

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

UNITED STATES OF AMERICA : CRIMINAL ACTION NO.
 : 93-254
 v. :
 : CIVIL ACTION NO.
NELSON RAMIREZ : 94-7181

Ditter, J.

September 22, 1997

M E M O R A N D U M

Before me is Defendant Nelson Ramirez' motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons below, I conclude that he is entitled to an evidentiary hearing on two issues: first, whether his guilty plea was knowing and voluntary in the event that defense counsel promised or misrepresented to defendant that if he pleaded guilty, he would receive a five-year sentence; and second, whether, despite defendant's requests to do so, defense counsel failed to pursue an appeal on defendant's behalf. I will deny defendant's remaining claims.

I. DISCUSSION

On August 2, 1993, Nelson Ramirez pleaded guilty to conspiracy to distribute more than 100 grams of heroin and to distributing more than 100 grams of heroin.¹ I sentenced Ramirez

¹ Ramirez was charged with two actual distributions. The first, on March 31, 1993, in New York at Ramirez' home, involved approximately one-eighth kilogram of heroin and the second took place in Philadelphia on April 23, 1993, and involved approximately one-half kilogram of heroin. In the guilty plea
(continued...)

to ninety-six months imprisonment, imposed a four-year term of supervised release, and ordered him to pay a \$100 special assessment. Ramirez did not appeal. At the time, Ramirez was represented by court-appointed counsel.

Although his pro se brief in support of his motion is unclear and often repetitive, Ramirez appears to be alleging that he was denied effective assistance of counsel for a variety of reasons. In his equally as vague "traverse," or reply to the government's opposition, Ramirez raises new instances of his counsel's ineffectiveness in addition to the arguments previously asserted in his initial motion. I will address his initial motion and the "traverse" separately insofar as they raise distinct allegations.

A. The Initial Motion

In his initial motion, Ramirez alleges that: 1) he agreed to plead guilty based on his attorney's false promise that he would receive a five-year sentence; 2) his attorney failed to advise him that if he went to trial he could raise an entrapment defense; 3) his attorney failed to conduct any pre-trial investigation; 4) his attorney's representation at sentencing was "at best perfunctory" resulting in an incorrect sentencing

¹(...continued)

agreement, the parties stipulated that Ramirez conspired to sell and did sell approximately 617.4 grams of heroin. (Guilty Plea Agmt. at 3). The parties did not stipulate to the amount of heroin under negotiation that Ramirez intended to distribute in furtherance of the conspiracy. (Id.).

calculation; 5) his attorney failed to provide him with a copy of the pre-sentence report in a timely manner so that he could advise counsel of the errors it contained; and 6) his attorney failed to file a timely appeal.

A defendant alleging ineffective assistance of counsel bears a heavy burden. In order to prevail on an ineffective assistance of counsel claim in connection with a guilty plea, Ramirez must show that counsel's assistance was so defective that he was denied his right to counsel as guaranteed by the Sixth Amendment and that but for the defective assistance, he would not have pleaded guilty. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985) (adopting standard for claims of ineffective assistance of trial counsel as enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984)). Specifically, Ramirez must demonstrate that his "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Further, as it is presumed that counsel will act competently, to prove prejudice, Ramirez must establish that there is a reasonable probability that the outcome would have differed had counsel's alleged errors been eliminated. Id. at 694; see Hill, 474 U.S. at 59 ("[D]efendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."). In short, Ramirez must prove that because of his counsel's defective performance, the outcome of the "proceeding was fundamentally unfair or unreliable." Lockhart v. Fretwell,

1. Defense Counsel's Alleged Promise of a Five-Year Sentence

After informing Ramirez that the relevant range for his conduct was between five and forty years for each count, I asked him three times during the course of the change of plea hearing whether anyone had made any promises or representations to him. (Change of Plea Tr. at 62, 69, & 71). Each time, before entering his guilty plea, Ramirez stated that no one had made any promises or representations to him. (Id.). Ramirez now alleges that his "attorney falsely represented to him that in exchange for his plea of guilty he would receive a 5 year sentence." (Pet'r's Br. at 11). Ramirez states that "he followed the advise [sic] of his attorney and entered a plea of guilty," and that his "understanding by his attorney's advise [sic] surrounded the concept that he would receive a sentence of 5 years."² (Id. at 12). Ramirez also vaguely refers to an interview with the government prior to signing the agreement where he apparently expressed his view as to "the events," (id. at 8), and states that his "conviction rests on an agreement promise of a 5 year sentence, a promise that the government failed to commit to." (Id. at 3).

