

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

LAWRENCE PIROLLO : CIVIL ACTION  
 :  
 v. : NO. 97-1915  
 :  
 UNITED STATES OF AMERICA : (Criminal No. 92-133-1)

M E M O R A N D U M

WALDMAN, J.

August 11, 1997

I. BACKGROUND

Petitioner was charged in fourteen counts of a 116 count indictment against multiple defendants with the manufacture and distribution of multi-kilogram quantities of methamphetamine and conspiring to do so over a two-year period. The indictment charged that petitioner and codefendant John Gatto were partners and organizers, supervisors or managers in a substantial drug trafficking operation. Petitioner was also charged with carrying and using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c).

Pursuant to an agreement with the government, petitioner pled guilty on November 4, 1992 to one count charging that he engaged in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848. The government agreed to a dismissal of all other charges against petitioner, including the firearm charge with a mandatory consecutive sentence, and not to prosecute him further for any offenses related to the CCE activity prior to the agreement except any murder, attempted murder or crime of physical violence. Petitioner was sentenced

to a period of 240 months of imprisonment, the minimum sentence mandated by statute, to be followed by five years of supervised release.

Presently before the court is petitioner's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. Petitioner asserts that his retained trial counsel provided ineffective assistance and his guilty plea was involuntary. The court has reviewed petitioner's submissions and pertinent court records in the criminal case against petitioner and his codefendants and in the related case against George Williams. For the reasons that follow, the petition will be denied.

## **II. DISCUSSION**

### **A. Voluntariness of Petitioner's Guilty Plea**

Petitioner states that he involuntarily pled guilty to a crime he had not committed. Petitioner contends that the government's willingness to enter into a plea agreement with him only on condition that codefendants Anthony Gatto and John Gatto also pled guilty combined with a government promise of lenient treatment for his brother-in-law rendered petitioner's plea involuntary.

The government acknowledges that its willingness to enter plea agreements with petitioner, John Gatto and Anthony Gatto was contingent upon all three pleading guilty. One codefendant had absconded and the remaining 19 co-defendants had all pled guilty. The government had fully prepared and was ready

to proceed when on the proverbial eve of trial petitioners and Messrs. Gatto decided to seek plea bargains. Petitioner's brother-in-law, Ronald Serchia, was a defendant in an unrelated drug case which petitioner claims the government promised to drop. On a similar claim by petitioner's nephew Anthony, the court credited the testimony of the prosecuting attorneys in this case and found that the government had made no such promise.<sup>1</sup>

#### 1. Procedural Default

A petitioner seeking relief from an alleged error or defect in connection with his sentence which was not raised on direct appeal must satisfy the cause and prejudice standard articulated in United States v. Frady, 456 U.S. 152 (1982). United States v. Essiq, 10 F.3d 968, 979 (3d Cir. 1993). Ineffectiveness of counsel will constitute "cause" for a petitioner's failure to challenge the voluntariness of his guilty plea on direct appeal only if it is an independent constitutional violation. Oliver v. United States, 961 F.2d 1339, 1342 (7th Cir.), cert. denied, 113 S.Ct. 469 (1992).<sup>2</sup> "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does

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1. See U.S. v. Gatto, 1994 WL 570821 (E.D. Pa. Oct. 19, 1994). The case against Mr. Serchia never did proceed to trial. Trial was deferred because of his health problems and the case was dismissed upon his death.

2. Petitioner is not required to show "cause and prejudice" for a failure to raise an ineffective assistance of counsel claim on direct appeal. United States v. DeRewal, 10 F.3d 100, 104-05 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994).

not constitute cause for procedural default," however, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Murray v. Carrier, 477 U.S. 478, 486-87, 496 (1986).

Petitioner must also show that the alleged error resulted in actual prejudice, a showing even more stringent than that required to establish plain error on appeal. Frady, 456 U.S. at 166, 168. A petitioner must show more than "a possibility of prejudice," but rather must demonstrate that any error worked to his "actual and substantial disadvantage." Id. at 170 (emphasis in original).

