

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

UNITED STATES OF AMERICA

v.

JAMES A. MORGAN,

Defendant.

CRIMINAL ACTION  
NO. 12-0023

**OPINION**

**Slomsky, J.**

**August 22, 2014**

**I. INTRODUCTION**

Defendant, James A. Morgan (“Morgan” or “Defendant”) filed a pro se Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255. (Doc. No. 69.) In turn, the Government filed a Motion to Dismiss the § 2255 petition (Doc. No. 71), to which Morgan has not responded. As more thoroughly explained below, Morgan’s guilty plea agreement contained an appellate waiver provision. Because he entered into the guilty plea agreement and the appellate waiver provision knowingly and voluntarily, he has waived his right to bring the claims set forth in the present § 2255 Motion. Moreover, there are no allegations of a miscarriage of justice sufficient enough to override the waiver. As a result, the Government’s Motion will be granted, and Morgan’s § 2255 Motion will be dismissed.<sup>1</sup>

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<sup>1</sup> In reaching this decision, the Court has considered the following: Defendant’s Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. §2255 (Doc. No. 69), the Government’s Motion to Dismiss (Doc. No. 71), and the notes of testimony from Defendant’s guilty plea hearing held on January 28, 2013.

## II. BACKGROUND

On January 19, 2012, a federal grand jury returned a ten-count indictment charging James Morgan with the following offenses: one count of using interstate communications to attempt to seduce a minor, in violation of 18 U.S.C. § 2422(b) (Count 1); four counts of transfer of obscene material to a minor, in violation of 18 U.S.C. § 1470 (Counts 2-5); four counts of transporting and shipping child pornography images, in violation of 18 U.S.C. § 2252(a)(1) (Counts 6-9); and one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4) (Count 10). (Doc. No. 8.)

On January 28, 2013, Morgan pled guilty to all of the charges in the indictment. Under the terms of the plea agreement, Morgan, with limited exceptions,<sup>2</sup> waived his right to appeal directly to the Third Circuit and to collaterally attack his conviction or sentence, such as through a § 2255 Motion. (Doc. No. 50.) Specifically, the appellate waiver in the plea agreement stated:

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. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.
  - 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 in this paragraph, the defendant may file a direct appeal but may raise only claims that:

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<sup>2</sup> The plea agreement reserved Morgan's right to appeal the district court's prior decision denying his motions to suppress certain statements and physical evidence. (Doc. No. 50 at 6.)

- (1) the defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in paragraph 3 above;
- (2) the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines;
- (3) the sentencing judge, exercising the Court's discretion pursuant to United States v. Booker, 543 U.S. 220 (2005), imposed an unreasonable sentence above the final Sentencing Guideline range determined by the Court; and/or
- (4) The district court decided adversely to the defendant the following issue: The defendant's motion to suppress the search of the defendant's home and computer and the statements made by the defendant at the time he was interviewed by agents from the Federal Bureau of Investigations.

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.

(Doc. No. 50 at 5-6.)

On January 28, 2013, during the guilty plea colloquy, the Court reviewed each of these provisions with Morgan. (N.T., Guilty Plea Hearing, January 28, 2013 at 16:14-19:11.) Then, on August 1, 2013, the Court entered judgment against Morgan and imposed a total term of imprisonment of 126 months, followed by a term of supervised release of ten years, along with a \$1,000 special assessment. (Doc. No. 60.) Four days later, on August 5, 2013, Morgan filed a timely appeal contending that the District Court had improperly denied Motions to Suppress, which he previously filed in 2012.<sup>3</sup> (Doc. No. 61.) On April 1, 2014, the Third Circuit affirmed

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<sup>3</sup> On May 31, 2012, Morgan filed a Motion to Suppress statements he made to FBI agents. (Doc. No. 22.) The following day, June 1, 2012, Morgan also filed a Motion to Suppress any evidence that was obtained during searches of his home and an email account. (Doc. No. 23.) The Government opposed both Motions (Doc. No. 24), and a hearing on the Motions was held

the Court's denial of Morgan's Motions to Suppress. United States v. Morgan, 562 F. App'x 123 (3d Cir. 2014).