² At times, Ramirez appears to confuse the representation of a five-year mandatory minimum with the idea that at most he would receive five years. Mandatory minimum refers to the least amount of incarceration a prisoner must serve, not the most years a prisoner could serve.

In light of his open court testimony, Ramirez faces a "formidable barrier" in proving that he did, in fact, plead guilty based on his counsel's false representations or promises. Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Overcoming this barrier, however, is not "insurmountable." Id. at 74. "[G]uilty pleas are not voluntary where they are induced by misleading statements of defense counsel." Dickerson v. Vaughn, 90 F.3d 87, 91 (3d Cir. 1996) (citing cases). Nonetheless, Ramirez must do more than make general allegations of a promise or representation; he "must advance specific and credible allegations detailing the nature and circumstances" of his counsel's promise or representation.³ Zilich v. Reid, 36 F.3d 317, 320-21 (3d Cir. 1994).

Although Ramirez' allegations do not precisely detail the character of the supposed promise or representation, they are specific enough that if true, might entitle him to relief under 28 U.S.C. § 2255. Further, his allegations are based on facts and discussions wholly outside the record available for review.⁴ Consequently, I conclude that he is entitled to an evidentiary

³ Had Ramirez failed to do so and had his "allegations of an unkept promise [been] inconsistent with the bulk of his conduct," I would have summarily dismissed this collateral challenge to his guilty plea. Lesko v. Lehman, 925 F.2d 1527, 1537-38 (3d Cir. 1991) (internal quotations omitted).

⁴ 28 U.S.C. § 2255 states in part that [u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

hearing on this issue.

2. Defense Counsel's Alleged Failure to Advise Defendant of Entrapment Defense

Ramirez next argues that it is obvious that he could have raised and prevailed on an entrapment defense at trial. Thus, he claims counsel was ineffective for failing to advise him of this avenue of defense. He is mistaken. "[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." Hill, 474 U.S. at 59. I find that Ramirez has not alleged facts that show that he would have prevailed had he asserted an entrapment defense.

In order to be entitled to an instruction on entrapment, a defendant must offer evidence showing 1) government inducement and 2) that he was not predisposed to commit the crime.⁵ Mathews v. United States, 485 U.S. 58, 62-63 (1988). Ramirez alleges that a government "informant initiated the transaction and therefore induced [him] into committing the offense." (Pet'r's Br. at 14). Ramirez claims that this initiation, the fact that he had no prior convictions, and his

⁵ "[T]he government then has the burden of proving beyond a reasonable doubt that it did not entrap the defendant." United States v. Wright, 921 F.2d 42, 44 (3d Cir. 1990) (internal quotations omitted).

contention that he had no desire to enter into a multi-kilogram transaction demonstrate that he was induced and not predisposed to distribute heroin.

The Third Circuit has said that mere solicitation by the government is not enough to establish inducement. United States v. Marino, 868 F.2d 549, 552 (3d Cir. 1989). Inducement includes but is not limited to "persuasion, fraudulent representation, threats, coercive tactics, harassment, promises of reward or pleas based on need, sympathy or friendship." Id. at 552 & n.4 (internal quotations omitted). Here, the confidential informant (CI) solicited, via numerous telephone calls, the initial and later transaction. He also invited Ramirez to Philadelphia to observe his operations. I find that these actions, characterized by Ramirez as "browbeating," are insufficient to constitute evidence of inducement.⁶

Even assuming that these allegations satisfy the inducement prong, I find that Ramirez has failed to allege facts that would show that he was not predisposed to distribute heroin. For example, despite Ramirez' claims of non-predisposition, he admits that he had accumulated a large outstanding credit card debt and that he assisted the CI in the heroin transactions in the hopes of getting money to pay that debt, thus preventing the

