

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

<b>UNITED STATES OF AMERICA</b>	<b>:</b>	<b>CIVIL ACTION</b>
		<b>96-5046</b>
<b>vs.</b>	<b>:</b>	
<b>EDWIN RAMOS</b>	<b>:</b>	<b>CRIMINAL ACTION</b>
		<b>90-00431-06</b>

**MEMORANDUM**

**DuBOIS, J.**

**September 2, 1997**

By Memorandum and Order dated July 16, 1997, the Court dismissed or denied all claims, excepting two, raised by petitioner Edwin Ramos in his Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence. The Court scheduled a hearing for the limited purpose of further developing the factual record with respect to the two claims which were not dismissed or denied; the hearing was held on August 8, 1997, and continued on August 15, 1997. In addition, the Court permitted the parties to submit supplemental memoranda of law on the remaining issues.

On August 8, 1997 the Court received evidence on petitioner's claim that his sentencing counsel was ineffective for failing to appeal his sentence. The Court concludes, after considering that evidence, that petitioner's counsel was not ineffective for failing to appeal petitioner's sentence; that claim will therefore be denied. On August 15, 1997 the Court received evidence regarding petitioner's claim that the Government breached the Plea Agreement when, in reiterating a stipulation contained in the Plea Agreement, it stated at the March 21, 1991 Change

of Plea Hearing that petitioner had accepted responsibility, but then argued to the contrary at sentencing. This claim has no merit. Because the Court finds that petitioner has not shown cause and prejudice to excuse the failure to raise that claim on direct appeal, the Court will dismiss that claim.<sup>1</sup>

### I. Ineffectiveness of Counsel

At an evidentiary hearing on August 8, 1997, the parties presented evidence with respect to the question of whether petitioner's sentencing counsel was ineffective for failing to file a notice of appeal. Harold M. Kane, petitioner's retained attorney for his guilty plea and sentencing, testified for the Government at the hearing. Petitioner also testified at that hearing.

According to petitioner, immediately after his sentencing, he asked Mr. Kane whether he was going to file a notice of appeal and Mr. Kane answered affirmatively. Aug. 8, 1997, Tr. at 40 ("As soon as he imposed the 23 years I turned to Mr. Kane and told him, are you going to appeal this and he told me yes."); see also id. at 51. Petitioner also testified that shortly after sentencing he telephoned Mr. Kane from prison and told him there were many issues which he wanted to appeal. Id. at 41-42. Mr. Kane, petitioner testified, replied "We made out great. You could have got life. If you appeal this, you will get life." Id. at 42. After the telephone conversation, according to petitioner, he did not believe that Mr. Kane intended to file a notice of appeal. Id. at 51-52, 53.

Petitioner argues, as a result, that his attorney promised to perfect an appeal but did not,

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<sup>1</sup>The fact of the case are more completely set forth in the Memorandum dated July 16, 1997. See Edwin Ramos v. United States, No. 96-5046, -- F. Supp. --, slip op. (E.D. Pa. July 16, 1997).

and therefore was ineffective. However, the Court does not credit petitioner's testimony.<sup>2</sup>

Although petitioner testified that immediately after his sentence was imposed he desired to appeal and therefore asked his attorney whether he intended to appeal, the Court finds that such testimony is inconsistent with contemporaneous actions taken by petitioner. Petitioner's sentencing guideline range was life imprisonment. The Government filed a downward departure motion, and argued for only "the most minimal departure." Jan. 22, 1993, Tr. at 549. At sentencing, the Court granted the Government's motion and sentenced defendant to twenty-three years--what it believed to be a "fair" sentence, Jan. 22, 1993, Tr. at 574. Immediately following imposition of a sentence, while still on the record, petitioner said to the Court, "I am grateful for your leniency. Thank you very much." Id. at 573.

Moreover, the Court does not credit petitioner's testimony that Mr. Kane told petitioner he would get a life sentence if he appealed. At the hearing, Mr. Kane testified that he did not make this statement because he knew that it was not a correct statement of the law. Aug. 8, 1997, Tr. at 57.

