

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

UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. 2010-cr-00193
vs.	)	
	)	Civil Action
FELIX ALVAREZ,	)	No. 2012-cv-00894
	)	
Defendant	)	

\* \* \*

APPEARANCES:

SHERRI A. STEPHAN, ESQUIRE  
Assistant United States Attorney  
On behalf of the United States of America

FELIX ALVAREZ  
Pro Se Defendant

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O P I N I O N

JAMES KNOLL GARDNER,  
United States District Judge

This matter is before the court on the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed March 23, 2012 by defendant Felix Alvarez pro se ("§ 2255 Motion").<sup>1</sup> On February 22, 2013 the

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<sup>1</sup> Mr. Alvarez's within § 2255 Motion was filed March 23, 2012 (Document 68). Defendant previously submitted a nearly-identical § 2255 Motion on a non-standard form, which was filed on February 16, 2012. See Document 65. The claims in the current § 2255 Motion relate back to that filing.

Additionally, the original § 2255 Motion indicates that it was signed by defendant on February 8, 2012. Thus, giving the defendant the benefit of the prison mailbox rule, I consider February 8, 2012 the filing date of Mr. Alvarez's motion. See Burns v. Morton, 134 F.3d 109 (3d Cir. 1998) and Rule 3(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts.

Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 was filed ("Government's Motion to Dismiss").

For the following reasons, I deny defendant's § 2255 Motion without a hearing, and I deny a certificate of appealability. Specifically, I deny the motion on grounds One, Two and Three because defendant waived the right to appeal or collaterally challenge his sentence, the waiver is valid, and its enforcement will not lead to a miscarriage of justice. I deny ground Four on the merits because I conclude that defendant has not established that his counsel was ineffective.

#### PROCEDURAL HISTORY

On April 1, 2010 a federal grand jury in the Eastern District of Pennsylvania returned a six-count Indictment against movant Felix Alvarez for his actions relating to the possession and distribution of heroin in Allentown, Lehigh County, Pennsylvania from October 2005 through February 2007. Defendant was charged with Conspiracy to distribute one kilogram or more of heroin, in violation of 21 U.S.C. § 846 (Count One); three counts of Distribution of heroin and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Counts Two, Three and Four); Possession with the intent to distribute 100 grams or more of heroin and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count Five); and Possession of a firearm in furtherance of a drug trafficking crime and aiding and

abetting, in violation of 21 U.S.C. §§ 924(c) and 18 U.S.C. § 2 (Count Six).

A change of plea hearing was held before me on August 31, 2010, at which time defendant pled guilty to all six charges pursuant to a plea agreement with the government. As part of the plea agreement, defendant waived his right to appeal or collaterally challenge the judgment in this case.<sup>2</sup> Defendant was represented through the proceedings by court-appointed counsel Kathryn E. Roberts, Esquire.

On February 9, 2011 I imposed a sentence of 216 months imprisonment (consisting of a term of 156 months incarceration on Counts One through Five to be served concurrently and a term of 60 months incarceration on Count Six to be served consecutively to Counts One through Five),<sup>3</sup> a five year term of supervised release,<sup>4</sup> a \$1,000 fine, and a special assessment of \$600.

On February 16, 2012 defendant filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a

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<sup>2</sup> Guilty Plea Agreement (Document 54) at ¶ 8; Transcript of the Change of Plea Hearing Before the Honorable James Knoll Gardner[,] United States District Judge, on August 31, 2010 ("Plea Hearing Transcript") (Document 69) at pages 44-47 and 70-81.

<sup>3</sup> The entire sentence was imposed consecutively with the sentence imposed on December 23, 2009 by Honorable William H. Platt, Judge of the Court of Common Pleas of Lehigh County Pennsylvania in Case Number 4764 of 2007 wherein defendant Alvarez was sentenced to not less than 28, nor more than 60, years on state charges of Murder in the third-degree, Attempted criminal homicide, Aggravated assault, two counts of Recklessly endangering another person, and Criminal conspiracy.

<sup>4</sup> This term of supervised release consists of five years on Counts One and Six, three years each on Counts Two, Three and Four, and a term of five years on Count Five, all such terms to run concurrently.

Person in Federal Custody on a non-standard form.<sup>5</sup> On February 23, 2012 I signed an Order instructing the Clerk of Court to furnish defendant with a blank copy of the current standard form for filing a petition pursuant to 28 U.S.C. § 2255. The Clerk mailed a copy of a blank § 2255 petition to defendant on February 27, 2012.

