically held that the appropriate test in cases involving counsel's failure to file a direct appeal is that set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562 (1984). Roe v. Flores-Ortega, 528 U.S. 470, 476, 120 S. Ct. 1029, 1034 (2000). In Strickland, the Supreme Court set forth a two-prong test — both parts of which must be satisfied — by which claims alleging counsel's ineffectiveness are reviewed. Strickland, 466 U.S. at 687.

First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Id. at 688. The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Because of the difficulties in making a fair assessment, eliminating the "distorting effect" of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 163-164 (1955)). It is well established that counsel cannot be ineffective for failing to raise a meritless claim. Strickland, 466 U.S. at 691; Holland v. Horn, 150 F. Supp. 2d 706, 730 (E.D. Pa. 2001).

Pursuant to the second prong, the defendant must establish that the deficient performance prejudiced the defense. It requires a demonstration that counsel's errors were so serious as to deprive the defendant of a fair trial or a trial whose result is reliable. Strickland, 466 U.S. at 687. More specifically, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Berberena alleges that although he had specifically instructed him to do so, following the re-sentencing his trial counsel failed to file a notice of appeal on his behalf. The Supreme Court has held that an attorney who "disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Flores-Ortega, 528 U.S. at 477 (citing Rodriguez v. United States, 395 U.S. 327, 89 S.Ct. 1715 (1969)). In Solis v. United States, 252 F.3d 289 (3d Cir.2001), the Third Circuit held that in such cases, prejudice is presumed from counsel's failure to file a notice of appeal when so requested by a client, thereby also satisfying the second prong of the Strickland test. Solis, 252 F.3d at 293-94.

In cases where the client has not made a specific request to file an appeal, the ineffective assistance of counsel analysis does not automatically end, but proceeds to ask "whether counsel in fact consulted with the defendant about an appeal." Flores-Ortega, 528 U.S. at 478. An attorney has an obligation to consult with his or her client regarding an appeal "where there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. 528 U.S. at 480. In cases where counsel has consulted with the client, i.e. discussed with the client the advantages and disadvantages of filing an appeal, he or she

has only performed in an unreasonable manner if he or she failed to follow express instructions to file an appeal. Id.

In light of Berberena's claim that his attorney failed to file an appeal after Berberena specifically requested him to do so, this Court appointed Michael G. Paul, Esquire as counsel for Berberena and held an evidentiary hearing in this matter on Wednesday, June 13, 2007. Berberena testified that at the conclusion of the re-sentencing hearing he asked his attorney, Mr. Centrella, why he did not receive the "safety valve"<sup>1</sup> and informed him that he wanted to appeal because he felt he was entitled to it. (N.T. 7:2-16). According to Berberena, Mr. Centrella explained that there was a chance his sentence could stay the same, but he also stated it was his understanding that Mr. Centrella was going to file an appeal. (N.T. 9:1-8). Berberena explained that he then followed up by sending Mr. Centrella letters dated December 12, 2005 and August 30, 2006, requesting copies of the transcript from his re-sentencing and inquiring as to the status of his appeal. (N.T. 9:9-10:9, 10:20-24). He testified that he did not receive a response to the letters to Mr. Centrella. (N.T. 10:13-19). He also sent a letter to the Clerk's Office, dated August 30, 2006, to which he received a response informing him that no appeal had been filed on his behalf. (N.T. 10:20-11:7).

On cross-examination, Berberena admitted that Mr. Centrella had informed him that he received a "pretty good" sentence under the circumstances and that he did not see any grounds for appeal. When asked if he agreed with him, Berberena responded "Yes, in a way, yes." (N.T. 13:16-20). According to Berberena, he felt the "safety valve" was automatic for a first time offender, such

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<sup>1</sup>The term "safety valve" refers to a discretionary departure from the sentencing guidelines, resulting in a lesser sentence for a first time offender if, inter alia, he did not "possess a firearm or other dangerous weapon...in connection with the offense." § U.S.S.G. 5C1.2(a)(2). Although Booker precludes an automatic upward departure for using a firearm, even post-Booker the sentencing judge is not required to grant the "safety valve" if, in fact, a gun was used. Here, it is undisputed that at the time of his arrest, Berberena had a loaded AK-47 under his mattress.

as himself. (N.T. 16:5-18).

Mr. Centrella testified that he felt Berberena's first sentence was rather harsh in comparison to the other defendants. (N.T. 21:18-21). At the sentencing hearing, he had argued that Berberena should not have received the gun enhancement, which would then allow him to at least argue that he could receive the "safety valve." (N.T. 22:15-23). He explained that he thought if he could win on those issues he could get the guideline range down to about 11 years. (N.T. 22:25-23:4). In the interim, Blakely and Booker were decided and the Third Circuit remanded for re-sentencing pursuant to Booker. Mr. Centrella testified that at the re-sentencing he made the same arguments he had made at the prior sentencing hearing, with an additional post-Booker argument regarding the disproportionate sentences among the co-defendants. Judge Schiller rejected his other arguments, but found that the disproportionate sentence argument had some merit and gave him a downward departure. (N.T. 23:6-24:6). According to Mr. Centrella, after reading the sentence and his decision, Judge Schiller asked if there were any objections. He objected on the grounds that Judge Schiller had found against him on the issue of the "safety valve". Mr. Centrella testified that after he made the objection, Judge Schiller "looked at [him] and said something along the lines of you understood what I did, don't you? And [he] said something along the lines of, yes, your Honor, I understand." (N.T. 24:18-25:4).