Additionally, petitioner's statement that, immediately after the January 22, 1993 sentencing, he wished to appeal many issues is inconsistent with his subsequent actions. Compare Hannon v. Maschner, 981 F.2d 1142, 1144 (10th Cir. 1992) (affirming district court's finding that defendant had not waived his right to appeal where defendant "had been trying to assert his right to appeal almost from the day he was incarcerated"). Although on January 31,

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<sup>2</sup>In making its assessment of petitioner's credibility on this issue the Court did not rely upon the fact that at the August 15, 1997 hearing petitioner admitted to lying to the Government about a grenade attack on a police station and his assistance to the leader of the conspiracy, his brother, Richard Ramos, in his attempt to avoid apprehension.

1994 petitioner appealed an order denying his motion for return of property, petitioner did not say or do anything on or before that date with respect to an appeal of his sentence. And, even though petitioner was aware that other members of his family and the conspiracy--Richard, Maria and Elizabeth Ramos--had filed notices of appeal in March 1994, petitioner did not make any effort to appeal his case. In fact, in his original petition under 28 U.S.C. § 2255 filed July 15, 1996, prepared by new counsel, petitioner did not claim that his attorney at sentencing failed to file a notice of appeal regarding any sentencing issues. That issue was not raised until petitioner's counsel filed a reply (described as a "Traverse") to the Government's response to his petition, in which the claim was noted in one sentence. Id. at 49-50.

Although the Court does not find that Mr. Kane promised to file a notice of appeal and then failed to do so, this does not end the inquiry. In order to succeed on this issue defendant need only show that he did not knowingly, voluntarily and intelligently consent to counsel's failure to perfect an appeal. United States v. Stearns, 68 F.3d 328, 330 (9th Cir. 1995). As the Court stated in its prior opinion addressing petitioner's claim that counsel was ineffective in failing to perfect his appeal,

In analyzing whether the performance of petitioner's counsel fell below an objective standard of reasonableness, the Court must decide whether counsel "explain[e]d the advantages and disadvantages of an appeal, advise[d] the defendant as to whether there [we]re meritorious grounds for an appeal, and inquire[d] whether the defendant want[ed] to appeal." Romero v. Tansy, 46 F.3d 1024, 1031 (10th Cir.) (citations omitted), cert. denied, 115 S. Ct. 2591 (1995). These obligations are not discharged unless the petitioner makes a voluntary, knowing and intelligent waiver of his right to appeal. Id.

Edwin Ramos v. United States, No. 96-5046, -- F. Supp. --, slip op. at 14 (E.D. Pa. July 16, 1997). After closely considering Mr. Kane's testimony, the Court concludes that he acted appropriately.

Mr. Kane testified that he had no specific recollection of his conversations with defendant after the January 22, 1993 sentencing. Aug. 8, 1997, Tr. at 8. This is not surprising, the Court finds, considering that the event in question took place over four and a half years ago and Mr. Kane testified that he has represented hundreds of clients in the interim, id at 11-12. Under the circumstances, it is entirely appropriate for the Court to look to the customary practice of Mr. Kane at the pertinent time, January of 1993. Brim v. Solem, 693 F.2d 44, 45 (8th Cir. 1982) (relying on affidavit of defense counsel regarding his customary practice in determining that counsel had advised petitioner of his right to appeal), cert. denied, 460 U.S. 1072 (1983); Banda v. Estelle, 519 F.2d 1057, 1058 (5th Cir. 1975) (in rejecting petitioner's claim that his attorney failed to advise him of his right to appeal, court stated: "Witnesses in a hearing on a petition for habeas corpus need not testify from their personal recollection of the particular trial under attack. Rather, evidence as to standard practice or customary procedure can be used to demonstrate compliance with constitutional standards." (citation omitted)), cert. denied, 423 U.S. 1024 (1975).