As described above, on March 23, 2012, defendant filed his within § 2255 Motion. On February 22, 2013 the Government's Motion to Dismiss was filed.

Hence this Opinion.

#### CONTENTIONS OF THE PARTIES

##### Defendant's Contentions

Defendant raises four grounds for relief in his motion. Initially, defendant contends that he neither understands English nor his constitutional rights, and that the guilty plea was the result of unconstitutional coercion.

Next, defendant avers that his guilty plea was involuntary. Specifically, defendant contends that it was the result of threats made by a Lehigh County, Pennsylvania Assistant District Attorney that defendant would otherwise receive two life sentences.

In addition, defendant claims that he assumed responsibility for the drugs because he was informed that they

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<sup>5</sup> See Document 65.

were found at his sister's house, located at 1235 Walnut Street. He further contends that he had no intention of claiming responsibility for the evidence found at the 1318 Walnut Street residence.

Finally, defendant contends that his court-appointed counsel, Kathryn E. Roberts, Esquire, was ineffective because she failed to conduct a reasonable investigation. Specifically, defendant alleges that a reasonable investigation would have revealed that defendant had neither any "prior drug convictions, nor any prior [criminal history] points,"<sup>6</sup> and that the defendant was not present at 1318 Walnut Street at the time the search warrant was executed.

#### Contentions of the Government

The government contends that defendant's first three grounds should be dismissed because defendant waived his right to appeal or collaterally challenge the judgment in this case. Specifically, the government contends that the waiver was knowing and voluntary and that this case does not present a miscarriage of justice.

Regarding ground four, the ineffective assistance of counsel claim, the government contends that defendant has not met his burden of proving deficient performance and resulting

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<sup>6</sup> See § 2255 Motion at page 10, "GROUND FOUR: IV."

prejudice. Thus the government contends that the motion to dismiss should be granted on the merits.

#### STANDARD OF REVIEW

Section 2255 of Title 28 of the United States Code provides federal prisoners with a vehicle for challenging an unlawfully imposed sentence. Section 2255 provides, in relevant part:

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 a 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).

A motion to vacate sentence under Section 2255 "is addressed to the sound discretion of the district court." United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). Defendant may prevail on a Section 2255 habeas claim only 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, 82 S.Ct. 468, 471, 7 L.Ed.2d 417, 421 (1962).

A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." United States v. Mezzanatto, 513 U.S. 196, 201, 115 S.Ct. 797, 801, 130 L.Ed.2d 697, 704 (1995). Such waivers may be enforced, "provided that they are entered into knowingly and voluntarily and their enforcement does not work a miscarriage of justice." United States v. Mabry, 536 F.3d 231, 237 (3d Cir. 2008) (citing United States v. Khattak, 273 F.3d 557, 561 (3d Cir. 2001)).

In determining whether a waiver is knowing and voluntary, the court must look to the record, specifically the written plea agreement and the change of plea colloquy, for evidence that the defendant understood the waiver and agreed to it of his own volition. United States v. Gwinnett, 483 F.3d 200, 204-205 (3d Cir. 2007).

In establishing whether or not a miscarriage of justice has occurred, a court must consider

the 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.

United States v. Teeter, 257 F.3d 14, 25-26 (1st Cir. 2001)

(adopted by the Third Circuit in Khattak, 273 F.3d at 563).

Courts in this Circuit have held that enforcement of a waiver that is itself based upon ineffective assistance of counsel may result in a miscarriage of justice. United States v. Akbar, 181 Fed.Appx. 283, 286 (3d Cir. 2006); see also United States v. Robinson, 2004 WL 1169112, at \*3 (E.D.Pa. Apr. 30, 2004) (Baylson, J.). A claim of ineffective assistance of counsel involves two elements which must be established by defendant: (1) counsel's performance must have been deficient, meaning that counsel made errors so serious that he was not functioning as "the counsel" guaranteed by the Sixth Amendment; and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984).

To establish a deficiency in counsel's performance, a convicted defendant must demonstrate that the representation fell below an "objective standard of reasonableness" based on the particular facts of the case and viewed at the time of counsel's conduct. Strickland, 466 U.S. at 688, 104 S.Ct. at 2064-2065, 80 L.Ed.2d at 693-694; Senk v. Zimmerman, 886 F.2d 611, 615 (3d Cir. 1989). There is 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." Strickland, 466 U.S. at 689,

104 S.Ct. at 2065, 80 L.Ed.2d at 694-695 (internal quotations omitted).

To establish the second Strickland prong, "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." Id., 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Counsel's errors must have been so serious that they deprived defendant of a "fair trial" with a "reliable" result. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

#### DISCUSSION

Here, defendant knowingly and voluntarily waived his right to collaterally challenge the judgment in this case. Moreover, I conclude that there is no miscarriage of justice. As such, defendant's waiver of his right to collaterally attack his sentence should be enforced.