Petitioner does not allege that he argued on direct appeal that his decision to plead guilty was involuntary. Rather, petitioner states that had his counsel notified the court of the package nature of the plea bargains, he "would have made a record on a potentially powerful issue on appeal."

A petitioner can establish cause by showing that some "objective factor" prevented him from satisfying an applicable procedural requirement. See Murray, 477 U.S. at 488. Such an objective factor, however, must be one that is "external to the defense" such as "a showing that the factual or legal basis for a claim was not reasonably available to counsel" or "that some interference by officials made compliance impracticable." Id. (citations and internal quotations omitted).

Petitioner has failed to show the existence of such an "objective factor." He has failed to establish cause for his failure to raise this claim on direct appeal or to make the requisite showing of prejudice. Even assuming this claim were cognizable, it also fails on the merits.

## 2. Merits

To set aside a guilty plea under § 2255, a petitioner must show that the plea hearing was tainted by "'a fundamental defect which inherently results in a complete miscarriage of justice'" or "'an omission inconsistent with the rudimentary demands of fair procedure.'" United States v. Farley, 72 F.3d 158, 162 (D.C. Cir. 1995) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

Even assuming petitioner's claim is not procedurally barred, the government's failure to inform the court that its willingness to enter into a plea bargain with petitioner was contingent upon the two remaining codefendants also pleading guilty is not jurisdictional or of constitutional magnitude. Even if the failure amounted to a violation of Rule 11, petitioner has not demonstrated that this resulted in "a complete miscarriage of justice" or that the guilty plea hearing was "inconsistent with the rudimentary demands of fair procedure." Petitioner contends that his counsel's advice to "admit to the facts that established guilt" amounted to a due process violation because counsel knew petitioner maintained his innocence.

Petitioner has not demonstrated that his guilty plea was involuntary, that his plea hearing was fundamentally unfair or that any defect may have resulted in the conviction of an innocent person or a complete miscarriage of justice.

Package plea bargains or the offer of lenient treatment for some third-party are not constitutionally impermissible. See United States v. Clements, 992 F.2d 417, 419 (2d Cir.), cert. denied, 510 U.S. 919 (1993); United States v. Seligsohn, 981 F.2d 1418, 1426 (3d Cir. 1992); United States v. Pollard, 959 F.2d 1011, 1020-21 (D.C. Cir.), cert. denied, 506 U.S. 915 (1992); United States v. Marquez, 909 F.2d 738, 741-42 (2d Cir. 1990), cert. denied, 498 U.S. 1084 (1991); Politte v. United States, 852 F.2d 924, 930-31 (7th Cir. 1988); United States v. Wheat, 813 F.2d 1339, 1405 (9th Cir. 1987), aff'd, 486 U.S. 153 (1988). Where a handful of remaining defendants in a broad conspiracy case decide to explore the prospect of plea bargains only after the government has amassed all of its evidence and has fully prepared to proceed, it is not unreasonable for the government to eschew any arrangement which would not obviate the need for a trial.

An offer to execute plea bargains on an "all or none" basis is not a "promise." Whether it is a "condition" of each plea agreement or merely a negotiating position and a condition precedent to an agreement may be fairly debated. In any event, the better practice is to alert the court to the package feature of a plea bargain. See Clements, 992 F.2d at 419 ("preferred

practice" is to advise court of requirement that all defendants or none plead guilty). A failure to so notify the court, however, does not entitle a defendant at any subsequent time to withdraw his guilty plea. Rather, the focus remains on whether a particular plea was voluntary. See Marquez, 909 F.2d at 742; United States v. Daniels, 821 F.2d 76, 79-80 (1st Cir. 1987).

Presumably, the government offers some benefit or inducement with any plea bargain. That one pleads guilty to obtain such a benefit does not render the plea involuntary. Invariably, almost any criminal defendant will feel some pressure when having to weigh the benefits of pleading guilty and the risks of proceeding to trial. If such inherent pressure which results from the offer of a plea bargain constituted improper coercion, virtually any guilty plea pursuant to a plea agreement could be upset at the whim of the defendant. That a decision to plead guilty is motivated, in whole or in part, by a desire to help someone else no more renders a plea involuntary than one motivated solely by a less altruistic desire only to help oneself. Marquez, 909 F.2d at 742.