Mr. Kane testified that, at the time in question, it was his customary practice to discuss with his clients whether they wanted to appeal. Id. at 9. Specifically, he explained it was his practice to tell a client whether or not he thought there was an issue for appeal, and to recommend an appeal if he believed there was a meritorious ground for appeal. Id. at 10, 36. As part of his general practice he said he discussed with his clients the advantages and disadvantages of an appeal, id. at 35, and never ignored a client's request to file a notice of appeal; if a client instructed him to appeal, he would have filed a notice of appeal or ensured that someone else filed it. Id. at 10-11. Mr. Kane also stated that as part of his customary practice he talked to

clients immediately after sentencing and made subsequent arrangements to speak with them. Id. at 34-35.

The Court credits Mr. Kane's testimony. Based on that testimony, the Court determines that petitioner knowingly, voluntarily and intelligently waived his right to appeal. Mr. Kane recounted that he customarily spoke with his clients immediately after sentencing and shortly thereafter. Id. Even defendant agrees that this was true in his case. Id. at 40-41. At those times, Mr. Kane explained that, as part of his usual practice, he discussed with his clients the advantages and disadvantages of an appeal and advised them whether there were meritorious grounds for appeal. See Romero, 46 F.3d at 1031.

In this case, Mr. Kane testified that both he and petitioner were pleased with the sentence. Aug. 8, 1997, Tr. at 12, 13. On the latter point, Mr. Kane reported that petitioner was not given an enhancement for an aggravated role in the offense pursuant to United States Sentencing Guideline ("U.S.S.G.") § 3B1.1 and, in receiving a downward departure from a life sentence to a twenty-three year sentence, petitioner received more than "the most minimal departure" urged by the Government Id. at 12. On direct examination Mr. Kane testified that he recalled these two matters decided in petitioner's favor, but did not recall any specific issues which may have been appealable. Id. at 11-12. However, on cross-examination, when asked about specific issues, Mr. Kane stated that such issues "may," "might" or could have been appealable issues. Id. at 21, 22, 24, 29 and 30.<sup>3</sup> Although he did not specifically recall whether he spoke to petitioner about those

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<sup>3</sup>Because prejudice is presumed if petitioner did not waive his right to appeal, in determining whether counsel was ineffective for not filing a notice of appeal the Court does not look to the merits of the claims that were not appealed. Nevertheless, the Court notes that it reviewed and rejected as meritless all of the potentially appealable issues raised in petitioner's § 2255 Motion. The Court does not deem it appropriate to address the other issues which counsel argued were

potentially appealable issues, *id.* at 33-34, the Court concludes that Mr. Kane discussed all meritorious issues with petitioner, in light of his customary practice to discuss with his clients any appellate issues which he believed were meritorious. And, having done so, Mr. Kane would have ensured that a notice of appeal was filed if petitioner wished to appeal.

Thus, in this context, and in view of the potential detriments of an appeal--*inter alia*, financial expense and risk<sup>4</sup>--the Court finds that petitioner has not satisfied his burden of proving that he did not voluntarily, knowingly and intelligently waive his right to appeal after meaningful consultations with his attorney. See United States ex rel v. Johnson, 531 F.2d 169, 174 (3d Cir.) (explaining that § 2255 petitioner bears the burden of proof to support a claim of ineffective assistance of counsel), cert. denied, 425 U.S. 997 (1976). Rather, the Court concludes that petitioner, after discussing the appellate issues with Mr. Kane, voluntarily, knowingly, and intelligently concluded that the benefit of appealing did not outweigh the potential risks involved in an appeal, and waived his right to appeal.

## II. Breach of Plea Agreement

At the hearing on August 15, 1997, the Court addressed the issue of whether the

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appealable at the August 15, 1997 hearing, and in petitioner's Second Supplemental Memorandum, because those issues were not raised in the § 2255 Motion.

