

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

<u>UNITED STATES OF AMERICA</u>	:	
	:	<b>CRIMINAL ACTION NO. 11-727-01</b>
v.	:	
	:	
<u>KERMIT B. GOSNELL</u>	:	<b>CIVIL ACTION NO. 15-6808</b>
	:	

**MEMORANDUM**

**Rufe, J.**

**October 26, 2017**

Defendant Kermit Gosnell pleaded guilty to one count of conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846, ten counts of distribution of controlled substances and aiding and abetting in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2, and one count of maintaining a place for the illegal distribution of controlled substances in violation of 21 U.S.C. § 856. The charges related to Defendant’s operation of a medical office at which customers paid for prescriptions issued by him for oxycodone and other controlled substances that were not issued for legitimate medical purposes and not in the usual course of professional medical practice. The Court sentenced Defendant within the Sentencing Guidelines to 360 months of imprisonment and a \$50,000 fine.<sup>1</sup>

Defendant filed a direct appeal *pro se*. The Court of Appeals granted the government’s motion to enforce the appellate waiver in the plea agreement and summarily affirmed, and the Supreme Court denied a petition for a writ of *certiorari*. Defendant now seeks relief pursuant to 28 U.S.C. § 2255, asserting that he was coerced to plead guilty and waive the right to appeal, that his counsel was ineffective, that the prosecution failed to disclose exculpatory evidence, that he

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<sup>1</sup> The sentence was structured to run concurrently to three consecutive life sentences imposed by a Pennsylvania state court following Defendant’s conviction on murder and other charges related to illegal abortions performed in his medical practice.

had a justification defense, that the conviction was obtained by the illegal seizure of his life savings, and that inflammatory media attention created prejudice.<sup>2</sup> Because Defendant gave up his ability to raise most of these claims, and because those claims he may raise are without merit, the petition will be denied without a hearing.

## **I. STANDARD OF REVIEW**

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a prisoner serving a sentence in federal custody may petition the court which imposed the sentence to vacate, set aside, or correct the sentence by asserting 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.”<sup>3</sup> Relief under AEDPA is extraordinary and “generally available only to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.”<sup>4</sup> Claims of ineffective assistance of trial and appellate counsel are properly raised in a § 2255 motion.<sup>5</sup>

## **II. DISCUSSION**

### *A. The Guilty Plea Agreement Waiver*

Defendant pleaded guilty to the charges against him pursuant to a written guilty plea agreement. The plea agreement included a comprehensive waiver of rights to appeal or collaterally attack the conviction or sentence, limiting Defendant’s ability to raise any such

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<sup>2</sup> Some of these arguments relate to the state-court prosecution.

<sup>3</sup> 28 U.S.C. § 2255(a).

<sup>4</sup> *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1989).

<sup>5</sup> *Massaro v. United States*, 538 U.S. 500, 504 (2003) (“[A]n ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.”).

challenges unless the sentence exceeded the statutory maximum, unreasonably exceeded the Guidelines range, or the sentencing judge imposed an upward departure or upward variance under the Sentencing Guidelines. The plea agreement further provided that “the defendant may file a petition for collateral relief under 28 U.S.C. § 2255, but may only raise a claim that the attorney who represented the defendant at the time of the execution of this agreement and the entry of the defendant’s guilty plea provided constitutionally ineffective assistance during any part of the representation.”<sup>6</sup>

At the change-of-plea hearing on July 9, 2013, Defendant agreed to the terms of the written plea agreement, including the waiver. The Court reviewed the waiver provisions of the plea agreement, which had been summarized by the Assistant United States Attorney (“AUSA”):

The Court: Now, you also have appellate rights which are greatly affected by a guilty plea. And do you understand that if you went to trial and then were found guilty at trial, you could appeal that finding of guilt to the Third Circuit Court of Appeals, which could set aside or modify your finding of guilt or grant you a new trial?

The Defendant: Yes, I understand.

The Court: Do you understand that the plea agreement that you signed, which will be binding on you if you enter this guilty plea today, sharply limits even those appellate rights?

And, specifically, this plea agreement states with very limited exceptions that you are giving up the right to file any appeal in this case or any later challenge, such as a habeas motion to vacate, set aside, or correct your sentence. Do you understand that?

The Defendant: I understand.

The Court: Now, there are certain exceptions to that blanket waiver of appeal that appear in, is it paragraph 12? Let’s see. Let’s turn to that now. I’d like to review again. It’s paragraph

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<sup>6</sup> Plea Agreement at ¶ 8(c) [Doc. No. 115].

eight, page six. Even though [the AUSA] did read the relevant portions of paragraph eight, I'd like to have you turn to that and follow along with me.

The first paragraph that is included in number eight on page six is the blanket waiver. "In exchange for the promises made by the government in entering this plea agreement" you are stating that "voluntarily and expressly waive all rights to appeal or collaterally attack your conviction, your sentence, or any other matter relating to this prosecution." And by "collateral attack" we mean 28, United States Code, Section 2255, otherwise known as a habeas corpus motion. Do you understand that?