⁶ Ramirez cites cases from the Court of Appeals for the Second Circuit which hold that solicitation is enough to constitute inducement. To the extent that the law derived from these opinions differs from the prevailing law of the Third Circuit, however, it is not controlling.

suspension of his credit.⁷ (Pet'r's Br. at 5). However, Ramirez does not contend that the government knew of his financial situation and thus targeted him in an attempt to exploit that need. Ramirez also admits that while working as a cab driver, he had previously accepted cocaine from a passenger in lieu of money, and that after being approached by the CI, he twice solicited heroin from a customer he believed to be involved in "illegal trade." (Id. at 5-7; see also Sentencing Tr. at 58-59).

Despite Ramirez' assertions, his actions showed a "ready receptiveness to participat[e]" in the illegal transactions. Cf. United States v. Wright, 921 F.2d 42, 46 (3d Cir. 1990). Ramirez voluntarily returned the CI's phone calls. Further, during one of the recorded conversations, in the context of discussing both his brother, Juan Jairo Ramirez,⁸ and the heroin transactions, Ramirez stated that he "manage[d] the people here and all that." (Id. at 76-77). Finally, Ramirez admits that he sold the initial one-eighth kilogram of heroin in his home, and that although he lived in New York, he drove to Philadelphia on two separate occasions, once to observe the CI's operations,⁹ and later to consummate the second transaction

⁷ Ramirez stated at sentencing that he needed the money to buy a house and to give to his ill sister. (Sentencing Tr. at 61).

⁸ Juan Jairo Ramirez is Nelson Ramirez' brother and an unindicted co-conspirator.

⁹ Ramirez admits that he was encouraged to assist the CI after being exposed to the substantial amount of money the CI received for an unrelated deal, and that he performed the second transaction because his first transaction "as a broker had not
(continued...)

involving one-half kilogram of heroin. (Pet'r's Br. at 5-7).

In addition, at sentencing, Special Agent Mitchell Banta testified regarding a conversation between the CI and Juan Jairo Ramirez, which took place within two weeks of Nelson Ramirez' initial meeting with the CI. Juan Jairo told the CI that four kilograms of heroin (one and one-half which were earmarked for the CI and two and one-half which were to be sold to another customer) had been stolen from Nelson Ramirez' home. (Sentencing Tr. at 22-23). Agent Banta described later conversations Ramirez had with the CI in which Ramirez stated that he, and not his brother, was in charge of the business arrangement, Ramirez set the price for the initial cocaine transaction, and Ramirez indicated that there would be future transactions.¹⁰ (Id. at 26-27). Agent Banta stated that on

⁹(...continued)

proved at all lucrative." (Pet'r's Br. at 6).

¹⁰ In his "traverse," Ramirez argues that his attorney should have objected to Special Agent Banta's testimony that the CI told him that Ramirez represented that he was in charge of the operation because it was hearsay. This argument may be disposed of for two reasons. First, the Federal Rules of Evidence do not apply to sentencing hearings. Fed. R. Evid. 1101(d)(3). The standard for admissibility of testimony at sentencing is reliability. United States v. Brothers, 75 F.3d 845, 848 (3d Cir. 1996); U.S.S.G. § 6A1.3(a) (1992). Here, Agent Banta's testimony regarding later conversations Ramirez had with the CI were corroborated by recordings. Ramirez has not presented any evidence that shows that the CI was lying or that demonstrates that the CI later made contradictory or inconsistent statements. Cf. Brothers, 75 F.3d at 853 (finding testimony lacked indicia of reliability where contradictory testimony was presented); United States v. Miele, 989 F.2d 659, 664 (3d Cir. 1993) (same). Second, the testimony Ramirez objects to was not dispositive in his sentencing. For example, the government presented numerous tape recordings showing Ramirez' involvement in the transactions, (continued...)