<sup>4</sup>The Court notes that if petitioner appealed it would have been more likely that the Government would have cross-appealed issues decided favorably to petitioner. For example, the Government may have decided to appeal the Court's determination that petitioner was not a leader pursuant to U.S.S.G. § 3B1.1(a) (or even a supervisor pursuant to U.S.S.G. § 3B1.1(b)). See United States v. Sax, 39 F.3d 1380, 1392-93 (7th Cir. 1994) (government cross-appealed court's decision not to increase offense level under U.S.S.G. § 3B1.1(a) because, in government's view, guideline was not correctly applied to findings of fact that were not clearly erroneous); see also United States v. McMillen, 917 F.2d 773, 774-75 (3d Cir. 1990).

Government breached the Plea Agreement by stating at the March 21, 1991 Plea Hearing that, as of that date, petitioner had accepted responsibility and then arguing to the contrary at the January 22, 1993 sentencing. Because petitioner failed to present this issue on direct appeal, he must show cause and prejudice to excuse this procedural default. The cause and prejudice standard may be satisfied by a showing that petitioner's counsel was constitutionally ineffective for failing to raise this issue at sentencing, see Murray v. Carrier, 477 U.S. 478, 488 (1986), but the Court concludes petitioner has not made such a showing in this case. Counsel was not ineffective for failing to raise this issue at sentencing because the Court concludes the claim is meritless and thus petitioner suffered no prejudice. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984) (holding that in order to make a showing of ineffective assistance of counsel petitioner must establish both that his attorney performed below an objective standard of reasonableness and, as a result, that petitioner was prejudiced).

United States Sentencing Guideline § 3E1.1(a) provides that “[i]f the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.” U.S.S.G. § 3E1.1(a). The Court holds that because, after the March 21, 1991 Plea Hearing, petitioner attempted to falsely minimize the role he played in the charged conspiracy, the Government was justified in arguing at sentencing that petitioner had not clearly demonstrated acceptance of responsibility for his offense and, accordingly, was not entitled to the corresponding decrease in his offense level. Buttressing this conclusion, and further justifying the Government's action, is the fact that the Government learned after the Plea Hearing that petitioner had previously lied about his knowledge of a grenade attack on a police station in furtherance of the conspiracy and that petitioner had aided his brother, the leader of the

conspiracy, in temporarily avoiding apprehension, and then lied about such complicity.<sup>5</sup> In making its finding that defendant lied about these two matters the Court relies only upon admissions made by petitioner at the August 15, 1997 hearing.<sup>6</sup>

At the outset, the Court recognizes that the Government stated at the March 21, 1991 Plea Hearing that “we have stipulated that [Mr. Ramos] would be entitled to a two point reduction in the offense level because of his acceptance of responsibility that he’s demonstrated to this point.”

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<sup>5</sup>The sentencing hearing lasted two days. By the time the Court addressed the issue of acceptance of responsibility, the Court had already heard many witnesses and detailed argument. Thus, with reference to that issue, the Government stated “I would just like to be heard briefly, Your Honor, if I may, on acceptance of responsibility .... I think the Court understands our position, I’m not going to belabor it.” Jan. 22, 1993, Tr. at 532. The Government then stated that its position on the issue was based in part on “all the stuff [petitioner] didn’t admit.” *Id.* at 532; *see also id.* at 533-34. In light of all of the testimony and argument, the Court understands this statement to incorporate petitioner’s failure to admit his involvement with or knowledge of the distribution of crack cocaine, the grenade attack and aiding Richard Ramos in temporarily avoiding arrest. In addition, in arguing at sentencing that petitioner had not accepted responsibility the Government relied on the fact that petitioner had threatened witnesses and “continued to engage in criminal conduct [distributing drugs] to the bitter end.” *Id.* at 532.

<sup>6</sup>The Court does not rely upon, but notes that, at the August 15, 1997 hearing the Government was prepared to rely upon testimony by Detective Moffit from the January 22, 1993 sentencing to further support its conclusion that petitioner lied about those two matters. It was also the Government’s position that Detective Moffit’s testimony would have proved that petitioner was not forthcoming about his involvement with drug activities at Lee & Indiana Streets and was dishonest regarding the location of his assets, including a house at 5903 Chestnut Street, a property at Smylie Road, automobiles, and other drug proceeds.