Defendant waived his right to appeal or collaterally challenge the judgment in this case as part of his plea agreement with the government.<sup>7</sup> Specifically, defendant's plea agreement stated that:

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,

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<sup>7</sup> Guilty Plea Agreement dated August 31, 2010 at ¶ 8; Plea Hearing Transcript at pages 44-47.

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.<sup>8</sup>

Guilty Plea Agreement, at ¶ 8. The waiver allows for the defendant to appeal in a limited number of circumstances, none of which are applicable here.<sup>9</sup>

"[W]aivers of appeals, if entered into knowingly and voluntarily, are valid." Khattak, 273 at 562. In determining whether the waiver was entered into knowingly and voluntarily, I begin by examining the written plea agreement.

Here, the plea agreement clearly and expressly provides that the defendant waived both his right to appeal and his right to collaterally attack his conviction, sentence, or any other matter relating to the prosecution, including under 28 U.S.C. § 2255, "or any other provision of law." The plea agreement further states that he does so "voluntarily".<sup>10</sup>

"In determining whether a waiver of appeal is 'knowing and voluntary,' the role of the sentencing judge is critical," as

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<sup>8</sup> The plea agreement further specifies that "[t]his waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds can not be waived."

<sup>9</sup> Specifically, the plea agreement states that the defendant may appeal in the event that the government does so; if the sentence on any count of conviction exceeds the statutory maximum; if the sentencing judge erroneously departed upwards pursuant to the Sentencing Guidelines; or if the sentencing judge imposed an unreasonable sentence above the final Sentencing Guideline range determined by the court. Defendant, in his § 2255 Motion, alleges none of these circumstances.

<sup>10</sup> Guilty Plea Agreement, at ¶ 8.

it is the sentencing judge that is responsible for determining that the defendant understands "the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence." Khattak, 273 F.3d at 563. Therefore, I also look to the transcripts of the hearings before me in this matter for record evidence that the defendant knowingly and voluntarily entered into the plea agreement.

On August 31, 2010, at the change of plea hearing, counsel for the government summarized the contents of paragraph 8 of the plea agreement, including defendant's waiver of his right to collaterally challenge the judgment in his case.<sup>11</sup> At the end of the government's summary, I asked the defendant if he heard the terms of the agreement, which were translated for him by an interpreter. He responded that he had.<sup>12</sup> I then asked him if he understood the summary completely, and again he replied that he had.<sup>13</sup>

I next asked the defendant if the plea agreement had been correctly and completely summarized as he understood it, and he affirmed that it had been.<sup>14</sup> In addition, I confirmed that

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<sup>11</sup> Plea Hearing Transcript at pages 44-46.

<sup>12</sup> Id. at 46.

<sup>13</sup> Id.

<sup>14</sup> Id.

the defendant understood that the government's summary was not word for word what he had agreed to in the plea agreement itself and, furthermore, that he understood himself to be "'bound by all of the terms and conditions of the written Guilty Plea Agreement, whether [Assistant United States] Attorney [Sherri A.] Stephan summarized them or not.'"<sup>15</sup> Finally, at the conclusion of the Change of Plea Hearing, I found that defendant was "fully alert, competent, and capable of entering into an informed plea and that each guilty plea is a knowing and voluntary plea..."<sup>16</sup>

At the sentencing hearing held before me on February 9, 2011, defendant further affirmed that he understood he was waiving his right to collaterally challenge the judgment in this case.<sup>17</sup> Specifically, he agreed that he understood each of the limited grounds upon which he could appeal the judgment in his case, and that he had

given up entirely [his] right to take a collateral appeal. Therefore, even if [his] federal Constitutional rights are being violated by my sentence or [his] imprisonment, [he] cannot file a Petition for Writ of Habeas Corpus, and even if Attorney Roberts provided [him] with ineffective assistance as [his] lawyer, [he] cannot file a post-sentence collateral appeal on those grounds because [he has] waived or given up the right to

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<sup>15</sup> Plea Hearing Transcript at pages 46-47.

<sup>16</sup> Id. at 117.

<sup>17</sup> Transcript of Sentencing Hearing - Day 2 of 2 - Before the Honorable James Knoll Gardner[,] United States District Judge, on February 9, 2011 ("Sentencing Transcript") (Document 71) at pages 40-56.

file collateral appeals in [his] Guilty Plea Agreement.<sup>18</sup>

Sentencing Transcript at page 50.