Subsequently, on July 17, 2014, Morgan filed a pro se Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255. (Doc. No. 69.) On July 25, 2014, the Government filed a Motion to Dismiss in response. (Doc. No. 71.) Morgan has not responded to the Government's Motion. For reasons that follow, the Court will grant the Government's Motion, dismissing Morgan's § 2255 Motion.

### III. LEGAL STANDARD

Criminal defendants may waive both constitutional and statutory rights, including the right to appeal, "provided they do so voluntarily and with knowledge of the nature and consequences of the waiver." United States v. Mabry, 536 F.3d 231, 236 (3d Cir. 2008) (citations omitted). According to the Third Circuit:

Whereas a defendant bears the burden of presenting an argument that would render his waiver unknowing or involuntary, a court has an affirmative duty both to examine the knowing and voluntary nature of the waiver and to assure itself that its enforcement works no miscarriage of justice, based on the record evidence before it.

Id. at 237-38 (citing United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001)). When reviewing the enforcement of an appellate/collateral waiver, the Court must scrutinize the guilty plea colloquy and ensure that the Court "'inform[ed] the defendant of, and determine[d] that the defendant understand[ed] . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence' as Federal Rule of Criminal Procedure 11(b)(1)(N) requires." Id. at 239.

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on October 26, 2012. On November 13, 2012, the Court issued an Opinion and Order, denying both Motions to Suppress. United States v. Morgan, No. 12-cr-23, 2012 WL 5494668 (E.D. Pa. Nov. 13, 2012), aff'd, 562 F. App'x 123 (3d Cir. 2014).

In determining whether a miscarriage of justice would occur if the waiver were enforced, there is not “a list of specific circumstances which would give rise to, or constitute, a miscarriage of justice.” Id. at 243. Instead, the court must employ a “common sense approach,” considering factors such as:

[T]he clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), 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 242-43 (quoting United States v. Teeter, 257 F.3d 14, 25-26 (1st Cir. 2001)). Declining to enforce an appellate waiver due to a miscarriage of justice will be done sparingly, in narrow circumstances. United States v. Wilson, 429 F.3d 455, 458 (3d Cir. 2005) (quoting Teeter, 257 F.3d at 26)).

#### **IV. ANALYSIS**

##### **A. The Waiver in Morgan’s Plea Agreement was Knowing and Voluntary**

Before enforcing the appellate waiver against Morgan, the Court must first determine whether the waiver was knowing and voluntary. During the guilty plea colloquy held on January 28, 2013, the following exchange took place:

Court: Mr. Morgan, I want to go over the plea agreement with you. I’m not going to read every word of it, but I just want to make sure that you understand the essential terms. And the first thing I’m going to ask you to do is turn to page 7, and that’s a signature page. Do you see it?

Morgan: Yes.

Court: Is that your signature on there?

Morgan: Yes, it is.

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Court: All right. Now, did you voluntarily sign the plea agreement?

Morgan: Yes.

Court: Did you read it before you signed it?

Morgan: Yes.

Court: Did you discuss the plea agreement thoroughly with your lawyer?

Morgan: Yes.

Court: And did [your lawyer] fully explain to you what the written plea agreement means?

Morgan: Yes.

Court: And have you had enough time to talk over the plea agreement with your lawyer?

Morgan: Yes.

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Court: Now, paragraph 8 provides for what we call the appellate waiver. In other words, these are certain rights on appeal you give up by entering into this plea agreement. Do you understand?

Morgan: Yes.

Court: All right. And paragraph 8 on page 5 states, "In exchange for the undertakings made by the Government in entering this plea agreement," and that word undertaking is a fancy word for the promises the Government's making to you, "you voluntarily and expressly waive all rights to appeal or collaterally attack your conviction, sentence, or any other matter relating to this prosecution regardless of what provision of federal law it arises under." Do you understand?

Morgan: Yes.

Court: Now, the waiver is not intended to bar the assertion of a constitutional claim that relevant case law holds cannot be waived. Do you understand that?

Morgan: Yes.

Court: Now, there are certain exclusions, paragraph A, says that if the Government appeals from the sentence, then you can appeal from the sentence. Do you understand?