Petitioner's plea is facially voluntary and valid. See Zilch v. Reid, 36 F.3d 317, 320-21 (3d Cir. 1994). Petitioner represented that he read the plea agreement, reviewed every part of it with his attorney and "freely and voluntarily agreed to it." Petitioner stated under oath that he understood the charges against him and the rights he was waiving, that there was a

factual basis for his guilty plea and that he was not changing his plea because of any threat, coercion or undisclosed promise.

Petitioner has not made the type of specific and credible presentation to demonstrate coercion, id., which might overcome the clear appearance of voluntariness from his presumptively truthful responses at the plea hearing. See Farley, 72 F.3d at 163-64; Clements, 992 F.2d at 418-20; United States v. Morrow, 914 F.2d 608, 613-14 (4th Cir. 1990). A defendant's "declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). See also United States v. Gonzales, 970 F.2d 1095, 1100 (2d Cir. 1992) (claim of innocence contradicted by unequivocal statements at plea proceeding not credible); United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988) (defendant bears "heavy burden" to show statements made under oath at plea colloquy were false); United States v. McKoy, 645 F.2d at 1039 (defendant must offer tenable explanation for about-face on acknowledgment of guilt or guilty pleas would be reversible at whim of defendant).

**B. Ineffective Assistance of Counsel**

Effective assistance of counsel means adequate representation by an attorney of reasonable competence. Government of the Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). To show ineffective assistance of counsel, it must appear that a defendant was prejudiced by the performance of counsel which was deficient and unreasonable under prevailing

professional standards. Strickland v. Washington, 466 U.S. 668, 686-88 (1984); Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). Counsel's conduct must have so undermined the proper functioning of the adversarial process that the result of the pertinent proceedings cannot be accepted as reliable, fair and just. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Strickland, 466 U.S. at 686; United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989).

To show prejudice when challenging a guilty plea on the ground of ineffective assistance of counsel, a petitioner must show that there is a reasonable probability that but for errors of counsel, he would not have pled guilty and would have proceeded to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for the reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. What investigatory decisions are reasonable necessarily depends on a defendant's strategic choices and the information provided by him. Id.

1. Failure to Interview Potential Witnesses

Petitioner claims that his counsel's failure to interview his codefendants constituted ineffective assistance because some of these individuals would have testified that

petitioner did not organize, manage or supervise them, thus undercutting the government's ability to establish that he acted in concert with at least five others with respect to whom he occupied a management position, as required to prove a violation of 21 U.S.C. § 848.<sup>3</sup> Petitioner submits declarations of Anthony Gatto, Angelo Fugarino, Frank Baldino and Bernard Centrella that they were never employed, supervised, managed or organized by petitioner.

These declarations long post-date petitioner's plea and are directly contradicted by petitioner's sworn admissions at his plea hearing as well as statements of some of the declarants in connection with their own guilty pleas. Petitioner acknowledged under oath that he had "organized and then supervised or managed the activities of more than five other people, including Angelo Fugarino, Asa Blake, Phil Whelan, Frank Baldino, Joseph Fugarino and Bernard Centrella." When pleading guilty, Anthony Gatto stated that he received quantities of methamphetamine from petitioner and John Gatto to adulterate or "cut" and then return to them. In connection with his guilty plea, Frank Baldino acknowledged that he stored methamphetamine for petitioner and John Gatto and acted at their direction. At the time of his guilty plea, Angelo Fugarino acknowledged that he took monthly deliveries of methamphetamine from petitioner at petitioner's

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3. Petitioner does not deny that he was involved in a series of drug transactions from which he derived substantial income. See 21 U.S.C. § 848(c).

direction to give to others to store, adulterate and redistribute. Petitioner also submits the declaration of John Gatto that he did not organize, manage or supervise any of his codefendants. This is flatly contradicted by his sworn statements at his guilty plea hearing, and by admissions of Angelo Fugarino, Frank Baldino and other codefendants in connection with their guilty pleas.<sup>4</sup> These declarants give no tenable explanation for their contradiction of the presumptively honest statements presented to the court with their own guilty pleas. See Blackledge, 431 U.S. at 73-74; Gonzales, 970 F.2d at 1100; Rogers, 848 F.2d at 168; McKoy, 645 F.2d at 1039.