Additionally, after confirming that he understood his waiver of his direct and collateral appeal rights, defendant was asked if he had any questions about his sentence or his appeal rights, and he replied that he did not.<sup>19</sup>

Defendant additionally asserted at the change of plea hearing that his signing of the Guilty Plea Agreement was voluntary, and that he had been neither forced nor threatened, nor offered anything in return for his having signed the plea.<sup>20</sup> Because defendant has offered no clear argument as to why the court should not rely upon his sworn statements during the hearing, “[d]efendant’s unsupported *ex post* statements that the waiver was not knowing and intelligent, without more, fail to meet the burden required to rebut the presumption of truthfulness that attaches to the statements that he made, under oath” at the sentencing hearing. Ballard, 2009 WL 637384, at \*6 (E.D.Pa. Mar. 11, 2009) (DuBois, S.J.).

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<sup>18</sup> While ineffective assistance of counsel may result in a miscarriage of justice, an ineffective assistance of counsel argument “survives only with respect to those discrete claims which related directly to the negotiation of the waiver.” United States v. Ballard, 2009 WL 637384, at \*4 (E.D.Pa. Mar. 11, 2009) (DuBois, S.J.) (citing Jones v. United States, 167 F.3d 1142, 1145 (7th Cir.1998)). All other ineffective assistance of counsel collateral attacks pursuant to § 2255 can be waived unless the enforcement of the waiver would constitute a miscarriage of justice. Akbar, 181 F.App'x at 285.

<sup>19</sup> Sentencing Transcript at page 56.

<sup>20</sup> Plea Hearing Transcript at page 38.

Based on defendant's affirmations, together with his confirmation that the Guilty Plea Agreement had been translated into Spanish for him and he had read and understood it prior to his signing it,<sup>21</sup> I conclude that defendant knowingly and voluntarily entered into the waiver of his right to collaterally challenge his sentence. Therefore, his waiver is valid.

Waivers that are entered into knowingly and voluntarily are permissible "unless they work a miscarriage of justice." Khattak, 273 F.3d at 558. The United States Court of Appeals for the Third Circuit has not articulated a definition for the phrase "miscarriage of justice" but instead directs courts to look to a variety of factors to determine if there are unusual circumstances in the case at hand that invalidate an otherwise proper waiver. United States v. Jackson, 523 F.3d 234, 242-243 (3d Cir. 2008). Specifically, courts must look to the clarity of the alleged error, its gravity and character, the impact of the error on defendant and on the government, and the extent to which defendant acquiesced in the result. Khattak, 273 F.3d at 563.

Defendant contends in Ground One that he did not "understand English, or his constitutional rights" and that he "was coerced into entering a guilty plea."<sup>22</sup> In Ground Two, he

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<sup>21</sup> Plea Hearing Transcript at pages 37-38.

<sup>22</sup> § 2255 Motion at page 7.

further contends that he pled guilty to the charges based on threats that he would receive two life sentences.

The change of plea hearing before me on August 31, 2010 reveals that defendant, while he did not speak English, was informed of his rights through an interpreter and affirmed that he understood the English-to-Spanish translation of his rights.<sup>23</sup> He further affirmed that he had read and understood Spanish translations of both the Guilty Plea Agreement and the Acknowledgment of Rights document.<sup>24</sup> In addition, defendant stated that he agreed to all the terms and conditions in both documents, and had signed them voluntarily and without coercion.<sup>25</sup>

Additionally, in grounds One and Three, defendant repeatedly asserts that he was unaware that he was pleading guilty to drug activity involving the residence at 1318 Walnut Street, in Allentown. In grounds One, Three, and Four, defendant alleges that he had no intention of taking responsibility for any activity conducted, or drugs found, there.

This, too, is contradicted by the change of plea hearing transcript. At the hearing, counsel for the government summarized the factual basis for the guilty plea, including the

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<sup>23</sup> Plea Hearing Transcript at pages 23-27.

<sup>24</sup> Id. at pages 36-38.

<sup>25</sup> Id. at page 38.

search of 1318 Walnut Street and the drugs and drug trafficking paraphernalia found there.<sup>26</sup> Defendant then averred that he had heard and understood all of the facts summarized by government counsel, and that the facts were correctly summarized.<sup>27</sup> He then admitted all the facts summarized and that he was actually guilty of the six charges against him.<sup>28</sup>

In defendant's grounds One, Two and Three, he has offered no clear argument to overcome the presumption of truthfulness which attaches to his sworn statements.<sup>29</sup> Furthermore, defendant has not established that there are unusual circumstances which invalidate his otherwise proper waiver. Thus, I find nothing to conclude that upholding this waiver would lead to a miscarriage of justice, especially in light of the extent to which the defendant acquiesced in the result.