Morgan: Yes.

Court: And paragraph B says if the Government doesn't appeal, then you still can appeal, file a direct appeal, but you're limited on what you can raise. You can only raise three claims; number one, that your sentence on any count or conviction exceeds the statutory maximum for that count. Do you understand?

Morgan: Yes.

Court: All right. Number two, I'm going over to page 6, if the sentencing judge erroneously depart[s] upward pursuant to the sentencing guidelines, you can raise that on appeal. Do you understand?

Morgan: Yes.

Court: And the last one is that if the Court in exercising my discretion pursuant to this U.S. Supreme Court case, United States versus Booker that was decided in 2005, which essentially said that the sentencing guidelines, the federal sentencing guidelines are no longer mandatory, they're only advisory, and I have to consider them, but if I impose an unreasonable sentence above the final sentencing guideline range that I determine, you can raise that on appeal. Do you understand?

Morgan: Yes.

Court: All right. And there's a fourth exception you can raise on appeal. I think I said three originally, but there's four. If—you can raise on appeal that I decided adversely the following issue, the motion to suppress, the search of your home and computer, and statements made by you at the time you were interviewed by agents of the Federal Bureau of Investigation, you can raise that on appeal. Do you understand?

Morgan: Yes. Yes.

Court: All right. So if you appeal, pursuant to the paragraph we just read, and no issue may be presented by you on appeal, other than those described in this paragraph. Do you understand?

Morgan: Yes.

Court: Now, I want you to understand that subject to these very narrow exceptions, you're giving up your right to appeal both the validity of your guilty plea and the legality of your sentence. Do you understand?

Morgan: Yes.

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Court: All right. So that's your plea agreement. Do you have any questions about it?

Morgan: No, I don't.

Court: You fully understand what's in it?

Morgan: Yes.

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Court: All right. Mr. Morgan, other than what's set forth in this signed plea agreement, has anyone promised or offered you anything else to get you to plead guilty?

Morgan: No.

Court: Apart from discussing the mandatory minimum sentences and the sentencing guidelines, has anyone made a prediction of what your sentence will be? Apart from discussing—

Defense Counsel: Apart from me discussing with you the guidelines, the mandatories and what I believe is an opinion, just an opinion as to the area that you could be sentenced in, other than that—

Morgan: No.

Defense Counsel: —has anybody promised you?

Morgan: No. No.

Court: All right. Did anyone threaten or force you to plead guilty?

Morgan: No.

Court: Are you pleading guilty of your own free will?

Morgan: Yes.

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Court: Now, before I can accept your guilty plea, I have to make sure you understand the constitutional rights you give up by pleading guilty. Now, they're all described in the acknowledgment of rights that we've already gone over, and you have read the acknowledgement of rights, correct?

Morgan: Yes.

Court: All right. Now, even though you've read this and you've gone over them with your attorney, I again, still have to go over them with you in open court. And I'm going to state the right you give up, and ask you if you understand that. All right?

Morgan: Okay.

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Court: If you were found guilty, you could appeal such a finding of guilt to a higher court, which could set aside or modify the finding of guilt or give you a new trial. Do you understand?

Morgan: Yes.

Court: Do you understand the rights I've just explained to you?

Morgan: Yes.

Court: Do you have any questions about them?

Morgan: No, I don't.

Court: Do you understand that by entering a guilty plea, and I accepting your guilty plea, there will be no trial, and you are giving up forever the right to a trial and the other trial rights I have just explained to you?

Morgan: Yes.

Court: Do you understand that you cannot later come to any court and claim that you are not guilty or that your rights have been violated?

Morgan: Yes.

Court: Knowing what your rights are if you go to trial, and you're giving up those rights by pleading guilty, do you want to give up your right to a trial and plead guilty?

Morgan: Yes.

(N.T., Guilty Plea Hearing, January 28, 2013 at 7:8-18, 8:2-16, 16:14-19:11, 20:13-18, 21:2-22:1, 31:11-32:1, 34:22-35:22.)