Moreover, there is no showing that these codefendants were willing on November 4, 1992 to repudiate and forfeit the benefits of their plea agreements to testify for petitioner. Angelo Fugarino and Frank Baldino, among others, promised to cooperate with and testify for the government and benefitted from government motions pursuant to § 3553(e) and § 5K1.1.

Even assuming their attorneys would have acceded to requests for interviews, counsel's decision not to seek interviews of codefendants who had agreed to cooperate against the remaining defendants was not unreasonable.

Petitioner also claims that his counsel's failure to interview unspecified defense and government witnesses

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4. John Gatto, who is incarcerated with petitioner at F.C.I. Allenwood, has filed a similar § 2255 petition with language virtually identical to that in petitioner's filing.

constituted ineffective assistance, but fails to elaborate at all on this claim. Petitioner cannot demonstrate that his counsel was ineffective for failing to interview unidentified witnesses or making some showing of what their testimony would have been.<sup>5</sup>

2. Contingent Nature of Plea Bargain and Advice to Plead Guilty

Petitioner contends that counsel was ineffective for failing to disclose to the court that the government's plea bargain was contingent on all remaining defendants pleading guilty and for advising petitioner to plead guilty under such circumstances. Petitioner contends that but for these alleged deficiencies, he would not have pled guilty.

Whether or not disclosed by a defendant's counsel, a guilty plea is not involuntary whenever it is entered pursuant to a package deal. Petitioner does not claim that his attorney had information about the plea bargain which was unknown to petitioner. Petitioner does not explain how the disclosure by counsel of information already known to petitioner would have resulted in a decision by him to proceed to trial. Whether in response to an "all or none" offer or otherwise, there is no showing that counsel acted unreasonably and deficiently in advising petitioner to plead guilty.

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5. This is not a situation where a defendant claims his attorney withheld information from him or misadvised him of pertinent facts, law or potential legal consequences of a plea. Petitioner presumably knew whom counsel had or had not interviewed when petitioner stated under oath at his plea hearing that he was satisfied with his attorney's representation and advice.

Many codefendants pled guilty pursuant to agreements which obligated them to testify for the government against petitioner and his remaining codefendants. George Williams, a cooperating defendant in a related case, was prepared to testify that he was engaged by petitioner and John Gatto to manufacture kilogram quantities of pure methamphetamine for subsequent distribution. The government also was prepared to present the testimony of law enforcement officers who conducted physical surveillance of the conspirators and who seized 12½ pounds of methamphetamine linked to petitioner as well as drug records from a clandestine laboratory detailing the manufacture of at least 15 pounds of pure methamphetamine by Mr. Williams for petitioner and John Gatto. The government also had evidence of over 300 intercepted conversations which, in conjunction with simultaneous physical and video surveillance, substantiated the alleged drug distribution network encompassing manufacture through retail street sales.

Petitioner has not shown that he was prejudiced from his counsel's failure to notify the court of the contingent nature of the government's plea offer or his advice to petitioner to plead guilty. It does not appear from petitioner's submissions and the pertinent record that there is any reasonable probability he would have proceeded to trial but for counsel's failure to advise the court that petitioner's plea was "wired" to pleas of codefendants. See Farley, 72 F.3d at 164. Counsel's advice to petitioner to plead guilty was patently not

professionally deficient and unreasonable in view of the government's evidence, the posture of cooperating codefendants at the time and the practical choices facing petitioner as a result.

### **III. CONCLUSION**

Even assuming petitioner's claim that his guilty plea was involuntary is cognizable in this action, he has not shown that it was. Petitioner has not shown that he received ineffective assistance of counsel. Accordingly, petitioner's § 2255 petition will be denied. An appropriate order will be entered.

