

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

UNITED STATES OF AMERICA,	)	
	)	Criminal Action
Plaintiff	)	No. 2011-cr-00607-001
	)	
vs.	)	Civil Action
	)	No. 2013-cv-01121
EDWIN RODRIGUEZ,	)	
	)	
Defendant	)	

\* \* \*

APPEARANCES:

SHERRI A. STEPHAN, ESQUIRE  
Assistant United States Attorney  
On behalf of the United States of America

EDWIN RODRIGUEZ  
Defendant pro se

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O P I N I O N

JAMES KNOLL GARDNER  
United States District Judge

This matter is before the court on defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.

For the reasons expressed in this Opinion, the motion is dismissed.

FACTS AND PROCEDURAL HISTORY

On October 4, 2011 a nine-count Indictment was filed. In the Indictment, defendant, Edwin Rodriguez, was charged with one count of Distribution of 28 grams or more of cocaine base

("crack") within 1000 feet of a public school in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 860(a) (Count One); one count of Distribution of 28 grams or more of cocaine base ("crack") in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (Count Two); three counts of Distribution of cocaine base ("crack") within 1000 feet of a public school in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 860(a) (Counts Three, Five and Seven); three counts of Distribution of cocaine base ("crack") in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (Counts Four, Six and Eight); and one count of Possession and sale of a stolen firearm in violation of 19 U.S.C. § 922(j) (Count Nine).<sup>1</sup>

During a change-of-plea hearing on May 15, 2012, I conducted a guilty plea colloquy with defendant, who pled guilty to all nine counts of the Indictment.<sup>2</sup>

On August 14, 2012 defendant was sentenced to 96 months on each of Counts One, Three, Five, Seven, and Nine, to be served concurrently.<sup>3</sup>

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<sup>1</sup> See Indictment filed October 4, 2011 in the United States District Court for the Eastern District of Pennsylvania (Document 1).

<sup>2</sup> See Guilty Plea Agreement filed May 16, 2012 (Document 13) and Transcript of Change of Plea Before the Honorable James Knoll Gardner United States District Court Judge, held May 15, 2012 ("Change of Plea Transcript"), at pages 22-28.

<sup>3</sup> See Judgment in a Criminal Case (Document 21). No further penalty was imposed on each of Counts Two, Four, Six, and Eight because they were lesser included offenses of Counts One, Three, Five, and Seven, respectively.

On February 5, 2013 defendant pro se filed his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Defendant's § 2255 Motion"). On April 17, 2013 the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 was filed ("Government's Motion"). On May 8, 2013 defendant filed Petitioner Edwin Rodriguez's Reply Memorandum.

Hence this Opinion.

#### CONTENTIONS OF THE PARTIES

Defendant's habeas corpus motion contains one ground under which he contends that he is entitled to relief based on ineffective assistance of trial counsel. Specifically defendant claims that he is entitled to relief because he asked his trial counsel to file a notice of appeal and seek reduction of his sentence, and his trial counsel refused to do so.<sup>4</sup>

The government contends that defendant knowingly and voluntarily waived his appeal rights as part of his plea agreement. The government then argues that because his appeal rights were properly waived and because defendant's motion does not present a miscarriage of justice, defendant's motion should be dismissed.

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<sup>4</sup> See Defendant's § 2255 Motion at page 4.

## STANDARD OF REVIEW

Section 2255 of Title 28 of the United States Code provides federal prisoners with a vehicle for challenging an unlawfully imposed sentence. Section 2255 provides, in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

A motion to vacate sentence under Section 2255 "is addressed to the sound discretion of the district court." United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). Defendant may prevail on a Section 2255 habeas claim only by demonstrating that an error of law was constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice", or an "omission inconsistent with the rudimentary demands of fair procedure". Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417, 421 (1962).

To establish a deficiency in counsel's performance, a convicted defendant must demonstrate that the representation

fell below an "objective standard of reasonableness" based on the particular facts of the case and viewed at the time of counsel's conduct. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064-2065, 80 L.Ed.2d 674, 693-694 (1984); Senk v. Zimmerman, 886 F.2d 611, 615 (3d Cir. 1989). There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-695 (internal quotations omitted).

To establish the second Strickland prong, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Counsel's errors must have been so serious that they deprived defendant of a "fair trial" with a "reliable" result. Id., 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

When, as in this case, a defendant's claim of ineffective assistance of counsel involves the failure to file a notice of appeal when appeal rights were waived, the threshold issue is whether the waiver is enforceable. United States v. Mabry, 536 F.3d 231 (3d Cir. 2008).

"A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution," including the right to appeal. United States v. Mezzanatto, 513 U.S. 196, 201, 115 S.Ct. 797, 801, 130 L.Ed.2d 697, 704 (1995). Such waivers may be enforced, "provided that they are entered into knowingly and voluntarily and their enforcement does not work a miscarriage of justice". Mabry, at 237 (citing United States v. Khattak, 273 F.3d 557, 561 (3d Cir. 2001)).