The Court also asked counsel for the Government and the Defense whether they were satisfied about the following: that there was a factual basis for the plea; that Morgan was competent to enter a plea; that Morgan voluntarily pled guilty; that the guilty plea was not based on any external promises or agreements; and that Morgan fully understood the terms of the guilty plea. (Id. at 50:7-51:12.) Both parties answered in the affirmative to each question. (Id.)

Lastly, the Court made findings of fact, stating, inter alia:

Court: All right. I find that Mr. Morgan is fully alert, competent, and capable of entering an informed plea. I find that the plea is knowing and voluntary, and not the result of force or threats or any promises, apart from the plea agreement disclosed here in open court.

(Id. at 51:13-18.)

This guilty plea colloquy confirms that Morgan understood the terms of the plea agreement, which included an express waiver of his right to appeal or collaterally attack his conviction or sentence under § 2255. The exchange also confirms that Morgan signed the plea agreement voluntarily. Nowhere in his § 2255 Motion does Morgan argue to the contrary. Furthermore, during the guilty plea colloquy, the Court ensured that Morgan was competent, that the plea agreement had been thoroughly explained to him, and that Morgan had a full opportunity to discuss the agreement with his lawyer and make an informed decision. For these

reasons, the Court is satisfied that Morgan knowingly and voluntarily waived, inter alia, his right to collaterally attack his conviction and sentence.

**B. Enforcement of the Waiver Will Not Result in a Miscarriage of Justice**

Having determined that Morgan knowingly and voluntarily entered into the plea agreement, which contained an appellate/collateral waiver clause, the Court must now decide whether it should decline to enforce the waiver in order to avoid a miscarriage of justice. As noted above, this is only done in narrow circumstances. See, e.g., United States v. Schwartz, 511 F.3d 403, 405 (3d Cir. 2008) (“[W]e agree with Schwartz that his appellate waiver does not foreclose his claim that the government breached the [Plea] Agreement . . . .”); United States v. Shedrick, 493 F.3d 292, 298 (3d Cir. 2007) (“Enforcing a collateral-attack waiver where constitutionally deficient lawyering prevented Shedrick from understanding his plea or from filing a direct appeal as permitted by his plea agreement would result in a miscarriage of justice.”); United States v. Wilson, 429 F.3d 455, 458 (3d Cir. 2005) (“[I]t would constitute a miscarriage of justice to enforce a guilty plea made pursuant to a plea agreement if the defendant should have been permitted to withdraw.”).

Because Morgan has not responded to the Government’s Motion to Dismiss, the Court reviewed his § 2255 Motion and considered whether enforcing the waiver, which would prevent him from asserting the claims contained therein, would result in a miscarriage of justice. In his § 2255 Motion, Morgan raised the following constitutional claims: 1) The Government failed to turn over allegedly exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963);<sup>4</sup> and 2) Morgan’s defense attorney was ineffective in failing to argue on appeal that Morgan’s

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<sup>4</sup> In Brady, the Supreme Court of the United States held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87.

conduct did not amount to a violation of 18 U.S.C. § 2422(b) (using interstate communications to attempt to seduce a minor). (Doc. No. 69.) For reasons that follow, the Court agrees with the Government that enforcing the appellate waiver to bar these claims will not lead to a miscarriage of justice.

In his first claim, Morgan contends that the Government violated Brady by failing to turn over allegedly exculpatory documents, including: 1) a report entitled “James Morgan; Innocent Images” that was generated by the Philadelphia Regional Computer Forensics Laboratory and given to Special Agent James Zajac of the Federal Bureau of Investigations (“FBI”); and 2) what appears to be an FBI document dated January 26, 2012. (Doc. No. 69, Exs. A-B.) While the Court need not assess the merits of these claims at this point in the litigation, a cursory review of the § 2255 Motion reveals that a miscarriage of justice will not occur if the appellate waiver is enforced to bar these claims.