The Defendant: I understand.

The Court: But notwithstanding that blanket waiver, as [the AUSA] recounted on this record, if the government appeals from the sentence that I will eventually impose, you may file a direct appeal of your sentence, not losing any appellate rights, from your sentence[,] that is.

But if the government chooses not to appeal, then you may file a direct appeal but raise only the claims appearing in paragraph 8B(1), (2), and (3), and they are clearly stated there, as well as [the AUSA] clearly read them verbatim I believe.

If your sentence on any count of conviction exceeds the statutory maximum for that count, then that would be an illegal sentence, and you have a right to appeal that and you should.

You may challenge a decision by the judge to impose an upward departure from the sentencing guidelines. Whatever it is computed, the sentencing guidelines to be, which we don't know yet, if I impose an upward departure from that, you may appeal. And if I impose an upward variance, that is a discretionary sentence, above the final sentencing guideline range that I have also determined. Do you understand you may appeal that?

The Defendant: I understand.

The Court: But, you have to look at page seven because you're limited to those issues on appeal if such conditions exist to appeal.

And no issue may be presented by you on direct appeal other than those that have been described. Do you understand that?

The Defendant: I understand.

The Court: However, there's another exception to your blanket waiver provision, and that appears in paragraph 8C on the top of page seven.

In that case you may file a petition for collateral relief or a habeas corpus motion, but you may only raise a claim in that motion that the attorney who represented you at the time this plea agreement was executed and the guilty plea entered provided constitutionally ineffective assistance during any part of the representation.

The Defendant: I understand.

The Court: Do you understand that?

The Defendant: I understand.

The Court: So do you understand all the ways in which the plea agreement limits your appellate rights if you enter this guilty plea today?

The Defendant: I understand.<sup>7</sup>

In determining the validity of a waiver, the Court considers “(1) whether the waiver of the right to appeal [the] sentence was knowing and voluntary; (2) whether one of the specific exceptions set forth in the agreement prevents the enforcement of the waiver . . . ; and (3) whether enforcing the waiver would work a miscarriage of justice.”<sup>8</sup> Here, the written agreement and the lengthy plea colloquy establish that the waiver was knowing and voluntary.<sup>9</sup> The waiver carved

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<sup>7</sup> Tr. 7/9/13 at 28-31.

<sup>8</sup> *United States v. Goodson*, 544 F.3d 529, 536 (3d Cir. 2008) (citation and quotations omitted).

<sup>9</sup> See *United States v. Mabry*, 536 F.3d 231, 237–38 (3d Cir. 2008) (“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.”); *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) (appeal waiver knowing and voluntary where court complied with Rule 11 of Federal Rule of Criminal

out claims of ineffective assistance of counsel with regard to entry of the plea agreement and the guilty plea itself, and the Court will examine whether Defendant is entitled to relief on that ground. The exception within the waiver is essentially identical to the limited situations in which a miscarriage of justice may result, such as where “constitutionally deficient lawyering prevented [the defendant] from understanding his plea, where the defendant should have been permitted to withdraw his guilty plea, or where the waiver itself was the product of alleged ineffective assistance of counsel.”<sup>10</sup> Therefore, only Defendant’s claim that counsel was ineffective with regard to the guilty plea provides a possible basis for relief.

*B. Ineffective Assistance of Counsel*

The Sixth Amendment guarantees to each criminal defendant the effective assistance of counsel. Whether counsel was ineffective is evaluated under the familiar guidelines of *Strickland v. Washington*. To prevail on an ineffective assistance of counsel claim:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.<sup>11</sup>

“A defendant may withdraw a guilty plea based on ineffective counsel only if (1) the defendant shows that his attorney’s advice was under all the circumstances unreasonable under

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Procedure requiring that the Court address defendant and determine he understands the terms of the provision of a plea agreement waiving the right to appeal or collaterally attack the sentence).

<sup>10</sup> *United States v. Spivey*, No. CR 10-59-03, 2016 WL 1639013, at \*3 (E.D. Pa. Apr. 25, 2016) (internal quotation marks and citations omitted).

<sup>11</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

prevailing professional norms, [and that (2)] he suffered sufficient prejudice from his counsel's errors."<sup>12</sup>

At the change-of-plea hearing, the Court questioned whether there was any reason that Defendant could not understand the proceedings, and questioned whether Defendant had any cause for dissatisfaction with his counsel:

The Court: Do you feel you've had enough time to talk this matter over with your attorneys?

The Defendant: Yes, I do.

The Court: And so far, have they done everything for you that you wanted them to do in this matter?

The Defendant: Yes, they have.

The Court: And are you satisfied with their legal assistance?

The Defendant: And I am satisfied with their legal assistance.

The Court: Thank you. Now, did you voluntarily sign the plea agreement?