At the August 15, 1997 hearing petitioner asked the Government to produce Detective Moffit, so that petitioner could cross-examine him with respect to his testimony at the January 22, 1993 sentencing hearing. In response, the Government said, in order to avoid another hearing day, it was willing to proceed without relying on Detective Moffit’s testimony, thereby obviating the need for Detective Moffit to be produced. Aug. 15, 1997, Tr. at 70, 75-76. (The Government reserved the right to make Detective Moffit available at a later hearing if it became necessary for the Government to rely on his testimony in pressing its position. *Id.* at 76.) Under the circumstances, the Court agreed that it was not necessary to produce Detective Moffit. *Id.* at 85. Thus, the Court will make its determination based only upon the evidence and argument presented at the August 15, 1997 hearing.

Tr. at 12. Thus, at that point the Government was prepared to recommend that petitioner receive a reduction in his offense level notwithstanding the evidence of which it was aware when it argued at the November 30, 1990 hearing that petitioner's bail be revoked--that is, that petitioner had threatened witnesses and had continued to sell drugs. See Government's Additional Memorandum Regarding Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, at 3. Thereafter, the Government changed its position and argued that petitioner had not accepted responsibility because, prior to sentencing, petitioner attempted to untruthfully minimize the role he played in the conspiracy and, after the Plea Hearing, the Government learned of petitioner's lies with respect to the grenade attack on the police station and his attempt to aid Richard Ramos in his effort to flee justice. The Court concludes that the Government was justified in arguing at sentencing that petitioner had not accepted personal responsibility based on petitioner's minimization of his conduct and that newly discovered evidence, particularly when considered together with the evidence of which the Government was aware before the Plea Hearing, despite its contrary position taken earlier on an incomplete record.

Before analyzing whether the Government breached the Plea Agreement, the Court notes that under the terms of the Plea Agreement the Government's obligation to make a recommendation that petitioner had accepted responsibility was conditioned on the Government's good faith evaluation of defendant and his actions. See United States v. Pollack, 91 F.3d 331, 334-35 (2d Cir. 1996) (citing United States v. Khan, 920 F.2d 1110, 1105 (2d Cir. 1990), cert. denied, 499 U.S. 969 (1991)); see also United States v. Flores, No. 93-350-08, -- F. Supp. --, slip op. at 11-12 (E.D. Pa. August 18, 1997). Nevertheless, under the evidence presented at the August 15, 1997, the Court holds that not only did the Government act in good

faith in arguing that petitioner had not accepted responsibility, but its evaluation of petitioner's conduct was, in fact, objectively accurate. Moreover, because the Plea Agreement provides that any untruthful information may void the Agreement, see Plea Agreement ¶ 6(d), the Government would have been justified in voiding the entire Agreement. See United States v. Carrara, 49 F.3d 105, 107 (3d Cir. 1995).

First and foremost, the Court concludes that because petitioner's version of his criminal activities, as conveyed by him after the March 21, 1991 Plea Hearing and just prior to sentencing, attempted to falsely minimize his role in the charged conspiracy, the Government was justified in arguing at sentencing on January 22, 1993 that petitioner had not accepted personal responsibility for his conduct, notwithstanding the Government's contrary statement at the Plea Hearing. See United States v. Yanez, 985 F.2d 371, 375-76 (7th Cir. 1993) (where statement in plea agreement that government would recommend that defendant had accepted responsibility was qualified so as to be based on information known at that time and defendant, after signing agreement, "untruthfully minimized his involvement in the offense conduct," defendant had not fully accepted responsibility). At the hearing on August 15, 1997, the Government explained that when it decided not to recommend a reduction for acceptance of responsibility, "the minimization was really the issue that we took into account." Tr. at 77; see also id. at 80 ("[T]he whole tenor [of defendant's position before sentencing] was you have to prove everything, you have to prove everything that's relevant to the sentencing calculation.... [T]hat was an abandonment of acceptance of responsibility at that point.").