March 31, 1993, the CI purchased approximately 125 grams of heroin from Ramirez at Ramirez' home. (Id. at 28). At that transaction, which was recorded, Ramirez provided the CI with a sample of cocaine and also indicated that he and a cousin could supply additional kilograms of cocaine if desired.¹¹ (Id.). According to Agent Banta, further conversations demonstrated Ramirez' intent to come to Philadelphia to supply additional kilograms of heroin, one-half kilogram per trip. (Id. at 32-39). Agent Banta also testified, using the transcribed recordings, that on April 23, 1995, Ramirez traveled to Philadelphia, sold one-half kilogram of heroin to the CI and indicated that he would be willing to return later that night with an additional one-half kilogram. (Id. at 39-42). Clearly, the government's methods did not "implant in an innocent person's mind the disposition to commit a criminal act." Jacobson v. United States, 503 U.S. 540, 548 (1992). Thus, Ramirez has failed to assert facts which would establish that he was not predisposed to commit the crime.

Finally, assuming arguendo that Ramirez had produced the minimal evidence required to entitle him to an entrapment

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including Ramirez' own recorded statement that he "manage[d] the people here." (Sentencing Tr. at 76-77). Other than contending that the recorded statement was just a "mode of speech" (id. at 77), Ramirez has made no allegation or claim that the tapes were erroneously transcribed. I merely credited Agent Banta's testimony and Ramirez' original comment over his explanation at sentencing. Accordingly, counsel was not ineffective for failing to object.

¹¹ Ramirez does not allege that he was "induced" into offering cocaine in addition to the heroin.

instruction at trial (if he had not pleaded guilty), I find, based on the evidence presented and the testimony during sentencing, Ramirez has failed to demonstrate a reasonable probability that a jury would have acquitted him based on an entrapment defense. I find that the government would have been able to prove beyond a reasonable doubt that it did not entrap Ramirez. Accordingly, Ramirez was not prejudiced, and it follows that defense counsel cannot be deemed ineffective for failing to advise him to go to trial based on a defense reasonably likely to be unsuccessful.¹² Cf. Sistrunk v. Vaughn, 96 F.3d 666, 671 (3d Cir. 1996) (refusing to find counsel ineffective for failing to raise defense "doomed to failure").

3. Defense Counsel's Alleged Failure to Conduct Pre-trial Investigation

In connection with his argument that his counsel's representation was perfunctory at sentencing, Ramirez alleges that his attorney did not adequately investigate the facts of his case or consult with him to determine possible avenues of defense. Specifically, Ramirez argues that had his counsel investigated, he would have noted the government's "sentence entrapment," and could have raised that at sentencing to reduce

¹² Before Ramirez pleaded guilty, I asked him if he had sufficient time to consult with his attorney and whether he believed that his attorney understood any possible defense available to Ramirez. (Change of Plea Tr. at 13-14). Ramirez answered "yes" to both inquiries. (Id. at 14).

Ramirez' base level.¹³ Ramirez does not claim that an investigation would have yielded any other information beneficial to him.

Failure to conduct any pre-trial investigation normally constitutes ineffective assistance of counsel. United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989). Nonetheless, the crucial information Ramirez alleges demonstrates sentencing entrapment was always within Ramirez' possession. Ramirez had an obligation to inform his counsel of any information he felt was beneficial to his case. Although asserting that "[c]ounsel at minimum has [a] duty to interview potential witnesses," (Pet'r's Br. at 15), Ramirez does not allege that he referred his counsel to witnesses who could corroborate his version of the events or that defense counsel failed to contact these witnesses.

Applying the Strickland standard, I note initially that it was entirely reasonable that defense counsel did not raise a sentencing entrapment theory given that the Third Circuit has

¹³ Ramirez points to 18 U.S.C. § 3553, which provides in relevant part that

[t]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described[.]