The Defendant: I did, indeed.<sup>13</sup>

Defendant argues that he was "coerced" to plead guilty, but he fails to offer any facts to support this statement.<sup>14</sup> He argues that he intended only to take responsibility for inadequate supervision that led to illegal abuses by the office staff, and that he was depressed as a result of the criminal proceedings. There is nothing in the record that would lead to the conclusion that counsel was ineffective or that Defendant was prejudiced in any way in deciding to plead guilty.

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<sup>12</sup> *United States v. Johnson*, No. 14-3540, 2015 WL 1321515, at \* 4 (3d Cir. Mar. 25, 2015) (internal quotation marks omitted; alteration in original).

<sup>13</sup> Tr. 7/9/13 at 8-9 [Doc. No. 116].

<sup>14</sup> At the hearing, Defendant affirmed that he had not been made any promises outside of the plea agreement, that no one had forced, threatened, or intimidated him into pleading guilty, and that he had agreed to plead guilty of his own free will. *Id.* at 15.

Defendant also argues that counsel was ineffective between the guilty plea and sentencing by failing to develop evidence of mitigation, and that the prosecution failed to disclose favorable evidence. To the extent that these claims could be brought within the exception to the waiver, he does not cite any evidence that relates to a guilty plea to the charges against him – information regarding substance abuse in underserved populations, for example, was not relevant to the charges to which he freely pleaded guilty as it goes only to his possible motivations, not to the fact that he violated federal laws concerning the distribution of controlled substances.

Finally, the Court is persuaded that there has been no miscarriage of justice. Defendant is highly educated and intelligent, and based upon the entire record, the Court has no doubt that Defendant knowingly and voluntarily entered the guilty plea. Indeed, the Court took pains at the hearing to ensure that Defendant was pleading guilty because he was guilty. After the AUSA set forth in detail the factual basis for the guilty plea, the Court questioned Defendant:

The Court: All right. Mr. Gosnell, you were listening and I think you were following along in your copy of the memo. Do you agree that the government has accurately summarized the facts of this matter?

The Defendant: I believe that the government has accurately reflected the — let me see how it's termed.

(Pause in proceedings)

The Defendant: — the factual basis for the plea.

The Court: And then do you fully admit that you committed the acts that are represented in these facts?

The Defendant: This is an accurate representation of the events that would be used in the —

The Court: That's not my question.

The Defendant: What is your question?

The Court: So, you'll have to redirect and listen to my question. Do you fully admit that you committed the acts that are represented in these facts?

The Defendant: I committed. Yes, I admit to committing the acts that are represented in these —

The Court: And do you then admit that you're guilty of the crimes?

The Defendant: I've agreed to plead guilty to —

The Court: But I'm asking you —

The Defendant: — these acts.

The Court: — if you are guilty of these crimes.  
(Pause in proceedings)

The Defendant: Am I guilty of —

Ms. Cherniack:<sup>15</sup> If I could just have a moment, Your Honor?

The Court: Please.  
  
(Pause in proceedings)

The Defendant: I understand and agree to plead guilty to the elements of the offenses.

The Court: And I'm asking you are you pleading guilty because you are, in fact, guilty of these crimes as represented in these facts? This is not a nolo contendere plea.

Ms. Cherniack: No.

The Defendant: I understand it's not a nolo contendere.  
  
(Pause in proceedings)

The Defendant: Yes, I'm accepting responsibility for these acts.

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<sup>15</sup> Emily B. Cherniack, Esquire, of the law office of Jack McMahon represented Defendant at the change-of-plea hearing.

The Court: And that you are further admitting that you committed the acts represented here?

The Defendant: I committed the acts that are represented.

The Court: And, therefore, you are admitting, and this is a question I'm posing to you, that you are guilty of the crimes?

The Defendant: I plead guilty for these crimes.<sup>16</sup>

### III. CONCLUSION

Upon careful consideration of the parties' submissions and the record in this case, the Court concludes that there has been no showing of prejudice to Defendant or a miscarriage of justice. The motion will be denied without a hearing.<sup>17</sup> Because Defendant has not made a substantial showing of the denial of a constitutional right, a certificate of appealability shall not issue.<sup>18</sup> An order will be entered.

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<sup>16</sup> Tr. at 45-47.

<sup>17</sup> "In evaluating a federal habeas petition, a District Court must hold an evidentiary hearing '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" *United States v. Kenley*, 440 F. App'x 78, 80 (3d Cir. 2011). If the record as a whole "conclusively show[s] that the prisoner is entitled to no relief," a court is not required to hold an evidentiary hearing. *United States v. Dawson*, 857 F.2d 923, 927 (3d Cir. 1988) (quoting *Gov't of the V.I. v. Bradshaw*, 726 F.2d 115, 117 (3d Cir. 1984)) (internal quotation marks omitted). Here, the Court has assumed the truth of the facts set forth in Defendant's motion and finds that the record as a whole conclusively establishes that Defendant is entitled to no relief.

<sup>18</sup> 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