The Government's determination that petitioner's account of his role in the conspiracy minimized his responsibility for his conduct was justifiably based in large part on petitioner's

position that he was not responsible for distribution of crack cocaine, despite having previously stipulated to the contrary in his Plea Agreement, which was accepted by the Court at the March 21, 1991 Plea Hearing. Id. at 77-80. In fact, because petitioner had expressed this position to the Government before sentencing, the Government explained in its Revised Sentencing Memorandum filed November 25, 1992 that petitioner “has repeatedly maintained” he is not responsible for the distribution of crack cocaine at 17th and Mt. Vernon Streets. Revised Sent. Memo. at 35. As explained in the Court’s opinion of July 16, 1997, at sentencing the Court rejected petitioner’s position that he had no involvement with crack cocaine; the Court’s determination was based on evidence independent of petitioner’s stipulation in the Plea Agreement that he had been responsible for distributing over fifteen (15) kilograms of crack cocaine. United States v. Edwin Ramos, No. 96-5046, -- F. Supp. --, slip op. at 10-12 (E.D. Pa. July 16, 1997). Thus, because petitioner’s conduct after March 21, 1991 showed an attempt to untruthfully minimize his role in the criminal offense, a reduction pursuant to § 3E1.1 was not warranted, and the Government was not in breach of the Plea Agreement in so arguing. United States v. Salmon, 944 F.2d 1106, 1127-28 (3d Cir. 1991), cert. denied, 502 U.S. 1110 (1992); United States v. Ortiz, 878 F.2d 125, 128 (3d Cir. 1989).<sup>7</sup>

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<sup>7</sup>At the August 15, 1997 hearing the Government stated that, in concluding before sentencing that petitioner minimized his role in the offense, it also considered the fact that petitioner claimed he was not a leader of the conspiracy to distribute drugs at 17th & Mount Vernon Streets, and thus should not receive a four-level increase in his offense level under U.S.S.G. § 3B1.1(a). Tr. at 77. At sentencing the Court found that petitioner was not a leader at 17th & Mount Vernon Streets. Jan. 22, 1997, Tr. at 524-25. However, as the Court later stated, this was a “decision which could have gone either way.” Aug. 15, 1997 Tr. at 77. In light of this conclusion, the Court finds that the Government did not act in bad faith in also considering petitioner’s position with respect to the issue of leadership in concluding that petitioner minimized his conduct (although the Court did not consider this in reaching its decision). Additionally, petitioner’s denial that he had distributed crack cocaine, in and of itself, was sufficient to justify the

Although the Government's position could have been justified solely based on the fact that after the Plea Hearing petitioner attempted to minimize his role in the offense, the Government also presented evidence that petitioner lied about an August 1990 grenade attack on a police station, a matter comprising the offense of conviction, as a second independent basis of support for its position that it concluded after the Hearing that petitioner had not accepted responsibility. The Government argued in its Revised Sentencing Memorandum filed November 25, 1992 that petitioner had not been forthcoming about this subject until a July 1992 meeting. See Revised Sent. Memo. at 40; see also Jan. 22, 1993, Tr. at 551-52. Based on petitioner's testimony at the hearing on August 15, 1997, the Court finds that although petitioner "knew that [Richard Ramos] was responsible for what happened ... at the police station" two days after the incident, he was not forthcoming in his May 1991 interview about the subject. Tr. at 59-60.

Application Note 1(a) to § 3E1.1 of the Guidelines, which is authoritative, Stinson v. United States, 508 U.S. 36, 37-38 (1993), explains that in determining whether a defendant qualifies for such a decrease in his offense level, one, among many, non-exclusive consideration is whether petitioner "truthfully admitt[ed] the conduct comprising the offense(s) of conviction." U.S.S.G. § 3E1.1, note 1(a). The attack on the police station, which occurred during the conspiracy, was conduct in furtherance of that offense. See Aug. 15, 1997, Tr. at 69. The Court has already detailed the extent to which violence was used to further the interests of the conspiracy, see United States v. Maria and Elizabeth Ramos, Nos. 95-2991, 95-2995, -- F. Supp. -- (E.D. Pa. July 16, 1997), and petitioner's participation in violent acts in furtherance of the conspiracy, see United States v. Edwin Ramos, No. 96-5046, -- F. Supp. --, slip op. at 10 (E.D.