18 U.S.C. § 3553(b) (West Supp. 1997), and to cases which have held that this provision allows a sentencing court to depart based on a sentencing entrapment theory. See, e.g., United States v. Staufer, 38 F.3d 1103, 1106-08 (9th Cir. 1994); United States v. Barth, 990 F.2d 422, 424-25 (8th Cir. 1993).

not, to date, recognized its vitality. See United States v. Raven, 39 F.3d 428, 438 (3d Cir. 1994); cf. Pitts v. Cook, 923 F.2d 1568, 1574 (11th Cir. 1991) (finding that "counsel's pre-Batson failure to raise a Batson-type claim [did] not fall below reasonable standards of professional competence, and thus [did] not render counsel's assistance constitutionally ineffective"). Further, while perhaps not specifically referring to "sentencing entrapment," defense counsel strenuously argued that Ramirez lacked the intent and capability to distribute any additional heroin.¹⁴ Counsel cannot be branded ineffective for having failed to win that argument. See Zettlemyer v. Fulcomer, 923 F.2d 284, 296 (3d Cir. 1991).

In addition, Ramirez has not proven that counsel's failure to assert a defense specifically labeled "sentencing entrapment" prejudiced the outcome. Sentencing entrapment "has been defined as outrageous official conduct [which] overcomes the will of an individual predisposed only to dealing in small quantities for the purpose of increasing the amount of drugs ... and the resulting sentence of the entrapped defendant." Raven, 39 F.3d at 438 (internal quotations omitted). Agent Banta's testimony and the recorded conversations refute any possibility that Ramirez would have been entitled to a downward departure

¹⁴ Indeed, although the government contended that Ramirez contemplated an additional distribution of one and one-half to two kilograms of heroin, I found that Ramirez was clearly capable and intended to distribute only an additional one-half kilogram. (Sentencing Tr. at 88-90). Thus, defense counsel successfully argued his assertion, at least in part.

based on sentencing entrapment. Clearly, he was predisposed to engaging in both transactions at the negotiated quantities. After the first transaction, he voluntarily drove to Philadelphia from New York, and tape-recorded conversations show his agreement and willingness to participate in the sales at the negotiated amounts. Finally, Ramirez has not presented any argument -- much less any factual allegations -- which would allow me to characterize the government's actions as "outrageous." Thus, I find that Ramirez has failed to establish a reasonable probability that the outcome would have differed had counsel raised a sentencing entrapment argument at sentencing.

4. Defense Counsel's Alleged "Perfunctory" Representation at Sentencing

Ramirez alleges that his counsel was ineffective for failing to challenge paragraph 14 of the Presentence Investigation Report (PSI) because he felt it should have indicated why he only took one-half of the money brought by the CI to the second transaction. Ramirez alleges that the PSI should have indicated that during the second transaction, he told the CI to give him money only for what he had. Ramirez argues that his not accepting the full amount and requesting that he receive only one-half of the money proves that he was incapable of distributing and did not intend to distribute additional heroin; i.e., that this was his "last venture." (Pet'r's Br. at 21). Therefore, Ramirez argues, because of his counsel's deficient representation, he was wrongly given a base level of 32

pursuant to U.S.S.G. § 2D1.1(c)(6) at sentencing.¹⁵

I find that counsel was not ineffective for failing to insist that the PSI indicate why Ramirez asked for only one-half of the money so that it would show that he did not have the ability or intent to distribute greater than 617.4 grams of heroin. Defense counsel did object to the PSI stating that the base offense level should be based on the amount actually sold, not the amount negotiated. (Sentencing Tr. at 86-87). Further, as discussed earlier, during the sentencing hearing, counsel opposed the government's contention that Ramirez intended to and was capable of distributing an additional one and one-half to two kilograms of heroin. (Id.). Counsel argued that Ramirez' intent and capability ended with the 617 grams actually distributed. (Id.). Indeed, Ramirez asserted during sentencing that he told the CI to pay him only for the pound actually delivered, that he had no intention to distribute more than the 617 grams, and that he was merely going along with the CI, i.e., "puffing."¹⁶ (Id.

¹⁵ I found Ramirez' relevant conduct involved greater than one kilogram of heroin but less than three kilograms. Accordingly, Ramirez' base level was 32, which I reduced by three levels based on his acceptance of responsibility. The guideline range for his total offense level of 29 was 87 to 108 months.

¹⁶ Ramirez argues that counsel failed to argue the relevancy of Application Note 12, U.S.S.G. § 2D1.1. Ramirez is mistaken. Counsel did argue that Note 12 applied. (Sentencing Tr. at 87). Note 12 provided

In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated

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at 62). Thus, Ramirez testified at sentencing regarding exactly what he now argues that the PSI should have reflected. Having the PSI state Ramirez' explanation of what he did would not have added any more to Ramirez' own testimony.

