

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

THE UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CRIM. NO. 03-801
vs.	:	
	:	
FELIX PEREZ,	:	CIV. NO. 06-2923
	:	
Defendant.	:	

ORDER & MEMORANDUM

ORDER

AND NOW, this 14th day of December, 2006, upon consideration of petitioner's *pro se* Application for Certificate of Appealability (Document Number 70, filed December 11, 2006),

IT IS HEREBY ORDERED that petitioner's *pro se* Application for Certificate of Appealability, treated as a motion for reconsideration, is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability will not issue on the grounds that (1) petitioner's Application for Certificate of Appealability does not provide a basis for reconsidering the Court's Order and Memorandum of November 9, 2006; and (2) petitioner has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2).

MEMORANDUM

I. INTRODUCTION

Petitioner, Felix Perez, filed a *pro se* Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255, in which he asked the Court to vacate a sentence imposed on him following a guilty plea on the ground that his counsel was ineffective. In an Order & Memorandum dated November 9, 2006, the Court denied petitioner's Motion, and

ordered that a certificate of appealability (“COA”) would “not issue on the ground that petitioner has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2).” U.S. v. Perez, 2006 WL 3300376, *1 (E.D. Pa. Nov. 9, 2006). On December 11, 2006, petitioner filed the instant Application for Certificate of Appealability with respect to the Court’s denial of his *habeas* petition. The Court will treat petitioner’s Application for a Certificate of Appealability as a motion for reconsideration of that part of the November 9, 2006 Order & Memorandum that provided a COA would not issue. For the reasons that follow, petitioner’s Application for a Certificate of Appealability, treated as a motion for reconsideration, is denied and a COA will not issue.

II. DISCUSSION

A. Legal Standard

Three situations justify granting a motion for reconsideration: (1) an intervening change in the controlling law; (2) the availability of new evidence not available when the court dismissed the prior petition; or (3) the need to correct a clear error of law or fact or to prevent “manifest injustice.” Max’s Seafood Cafe v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). “Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly.” Enigwe v. United States Dist. Ct. for the Eastern Dist. of Pa., 2006 WL 2884433, *1 (E.D. Pa. Oct. 6, 2006) (citing Cont’l Cas. Co. v. Diversified Indus., Inc., 884 F.Supp. 937, 943 (E.D. Pa. 1995)).

The Court denied petitioner’s *habeas* petition based on petitioner’s waiver of the right to collaterally challenge his sentence. “When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA

should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).

B. Analysis

Petitioner advances two arguments in support of his motion for reconsideration of the Court’s denial of a COA. First, petitioner argues that he was “induce[d], by surprise, into a guilty plea.” (Application for a COA at 1.) Second, petitioner argues that his *habeas* petition included a “claim of inducement into an appeal waiver which was part of the plea” agreement. (Id. at 2.) Neither argument asserts an intervening change in the controlling law or the availability of new evidence not available when the Court dismissed petitioner’s prior petition. Thus, the Court will treat petitioner’s Application for Certificate of Appealability as motion for reconsideration based on clear error of law or fact or need to prevent manifest injustice.

The Court concludes that, with respect to the Court’s application of the COA standard set forth in Slack, there was no clear error of law or fact or need to prevent manifest injustice. Jurists of reason would not find it debatable that petitioner failed to state a valid claim of the denial of a constitutional right, nor would jurists of reason find the district court’s ruling debatable.

First, petitioner was not “induce[d], by surprise, into a guilty plea.” During the change of plea hearing, petitioner initially expressed unwillingness to proceed with the guilty plea because it required him to admit to distribution of 124 grams of cocaine base (“crack”) whereas petitioner

insisted that he distributed only 31 grams of cocaine base (“crack”). With some further discussion, the Government agreed to reduce the drug quantity to 31 grams of base cocaine (“crack”). (Change of Plea Hearing Transcript at 3-16). After the reduction in drug quantity, the Court specifically asked the petitioner, “Do you want to [plead guilty] today or do you want some time to think about it?” (Change of Plea Hearing Transcript at 16.) Petitioner responded, “I want to do it now.”¹ (*Id.*) Furthermore, the Court engaged in an extensive colloquy with petitioner pursuant to Federal Rule of Criminal Procedure 11. (Change of Plea Hearing Transcript at 17-50.) Lastly, petitioner’s argument pertains to the merits of his ineffective assistance of counsel claims, and not to the grounds upon which the Court denied petitioner’s *habeas* motion.²

Second, petitioner’s *habeas* petition did not include a “claim of inducement into an appeal waiver which was part of the plea” agreement.³ (Application for a COA at 3.) Moreover, the Court’s extensive colloquy with petitioner evinces that plaintiff’s acceptance of the waiver provision was in fact knowing and voluntary. *Perez*, 2006 WL 3300376, at *3-4.

¹ The Court also asked, “Now, do you need more time to consider a plea agreement based on [the] reduced drug quantity . . . or are you ready to proceed with it today.” Petitioner responded, “I will plead guilty to the 31 grams of crack and all the heroin.” (Change of Plea Hearing Transcript at 15-16.)

² Plaintiff states that “[c]ounsel stood there silent, instead of advocate, [*sic*] on behalf of Petitioner and request [*sic*] an investigation.” (Application for a COA at 2.)

³ Petitioner argued that his attorney failed to: (1) advise petitioner that his appeal had been dismissed pursuant to the waiver provision; (2) advise petitioner to continue to trial after the government agreed to change the drug quantity at the change of plea hearing, which allegedly evinced tampering of evidence; and (3) advise petitioner of a potential entrapment defense. *Perez*, 2006 WL 3300376, at *3. In Petitioner’s Reply to Government’s Motion to Dismiss Petition Under 28 U.S.C. §2255, petitioner stated that his plea was not made “knowingly and voluntarily” because he would have proceeded to trial had his attorney advised him of an entrapment defense. Petitioner did not claim in his *habeas* petition that ineffective assistance of counsel caused unknowing or involuntary agreement to the waiver provision.

III. CONCLUSION

For the foregoing reasons, none of the arguments raised in petitioner's Application for Certificate of Appealability provides a basis for reconsidering the Court's Order and Memorandum of November 9, 2006. Thus, petitioner's Application for Certificate of Appealability, treated as a motion for reconsideration, is denied and a COA will not issue.

BY THE COURT:

/s/ Honorable Jan E. DuBois

JAN E. DUBOIS, J.