

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : :
 : :
 : :
 : NO. 90-442-2
FREDDIE MARMOLEJOS : (NO. 96-CV-3182)

O R D E R - M E M O R A N D U M

AND NOW, this 18th day of June, 1998, the judgment order of October 11, 1991 having been vacated by the Court of Appeals, see United States v. Marmolejos, 140 F.3d 488, 493-494 (3d Cir. 1998), defendant Freddie Marmolejos is sentenced to 102 months of custody with credit given for time served, five years of supervised release, and a \$50 special assessment.

On June 11, 1991 defendant was convicted by a jury of conspiracy to distribute cocaine, 21 U.S.C. § 846 (1994). At trial, the government presented evidence that defendant had negotiated a purchase of 5.00 kg of cocaine but had actually delivered only 4.96 kg. On October 11, 1991 he was sentenced to 126 months of custody. Under the guidelines in effect at that time, application note 12 to U.S.S.G. § 2D1.1 required that the 5.00 kg amount – rather than the 4.96 kg – be used to calculate defendant's base offense level, resulting in a total offense level of 32 and a sentencing range of 121 to 151 months.¹

¹ Defendant had a criminal history category of I.

On July 29, 1992 the Court of Appeals affirmed defendant's conviction. See United States v. Marmolejos, 972 F.2d 1333 (3d Cir. 1992). In March 1995, defendant moved to set aside and correct his sentence, 28 U.S.C. § 2255 (1994). On May 22, 1995 this motion was denied, and, on October 30, 1995 the Court of Appeals affirmed the order.

In April 1996, defendant again moved under § 2255 to set aside his sentence on the ground that amendment 518 to the guidelines – which became effective November 1, 1995 – was a clarification of application note 12 and mandated use of the 4.96 kg amount in calculating his base offense level. On June 11, 1996 the motion was denied,² and defendant timely appealed. On April 2, 1998 the Court of Appeals reversed, holding that amendment 518 has retroactive effect. See 140 F.3d at 493.

Use of the 4.96 kg amount results in a base offense level of 30 and a sentencing range of 97-121 months. Defendant and the government have no objection to a sentence of 102 months. Defendant has expressly waived his right to be present at his re-sentencing. See affidavit of Freddie Marmolejos. Defendant's waiver is found to be knowingly and voluntarily made, and sufficient to allow sentencing in absentia. Fed. R. Crim. P. 43(b)(2); see also United States v. Ammar, 919 F.2d 13, 17 (3d Cir. 1990) (citing United States v. Brown, 456 F.2d 1112, 1114 (5th Cir. 1972) (upon express waiver by defendant's sworn affidavit, court may sentence in absentia)).

² Defendant also moved for reconsideration, which motion was denied on July 29, 1996.

The following notice is now given, as required by Fed. R.

Crim. P. 32(c)(5):

Freddie Marmolejos, you have the right to appeal the sentence imposed by this order. If you are unable to pay the costs of an appeal, you may apply for leave to appeal in forma pauperis. If you so request, the clerk of the court must immediately prepare and file a notice of appeal on your behalf. You have ten (10) days to file a notice of appeal to preserve your appellate rights. You have the right to be represented by an attorney, and if you cannot afford an attorney one will be appointed for you free of charge.

Edmund V. Ludwig, J.