Further, Ramirez has not proven that the outcome would have differed. Ramirez contends that "[t]he record indicates that ... at no time was [he] able to produce the amounts pursued." (Pet'r's Br. at 20). Ramirez' reading of the record differs substantially from my reading. After argument by both sides on the issue at sentencing, I overruled Ramirez' objection to the PSI and specifically made a finding that while Ramirez was incapable of and did not intend to distribute two additional kilograms, the government had proven that he did have the intent and capability to distribute at least an additional one-half kilogram of heroin. (See Sentencing Tr. at 88-90; see also My Order of November 24, 1993). I based my finding on Ramirez'

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amount, the court shall exclude from the guideline calculation the amount that it finds defendant did not intend to produce and was not reasonably capable of producing.

U.S.S.G. § 2D1.1 App. Note 12 (1992). Ramirez had the burden of presenting evidence establishing his lack of intent and capability. United States v. Raven, 39 F.3d 438, 434 (3d Cir. 1994). The government, however, retained the burden of persuading me by a preponderance of the evidence as to the amount of heroin in an uncompleted transaction. Id. at 434 & n.6. I found that the government met that burden. (Sentencing Tr. at 88-90).

Ramirez also appears to be arguing that the PSI should have reflected U.S.S.G. § 2D1.1 Application Note 12. I will not address his argument given that counsel argued its relevancy at sentencing and because the PSI did reference Application Note 12. The probation officer cited Note 12 in response to defense counsel's objection regarding the appropriate amount of heroin.

production of 617 grams of heroin, the testimony at sentencing of both Agent Banta and Ramirez, and the portions of the transcripts of the recorded conversations between Ramirez and the CI which I read. I credited the government's evidence over Ramirez' testimony and concluded that for sentencing purposes, he intended to distribute and did distribute 617 grams of heroin and that he plainly contemplated distributing an additional amount of at least one-half kilogram. In effect, therefore, both counsel and Ramirez challenged paragraph 14 of the PSI and the matter at issue was fully aired. Thus, Ramirez' argument fails.

5. Defense Counsel's Alleged Failure to Provide a Copy of the Pre-sentence Report in a Timely Manner

In a related argument, Ramirez claims that his counsel allowed him to examine the PSI only minutes prior to sentencing and that his counsel was deficient for not requesting a stay to allow him to review the report.¹⁷ Had counsel given Ramirez

¹⁷ Ramirez points to the Rules of Criminal Procedure which stated in part:

At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation.

Fed. R. Crim. P. 32(c)(3)(A) (prior to the 1994 amendments).

In the addendum to the PSI which reflected defense counsel's objection to the report, the probation officer certified that he
(continued...)

further opportunity to review the report, he allegedly could have advised "his attorney of the errors it contained and submit proper objections that would have ensured an adequate sentence." (Pet'r's Br. at 16). Ramirez states that he would have rebutted the "report's contents, particularly when the 'ilusory' [sic] 5 year sentence agreement [sic] which [he had] supposedly entered into, as drafted by the governemnt [sic] with no opposition by counsel, held no stipulation as to the quantity of the distributed heroin." (Id.).

Ramirez does not elaborate on the supposed "errors" contained in the PSI other than allege that there was no stipulation regarding the quantity involved. In fact, the PSI did contain a stipulation of the amount of heroin in the two consummated transactions. The parties disagreed on the quantity of heroin under negotiation; therefore the PSI properly did not contain a stipulation as to that amount. The government offered evidence at sentencing to prove by a preponderance of the evidence the amount under negotiation, and Ramirez was given the opportunity to present evidence that he lacked intent and capability. He so testified. Again, I made a credibility determination and found Ramirez not credible. Accordingly, Ramirez has not established that he was prejudiced by receiving the PSI allegedly only minutes before sentencing.