Morgan contends that the report from the computer lab “proves that the film or photo pictures taken was committed by an individual other than [sic] the defedant [sic], and undermine[s] the central underpinning of the prosecution—that Morgan participated in child pornography . . . .” (Doc. No. 69 at 21.) While the report appears to pertain to non-pornographic images that were found on Morgan’s computers and electronic devices, nowhere does the report indicate, let alone prove, that someone other than Morgan transmitted the pornographic images at issue in his criminal case. In addition, the Court reviewed the FBI document from January 26, 2012 which states that on December 20, 2011, pursuant to a validly executed search warrant, Special Agent Zajac seized fifty-five CDs and DVDs from Morgan’s home. (Doc. No. 69, Ex. B.) According to the document, none of the CDs or DVDs contained child pornography. (Id.) The lack of child pornography on CDs and DVDs that were taken from Morgan’s home says

nothing about pornographic images that were stored on his computer and transmitted over the internet. After reviewing this document and the computer lab report, it is clear that enforcing the appellate waiver against Morgan's Brady claim would not result in a miscarriage of justice.

In addition to the Brady claim, Petitioner also raised an ineffective assistance of counsel claim in his § 2255 Motion. Similarly, a miscarriage of justice will not occur if the Court enforces the appellate waiver to bar this claim. In his § 2255 Motion, Morgan asserts that his defense attorney, John J. Fioravanti, Jr., Esquire ("Defense Counsel"), was ineffective in failing to argue on appeal that Morgan's conduct did not amount to a violation of 18 U.S.C. § 2422(b) (using interstate communications to attempt to seduce a minor). Specifically, he contends that: 1) Defense Counsel was ineffective for failing to argue on appeal that Morgan's belief that the person he chatted with online was under eighteen years of age was not sufficient to violate 18 U.S.C. § 2422(b); and 2) Defense Counsel was ineffective for failing to argue on appeal that Morgan's conduct did not constitute "sexual activity" within the meaning of 18 U.S.C. § 2422(b). (Doc. No. 69 at 5-7.)

As noted above, Morgan pled guilty, inter alia, to one count of using interstate communications to attempt to seduce a minor, in violation of 18 U.S.C. § 2422(b).<sup>5</sup> As part of his plea agreement, Morgan voluntarily and expressly waived all rights to appeal his conviction, sentence, or any other matter relating to his prosecution. (Doc. No. 50 at 5.) Because Morgan

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<sup>5</sup> The statute provides as follows:

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. § 2422(b).

knowingly and voluntarily waived these appellate rights, his Defense Counsel could not have raised these arguments in front of the Third Circuit. However, Morgan did retain the right to file a direct appeal challenging the Court's prior decision denying his two Motions to Suppress. (Id. at 6.) Morgan invoked this right, and on appeal, Defense Counsel was limited to challenging the Court's rulings with respect to the Motions to Suppress. It would have been a violation of the appellate waiver provision for Defense Counsel to attempt to challenge Morgan's conviction and sentence on appeal, by raising the two arguments Morgan asserts here. Based on the record in this case, the enforcement of the appellate/collateral waiver will not result in a miscarriage of justice. Mabry, 536 F.3d at 237-38 (citation omitted).

#### **V. CONCLUSION**

When he pled guilty, Morgan knowingly and voluntarily waived his rights to collaterally attack his conviction and sentence pursuant to 28 U.S.C. § 2255. Furthermore, a miscarriage of justice will not result if the waiver is enforced in this case. For these reasons, the Court will grant the Government's Motion to Dismiss, thereby dismissing Morgan's § 2255 Motion. An appropriate Order follows.

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

UNITED STATES OF AMERICA

v.

JAMES A. MORGAN,

Defendant.

CRIMINAL ACTION  
NO. 12-0023

**ORDER**

**AND NOW**, this 22nd day of August 2014, upon consideration of Defendant's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. §2255 (Doc. No. 69), the Government's Motion to Dismiss (Doc. No. 71), the notes of testimony from Defendant's guilty plea hearing which was held on January 28, 2013, and in accordance with the Opinion of the Court issued this day, it is **ORDERED** as follows:

1. The Government's Motion to Dismiss (Doc. No. 71) is **GRANTED**.
2. Defendant's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. §2255 (Doc. No. 69) is **DISMISSED**.

BY THE COURT:

/s/ Joel H. Slomsky  
JOEL H. SLOMSKY, J.