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Government's determination that petitioner had minimized his role in the offense.

Pa. July 16, 1997). Because petitioner did not truthfully admit conduct comprising the offense of conviction, for this additional reason, the Government was justified in refusing to recommend that defendant had accepted personal responsibility.

Third, the Government contends that it was further justified in changing its position concerning acceptance of responsibility after the Plea Hearing because petitioner both assisted Richard Ramos, the leader of the conspiracy, in his efforts to avoid arrest and was not forthcoming when questioned about Richard Ramos' whereabouts. In its Revised Sentencing Memorandum the Government noted that petitioner had lied about this matter until July 1992. Revised Sent. Memo. at 40; see also Jan. 22, 1993, Tr. at 550-51. At the hearing on August 15, 1997 petitioner admitted that he was asked twice before the Plea Hearing whether he had any information about where Richard Ramos might be hiding, but replied in the negative, although petitioner, in fact, had paid \$13,000 to a contractor to arrange shelter for Richard Ramos in the Poconos. Tr. at 56-57. His lies compounded the significance of his actions because they hindered the Government in its efforts to apprehend Richard Ramos. Id. at 71-72.

The Court concludes that the Government's determination that petitioner had not accepted personal responsibility is justified for this third, independent reason. It is elemental that a co-conspirator, who takes affirmative action and knowingly frustrates the Government's efforts to apprehend another co-conspirator by paying a contractor to shelter him, and then lies about such misdeeds in order to further foil the Government, did not "clearly demonstrate acceptance of responsibility." See United States v. Banks, 751 F. Supp. 1161, 1167 (M.D. Pa. 1990) (where indicted defendant called co-defendant in effort to warn her, court held that defendant had not accepted responsibility), aff'd, 931 F.2d 52 (3d Cir. 1991). Reinforcing this conclusion is the

fact that petitioner affirmatively lied to the Government about his acts, at least twice: and, the Court notes, although it need not and does not rely upon this fact, see note 6, supra, Detective Moffit testified at the January 22, 1993 sentencing hearing that he told petitioner that he was not required or expected to tell the Government about his brother's whereabouts and stated "but, please, don't sit there and lie to us .... don't send us into some direction that isn't the right direction." Tr. at 399.

In sum, the Court concludes that the Government did not breach the Plea Agreement by arguing to the Court that petitioner had not accepted responsibility, notwithstanding its statement to the contrary at the March 21, 1991 Plea Hearing. See United States v. Ashurst, 96 F.3d 1055, 1057 (7th Cir. 1996); United States v. Rivera, 954 F.2d 122, 124 (2d Cir.), cert. denied, 503 U.S. 996 (1992). That conclusion is based on evidence presented at the August 15, 1997 hearing that shortly before sentencing, almost two years after the Plea Hearing, in explaining his role in the conspiracy, petitioner attempted to falsely minimize his involvement with crack cocaine. Additionally, that conclusion is supported by petitioner's lies regarding the grenade attack and his efforts to foil the Government in its attempt to locate his brother, about both of which the Government learned about after the Plea Hearing. Thus, petitioner's counsel was not ineffective for failing to argue at sentencing that the Government had breached the Plea Agreement, and petitioner has not shown cause and prejudice to excuse this procedural default. As a result, petitioner's claim that the Government breached the Plea Agreement will be dismissed.

### III. Conclusion

Petitioner's claim that his counsel was ineffective for failing to appeal his sentence will be denied. Petitioner's claim that the Government breached the Plea Agreement by arguing at sentencing that petitioner had not accepted responsibility will be dismissed.

An appropriate order follows.