Furthermore, failure to follow the formal requirements

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had disclosed the PSI with any revisions to Ramirez, his counsel, and the government.

of this Federal Rule of Criminal Procedure is not cognizable in a collateral action unless it is an error of jurisdictional or constitutional proportion, "a fundamental defect ... result[ing] in a complete miscarriage of justice, []or an omission inconsistent with the rudimentary demands of fair procedure." See Hill v. United States, 368 U.S. 424, 428 (1962). Here, because Ramirez argued at sentencing that he did not intend and lacked the ability to engage in further distributions, his receiving the PSI minutes before sentencing did not result in a claim cognizable under 28 U.S.C. § 2255.

6. Defense Counsel's Alleged Failure to File a Timely Appeal

Ramirez alleges that his lawyer failed to file either an appeal on his behalf or an Anders no-merit brief. Although he raised the issue of counsel's failure to appeal in his initial motion under 28 U.S.C. § 2255, only in his "traverse" to the government's opposition does Ramirez assert that he repeatedly asked counsel to appeal his sentence based on his understanding of a five-year sentence and that counsel refused to do so.

Upon request, a federal criminal defendant is statutorily entitled to appeal his sentence. 18 U.S.C. § 3742(a). In addition, Ramirez is not required to show that he was prejudiced by the failure to appeal. See United States v. Rodriguez, 395 U.S. 327, 329-30 (1969) (finding that if trial counsel failed to file appeal, defendant is not required to detail errors he would have raised on appeal or show prejudice

due to denial of appeal). Accordingly, Ramirez has raised a factual allegation that is wholly outside the record available for review, which if true, might entitle him to relief. Therefore, I conclude that Ramirez is entitled to an evidentiary hearing as to whether he requested counsel to file an appeal.

B. The "Traverse"¹⁸

Ramirez argues that his counsel failed to focus my attention at the plea hearing on his claim that he did not participate in the January 15, 1993, meeting with the CI, and thus I "mistakenly" believed at sentencing that Ramirez had participated in that meeting. In fact, during sentencing, upon his counsel's inquiry, Ramirez stated that although he was introduced to the CI on that date, he was not present during the meeting and that if any heroin was distributed, it was after he had left.¹⁹ (Sentencing Tr. at 55). Accordingly, I fail to find his counsel ineffective given that Ramirez' contention was before me prior to my sentencing him.

Ramirez further argues that the government misconstrued

¹⁸ In his "traverse," Ramirez generally attacks the government's plea memorandum and the government's response to his motion. At his change of plea hearing, Ramirez admitted the truth and accuracy of what was in the government's memorandum. (Change of Plea Tr. at 78).

¹⁹ Ramirez altered his testimony from the change of plea hearing. At that hearing, he stated that he came to know of the CI on March 29, 1993, when he first spoke with the CI. (Change of Plea Tr. at 35-36). At the sentencing hearing, however, he admitted that his brother introduced him to the CI on January 15, 1993. (Sentencing Tr. at 55).

and selectively edited his recorded comment that the first transaction would be smaller in order to "break the ice." Ramirez states that the recording when reviewed in its entirety actually reveals that he said: "Yes we go from there, we go up from there, or stay there. Anyway, what we need is ... [t]o break the ice." ("Traverse" at 3). Admitting that he made this statement, Ramirez alleges that this comment shows his lack of intent; i.e., that he did not want to distribute any additional heroin. Another reasonable reading of this statement is that Ramirez intended to deliver more heroin.²⁰ Accordingly, Ramirez has failed to establish a reasonable probability that the outcome would have differed had this portion of the recording been pointed out to me. Further, Ramirez does not allege that he told defense counsel that he made this statement or that defense counsel refused to bring this statement to my attention.