Mr. Centrella explained that after the re-sentencing, he sat down in the court room and had a discussion with Berberena, explaining that although Judge Schiller rejected his argument regarding the gun enhancement and safety valve, he used his discretion and gave him a downward departure based on the disproportionate sentences argument. He explained this took his sentence into the same range as if he had won the other arguments. Mr. Centrella stated that in his opinion, especially given

the “signal” Judge Schiller sent him that he gave him everything he was going to get, that they had no grounds for appeal. He testified that he told Berberena that he felt an appeal would be “a loser” and if he appealed he would do no better and could potentially do worse. (N.T. 26:19-28:2). Mr. Centrella stated that he had an independent recollection that Berberena clearly shook his head in agreement, stated he agreed, and did not request him to file an appeal after the discussion. (N.T. 28:3-17).

When asked about the letters Berberena sent to his office, Mr. Centrella testified that he specifically remembered receiving the first letter and sending a written response because it is the only time he ever received such a letter from a client with whom he has had direct discussion regarding not filing an appeal. (N.T. 29:1-18). After leaving the record open, Mr. Centrella has provided the Court with his copies of the letters he received from Berberena and his written responses. It appears from the stamp on Berberena’s letter dated December 12, 2005, that Mr. Centrella received that letter on December 20, 2005. By way of letter dated December 29, 2005, Mr. Centrella replied to Berberena by stating that he was surprised to receive his letter given their discussion immediately following the re-sentencing where they mutually agreed that an appeal was not warranted. Mr. Centrella’s synopsis of the issues and their discussion contained in his response to Berberena’s letter is much the same as his testimony. He stated in his letter as follows:

I was surprised by the enclosed letter dated December 12, 2005. We specifically discussed your right to appeal immediately following your sentencing and mutually decided that an appeal was not warranted. During your re-sentencing, Judge Schiller departed significantly from your guideline range and your previous sentence. He sentenced you to 12.5 years in prison rather than the 17 years that you had previously received as a sentence. As you may recall, I noted my objection to his failure to honor the safety valve at re-sentencing. His finding regarding the firearm precluded your right of receiving a downward departure based on the safety valve. However, Judge Schiller then departed for other reasons to the same level you would have

received if in fact he had granted our request for the safety valve. In effect, you received the same sentence that you would have even if we had won this argument. The judge specifically noted that during the re-sentencing hearing. For this reason, I did not think that an appeal is warranted, and we discussed this following the sentencing and you agreed. I accordingly did not file an appeal... (Centrella letter dated December 29, 2005).

In response to Berberena's subsequent letter to him and copy to him of the letter to the Clerk's Office, Mr. Centrella sent a brief letter dated September 12, 2006, enclosing another copy of his December 29, 2005 letter.

Having had the benefit of hearing the testimony of both Berberena and his trial counsel, Mr. Centrella, we find that although Berberena was disappointed that he did not receive the "safety valve", after discussing the issues with his attorney following the re-sentencing, he did not request him to file an appeal. We find that Mr. Centrella consulted with Berberena regarding the issues involved in filing an appeal and at the conclusion of their discussion Berberena did not request him to file an appeal. Rather, based upon their discussion, Berberena agreed with Mr. Centrella that he did not have grounds for an appeal and that he could end up with a longer sentence even in the unlikely event that he won his appeal. We note that at one point during the testimony, Mr. Berberena even admitted that he agreed with Mr. Centrella that there were no grounds for appeal. (N.T. 13:16-20).

It appears that it was later, after Berberena's time for filing an appeal had lapsed, that he decided that he should have appealed and began writing letters to Mr. Centrella and the clerk's office. It is quite telling that although Berberena presented copies of those letters as exhibits to his petition and at the hearing, he was not forthcoming with Mr. Centrella's response, recapping their consultation.

In conclusion, having found that Mr. Centrella consulted with Berberena regarding the issue of filing an appeal and that at the conclusion of their meeting he did not make a specific request that Mr. Centrella file an appeal, we do not find that Mr. Centrella acted in a manner that can be considered professionally unreasonable. See Flores-Ortega, 528 U.S. at 480. Therefore, we do not find ineffective assistance of counsel and habeas relief must be denied.

Therefore, I make the following:

**RECOMMENDATION**

AND NOW, this 26<sup>th</sup> day of June, 2007, IT IS RESPECTFULLY RECOMMENDED that the Motion, filed pursuant to 28 U.S.C. § 2255, to Vacate, Set Aside, or Correct the Sentence be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability.

/s/Jacob P. Hart

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JACOB P. HART  
UNITED STATES MAGISTRATE JUDGE

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

UNITED STATES OF AMERICA

v

JOEL BERBERENA

:CIVIL ACTION

:NO. 06-4185

:

:CRIMINAL ACTION

:NO. 01-00363-BMS-19

**ORDER**

BERLE M. SCHILLER, J.,

AND NOW, this                      day of                      , 2007, upon  
careful and independent consideration of the Motion, filed pursuant to 28 U.S.C. § 2255, to  
Vacate, Set Aside, or Correct the Sentence, the response, thereto, the attached affidavit, the  
subsequent information provided for *in camera* inspection, and after review of the Report and  
Recommendation of United States Magistrate Judge Jacob P. Hart, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The Motion to Vacate, Set Aside, or Correct the Sentence is DENIED.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

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BERLE M. SCHILLER, J.