In determining whether a waiver is knowing and voluntary, the court must look to the record, specifically the written plea agreement and the change of plea colloquy, for evidence that the defendant understood the waiver and agreed to it of his own volition. United States v. Gwinnett, 483 F.3d 200, 204-205 (3d Cir. 2007).

In establishing whether or not a miscarriage of justice has occurred, a court must consider

the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.

United States v. Teeter, 257 F.3d 14, 25-26 (1st Cir. 2001) (adopted by the Third Circuit in Khattak, 273 F.3d at 563).

## DISCUSSION

Here, defendant knowingly and voluntarily waived his rights to appeal or to collaterally challenge the judgment in this case. Moreover, I conclude that there is no miscarriage of justice. Because defendant entered into the waiver knowingly and voluntarily and because there is no miscarriage of justice, defendant's waiver should be enforced.

Defendant waived his right to appeal or collaterally challenge the judgment in this case as part of his plea agreement with the government.<sup>5</sup> Specifically, defendant's plea agreement stated that:

In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255 or any other provision of law.

Guilty Plea Agreement at ¶ 9.

The Guilty Plea Agreement further specified that the waiver was "not intended to bar the assertion of constitutional claims that the relevant case law holds can not be waived." The agreement also allowed for limited circumstances under which the

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<sup>5</sup> See Guilty Plea Agreement at ¶ 9 and Change of Plea Transcript at pages 48-65.

defendant may appeal his sentence.<sup>6</sup> While defendant claims that he asked his trial counsel to file an appeal to challenge his sentence, he does not allege any of the limited circumstances listed in the agreement, nor are they applicable in this case.<sup>7</sup>

Because it is the sentencing judge who is responsible for determining that the defendant understands "the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence," I also look to the transcript of the hearing before me in this matter for record evidence that the defendant knowingly and voluntarily entered into the plea agreement. See Khattak, 273 F.3d at 563.

At the change of plea hearing on May 15, 2012, counsel for the government summarized the Guilty Plea Agreement, including defendant's waiver of his appeal rights as contained in paragraph nine.<sup>8</sup> At the end of the government's summary, I

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<sup>6</sup> Under the agreement, defendant could appeal if the government did so, if the sentence on any count of conviction exceeded the statutory maximum, if the sentencing judge erroneously departed upwards pursuant to the Sentencing Guidelines, or if the sentencing judge imposed an unreasonable sentence above the final Sentencing Guideline range determined by the court. Guilty Plea Agreement at ¶¶ 9(a) and (b).

<sup>7</sup> The government has not appealed the sentence in this case. On August 14, 2012, I sentenced the defendant to 96 months (eight years) on Counts One, Three, Five, Seven, and Nine, to be served concurrently. This sentence was well below the applicable statutory maximums (eighty years for Count One, forty years for Counts Three, Five, and Seven, and ten years for Count Nine) and was within the Sentencing Guideline range of 87 to 108 months. An upwards departure was neither granted nor imposed.

<sup>8</sup> Change of Plea Transcript, at pages 22-27.

asked the defendant if he had heard and understood the terms of the plea agreement. He responded that he had.<sup>9</sup>

I next asked the defendant if the plea agreement had been correctly and completely summarized as he understood it, and he answered that it had been.<sup>10</sup> In addition, defendant affirmed that he understood the government's summary was not word for word what he had agreed to in the plea agreement itself but that he was "bound by all of the terms and conditions of the written Guilty Plea Agreement," whether summarized or not.<sup>11</sup>

I then discussed both the appeal rights a defendant would ordinarily have and those that defendant would have under his plea agreement. Defendant affirmed throughout the colloquy that he understood both the rights ordinarily available and which of those rights he had given up in his plea agreement.<sup>12</sup>

At the conclusion of the Change of Plea Hearing, defendant additionally confirmed that he was "pleading guilty voluntarily and of his own free will."<sup>13</sup> I found that defendant was "fully alert, competent, and capable of entering into an

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<sup>9</sup> Change of Plea Transcript, at page 27.

<sup>10</sup> Id., at page 27.

<sup>11</sup> Id., at page 28.

<sup>12</sup> Id., at pages 48-65.

<sup>13</sup> Id., at page 77.

informed plea and that each guilty plea is a knowing and voluntary plea" and accepted his change of plea.<sup>14</sup>

Based on defendant's affirmations, together with his confirmation that he had read and understood the Guilty Plea Agreement before he signed it,<sup>15</sup> I conclude that defendant knowingly and voluntarily entered into the waiver of his rights to appeal or collaterally challenge his sentence. Therefore, his waiver is valid.

Waivers that are entered into knowingly and voluntarily are permissible "unless they work a miscarriage of justice." Khattak, 273 F.3d at 558. The United States Court of Appeals for the Third Circuit has not articulated a definition for the phrase "miscarriage of justice" but instead directs courts to look to a variety of factors to determine if there are unusual circumstances in the case at hand that invalidate an otherwise proper waiver. United States v. Jackson, 523 F.3d 234, 242-243 (3d Cir. 2008).