Next, Ramirez argues that the conspiracy date alleged in the PSI or government plea agreement is in error. Ramirez contends that he did not enter into dealings with the CI until March 29, 1993, not January 15, 1993. It is not required that a person be a member of a conspiracy from its beginning, he can join it at any point during its progress and be held responsible so long as he remains a member of the group. See United States

²⁰ Ramirez concedes the reasonableness of the government's interpretation that the statement shows he wanted to continue dealing in larger doses when he makes this argument. Ramirez states, "Likewise interpretation would indicate that petitioner suggests that they can stay there, meaning he wants to deal in small doses." ("Traverse" at 3) (emphasis in original). However, I found the government's interpretation more plausible.

v. Gomberg, 715 F.2d 843, 847 (3d Cir. 1983), overruled on other grounds, 471 U.S. 773 (1985). Moreover, Ramirez questioned the opening date of the conspiracy at his change of plea hearing. At that time, I explained what is meant by conspiracy to Ramirez, as did his counsel. Ramirez then pleaded guilty to a conspiracy beginning in January. (Change of Plea Tr. at 36-39).

Ramirez also claims that his attorney erred by failing to direct my attention to portions of the tape recordings that were beneficial to him. Ramirez fails to describe specifically which dates and conversations would show that he did not have the intent to distribute at least an additional one-half kilogram of heroin. He argues that he does not have the tapes to review. This statement is without merit. Ramirez was a participant in the conversations that were recorded. His counsel had possession of the tapes and transcripts at sentencing. Ramirez does not offer any reason why he could not get the transcripts from counsel.²¹ Furthermore, I note that despite this claim of non-availability, in his "traverse," Ramirez quotes verbatim from a recorded conversation that appears nowhere in the record before me.

Finally, Ramirez raises another claim that his counsel performed deficiently at sentencing. Ramirez argues that counsel should have argued that he could not be found guilty of conspiracy when the person with whom he allegedly conspired was a

²¹ Ramirez does not allege that he asked his counsel to provide him with copies of the transcripts of those recordings and that his counsel refused to do so.

government informant. However, Ramirez neglects to recognize the fact that the government presented evidence, through Agent Banta's testimony and tape recordings, that Ramirez' brother, Juan Jairo Ramirez, was also involved in the initial negotiations to sell several kilograms of heroin.²² Accordingly, even though Juan Jairo was not indicted, he remains part of the conspiracy.²³

II. CONCLUSION

With the exception of his arguments regarding an alleged five-year promise and defense counsel's failure to appeal, I find that Ramirez is not entitled to an evidentiary hearing on any of his arguments because Ramirez' initial motion, his "traverse," the file, the change of plea and sentencing transcripts, and the government's response to his motion conclusively show that those contentions are meritless. Consequently, I will deny his remaining contentions.

An appropriate order follows.

²² Ramirez argues that there is no evidence that he conspired with his brother pointing to his testimony at sentencing that he told the CI that he was completely separate and apart from his brother. However, the government introduced Agent Banta's testimony regarding conversations that the CI had with both Ramirez and his brother involving the sale of multiple kilograms, and Ramirez stated on tape, when questioned if he had talked to his brother, that he had everything under control and that he managed the people around him. Thus, I merely credited the government's evidence over Ramirez' testimony.

²³ To the extent that Ramirez may be conceding that his brother conspired to sell multiple kilograms of heroin, but that he should not be held responsible for his brother's agreement, there was evidence that Ramirez knew and foresaw the quantity agreed to by his brother. Cf. United States v. Terselich, 885 F.2d 1094, 1097 (3d Cir. 1989).

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

UNITED STATES OF AMERICA : CRIMINAL ACTION NO.
 : 93-254
 v. :
 : CIVIL ACTION NO.
NELSON RAMIREZ : 94-7181

O R D E R

And NOW, this 22nd day of September, 1997, upon consideration of defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, the government's response, defendant's reply, the file, and the transcripts of both the change of plea and the sentencing hearings, it is hereby ORDERED that:

1. Defendant Nelson Ramirez is entitled to an evidentiary hearing solely on the issues of:
 - a. Whether defense counsel promised or misrepresented to defendant that if he pleaded guilty, he would receive a five-year sentence and if so, whether that promise or misrepresentation rendered defendant's guilty plea unknowing and involuntary; and,
 - b. Whether, despite defendant's requests to do so, defense counsel failed to pursue an appeal on his behalf.
2. I will hold an evidentiary hearing solely with respect to the issues specified above on November 6, 1997, at 10:15 a.m. in Courtroom 6A.

3. Defendant's remaining claims are DENIED.

J.