Accordingly, I grant the government motion to dismiss grounds One, Two and Three of defendant's § 2255 Motion.

In ground Four, defendant additionally claims that his attorney Kathryn E. Roberts, Esquire, was ineffective for failing to conduct a reasonable investigation. Specifically, defendant alleges that a reasonable investigation would have revealed that

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<sup>26</sup> Plea Hearing Transcript at pages 106-113.

<sup>27</sup> Id. at page 113.

<sup>28</sup> Id. at page 114.

<sup>29</sup> § 2255 Motion at pages 6-9.

defendant had no prior drug convictions or criminal history points, and that he was not present at the 1318 Walnut Street residence at the time of the search.

While ineffective assistance of counsel may result in a miscarriage of justice, an ineffective assistance of counsel argument "survives only with respect to those discrete claims which related directly to the negotiation of the waiver." Ballard, 2009 WL 637384, at \*4 (internal quotations omitted).

Defendant's ineffective assistance of counsel claim in this case does not address the negotiation of the waiver, but rather the obligation to perform a reasonable investigation. In addition, the facts which defendant alleges a reasonable investigation would reveal were actually discussed in the plea and sentencing hearings. Defendant's movements and location the night of the search were meticulously detailed at the plea hearing as part of the factual basis of the plea agreement presented orally by government counsel,<sup>30</sup> and therefore were known and included in the proceedings. Similarly, at the sentencing hearing, there was a detailed discussion of defendant's past offenses.<sup>31</sup>

Defendant offers no argument regarding how his counsel's performance was deficient or how he was prejudiced by

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<sup>30</sup> Plea Hearing Transcript at pages 107-112.

<sup>31</sup> Sentencing Transcript at pages 23-30.

the lack of investigation, especially because the facts he alleges the investigation would have yielded, were, in fact, brought up during the course of this matter. Given the lack of unusual circumstances which might invalidate defendant's waiver, I again find nothing to indicate that upholding this waiver would lead to a miscarriage of justice. Furthermore, defendant has not satisfied the first Strickland prong, i.e., that his counsel's performance was deficient.

Accordingly, I deny ground Four of defendant's § 2255 Motion.

#### Certificate of Appealability

The Third Circuit Local Appellate Rules require that "[a]t the time a final order denying a petition under 28 U.S.C. § 2244 or § 2255 is issued, the district judge will make a determination as to whether a certificate of appealability should issue." 3d Cir. L.A.R. 22.2 (2011). A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Here, I conclude that, because defendant has not met statutory requirements to have his case heard, no reasonable jurist could find this procedural ruling debatable. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604,

146 L.Ed.2d 542, 555 (2000). Accordingly, a certificate of appealability is denied.

#### CONCLUSION

For all the foregoing reasons, I grant the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 and dismiss grounds One, Two, and Three of defendant's pro se Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. In addition I deny on the merits defendant's claim of ineffective assistance of counsel contained in ground Four of his § 2255 Motion. Moreover, a certificate of appealability is denied.

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

UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. 2010-cr-00193
vs.	)	
	)	Civil Action
FELIX ALVAREZ,	)	No. 2012-cv-00894
	)	
Defendant	)	

O R D E R

NOW, this 25<sup>th</sup> day of March, 2015, upon consideration of the following documents:

- (1) Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, which motion was filed by defendant Felix Alvarez pro se on March 23, 2012 (Document 68); and
- (2) Government's Motion to Dismiss Petition [sic] Under 28 U.S.C. § 2255, which motion was filed on February 22, 2013 (Document 73);

upon consideration of the pleadings, exhibits, and record papers; and for the reasons articulated in the accompanying Opinion,

IT IS ORDERED that the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 is granted.

IT IS FURTHER ORDERED that grounds One, Two and Three contained in the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody are dismissed without a hearing.

IT IS FURTHER ORDERED that ground Four alleging ineffective assistance of counsel as alleged in the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is denied.

IT IS FURTHER ORDERED that a certificate of appealability is denied.

IT IS FURTHER ORDERED that the Clerk of Court shall close both Criminal Action number 2010-cr-00193 and Civil Action number 2012-cv-00894 for statistical purposes.

BY THE COURT:

/s/ JAMES KNOLL GARDNER  
James Knoll Gardner  
United States District Judge