Specifically, courts must look to the clarity of the alleged error, its gravity and character, the impact of the error on defendant and on the government, and the extent to which defendant acquiesced in the result. Khattak, 273 F.3d at 563.

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<sup>14</sup> Change of Plea Transcript, at page 80.

<sup>15</sup> Id., at pages 18-21.

Courts in this Circuit have held that enforcement of a waiver that is itself based upon ineffective assistance of counsel may result in a miscarriage of justice. United States v. Akbar, 181 Fed.Appx. 283, 286 (3d Cir. 2006); see also United States v. Robinson, 2004 WL 1169112, at \*3 (E.D.Pa. Apr. 30, 2004)(Baylson, J.). However, an ineffective assistance of counsel argument "survives only with respect to those discrete claims which related directly to the negotiation of the waiver." United States v. Ballard, 2009 WL 637384, at \*4 (E.D.Pa. Mar. 11, 2009)(DeBois, J.)(internal quotations omitted). In this case, defendant's ineffective assistance of counsel claim does not address the negotiation of the waiver, but rather the failure to file of a notice of appeal.

Absent a waiver, defendant is correct that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable"<sup>16</sup> and that failure to file notice in such a case can satisfy the first prong of Strickland. See Douglas v. Wolf, 201 Fed.Appx. 119, at 121 (3d Cir. 2006).

However, where there is a waiver of appeal rights, "counsel's duty to protect his or her client's interest

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<sup>16</sup> Indeed, the language defendant uses is an unattributed direct quote from the Supreme Court's decision in Roe v. Flores-Ortega. Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S.Ct. 1029, 1035, 145 L.Ed.2d 985 (2000). See also Rodriguez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969) and Peguero v. United States, 526 U.S. 23, 119 S.Ct. 961, 143 L.Ed.2d 18 (1999).

militates against filing an appeal' which could cost the client the benefit of the plea bargain against his or her best interest." Mabry, 536 F.3d at 240 (3d Cir. 2008)(quoting Nunez v. United States, 495 F.3d 544 (7th Cir. 2007), vacated on other grounds, 554 U.S. 911, 128 S.Ct. 2990, 171 L.Ed.2d 879 (2008)).

In such cases, "there is no reason to presume prejudice amounting to a miscarriage of justice in such a situation where the attorney's filing of an appeal would constitute a violation of the plea agreement." Mabry, 536 F.3d at 240-241 (3d Cir. 2008).

Here, filing an appeal would constitute a violation of the plea agreement. Additionally, defendant has not established that there are unusual circumstances which would invalidate his waiver, nor has he offered a clear argument to overcome the presumption of truthfulness which attaches to his sworn statements. Thus, I find nothing to conclude that upholding this waiver would lead to a miscarriage of justice, especially in light of the extent to which the defendant acquiesced in the result.

#### CERTIFICATE OF APPEALABILITY

The Third Circuit Local Appellate Rules require that "[a]t the time a final order denying a petition under 28 U.S.C. § 2244 or § 2255 is issued, the district judge will make a

determination as to whether a certificate of appealability should issue." 3d Cir. L.A.R. 22.2 (2011). A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Here, I conclude that, because defendant has not met statutory requirements to have his case heard, no reasonable jurist could find this procedural ruling debatable. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542, 555 (2000). Accordingly, a certificate of appealability is denied.

#### CONCLUSION

For all the foregoing reasons, I grant the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 and dismiss the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed by defendant pro se. Moreover, a certificate of appealability is denied.

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

UNITED STATES OF AMERICA,	)
	) Criminal Action
Plaintiff	) No. 2011-cr-00607-001
	)
vs.	) Civil Action
	) No. 2013-cv-01121
EDWIN RODRIGUEZ,	)
	)
Defendant	)

O R D E R

NOW, this 15<sup>th</sup> day of September, 2015, upon  
consideration of the following documents:

- (1) Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed by defendant Edwin Rodriguez pro se on February 5, 2013 (Document 22);<sup>1</sup>
- (2) Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255, which motion was filed April 17, 2013 (Document 24); and
- (3) Petitioner Edwin Rodriguez's Reply Memorandum, filed by defendant pro se on May 8, 2013 (Document 25),

and for the reasons contained in the accompanying Opinion,

IT IS ORDERED that the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 filed on April 17, 2013 is granted.

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<sup>1</sup> While Mr. Rodriguez's 2255 motion was filed February 27, 2013, the motion itself indicates that it was signed by defendant on February 5, 2013. Thus, giving defendant the benefit of the prison mailbox rule (see Burns v. Morton, 134 F.3d 109 (3<sup>rd</sup> Cir. 1998) and Rule 3(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts), I considered February 5, 2013 the filing date of Mr. Vasquez's motion.

IT IS FURTHER ORDERED that defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed on February 5, 2013 is dismissed.

IT IS FURTHER ORDERED that a certificate of appealability is denied.

IT IS FURTHER ORDERED that the Clerk of Court shall close this matter for statistical purposes.

BY THE COURT:

/s/ James Knoll Gardner  
James Knoll Gardner  
United States District Judge