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

UNITED STATES OF AMERICA	**:**	
	:	
v.	**:**	**CRIMINAL NO. 01-385**
	:	
JEFFREY RIVERA	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **October 25, 2006**

Now before the Court is the pro se Petition of Jeffrey Rivera ("Petitioner") to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. For the reasons that follow, the Petition will be denied.

I. BACKGROUND

On June 25, 2002, Petitioner pled guilty, as part of a plea agreement, to conspiracy to distribute heroin in violation of 21 U.S.C. § 846. On October 24, 2002, this Court sentenced Petitioner to 151 months imprisonment followed by five years of supervised release. On appeal, the Third Circuit vacated the sentence after concluding that the Court erred by not directly asking the Petitioner whether he had read the presentence report and discussed it with his lawyer. The Third Circuit remanded the matter for resentencing and instructed this Court to provide the Petitioner the opportunity to challenge the inclusion in the Presentence Report of a 1993 conviction in Puerto Rico, and to present any further evidence of his family circumstances. See United States v. Rivera, 79 Fed. Appx. 522, 529 (3d Cir. 2003).

On June 15, 2004, the Court held a resentencing hearing. During the hearing, the Court was advised that the Petitioner had reached a written agreement with the Government, whereby the Court would be asked to reimpose the 151-month sentence. The agreement specifically

provided that Petitioner would voluntarily waive all rights to appeal or collaterally attack the conviction, sentence, or any other matter relating to the prosecution under 28 U.S.C. § 2255. Before approving the agreement, the Court engaged in an extensive colloquy with the Petitioner to ensure that his waiver was knowing and voluntary. Petitioner confirmed that he did not wish to present further evidence of his family circumstances, and also agreed not to challenge his 1993 conviction in Puerto Rico. On September 2, 2005, Petitioner filed the instant § 2255 petition, alleging ineffective assistance of counsel.

II. DISCUSSION

Petitioner alleges that defense counsel's failure to fully investigate his 1993 conviction in Puerto Rico and to introduce evidence of his difficult family circumstances amounted to a violation of his constitutional rights. As a threshold matter, the Court must determine whether the Petition as a whole is precluded by Petitioner's agreement with the Government.

A. Waiver of Right to Collateral Challenge

In U.S. v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001), the Third Circuit held that "waivers of appeals are generally permissible if entered into knowingly and voluntarily, unless there is a miscarriage of justice." Id. Although the Third Circuit has not directly addressed the applicability of this holding to waivers of the right to collateral attack, a number of courts in this district as well as in other jurisdictions have held that the principle applies equally to waivers of the right to collateral attack. See United States v. Black, 2006 WL 759691, at *2 (E.D. Pa. March 23, 2006); United States v. Fagan, 2004 WL 2577553, at *3 (E.D. Pa. Oct. 4, 2004); see also United States v. White, 307 F.3d 336, 337 (5th Cir. 2002).

The agreement Petitioner entered into contained an explicit waiver clause, which stated in

pertinent part:

> 3. In exchange for this agreement by the government, and if the Court imposes a custody sentence of 151 months or less, defendant Rivera 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 collaterally attack arises under 18 U.S.C. 3742, 28 U.S.C. 1291, 28 U.S.C. 2255, or any other provision of law.

During the June 15, 2004 resentencing hearing, the Court asked a series of questions designed to ensure that Petitioner reviewed and understood the content of the presentence report and voluntarily entered into the agreement:

The Court: Before we go any further, however, I want to be absolutely certain – absolutely certain that you and your client have read the presentence report, the amended presentence report, and have discussed it thoroughly and that he understands the report.

Mr. Ortiz: Your Honor, Mr. Ortiz. I reviewed the presentence report with Mr. Rivera in Spanish, line by line, the revised presentence report, the most recent presentence report...
...

The Court: Mr. Rivera, I'm going to ask you, do you have a copy of this supplemental agreement?

Mr. Rivera: Yes.

The Court: And have you had the opportunity to read it carefully?

Mr. Rivera: Yes.

The Court: And someone has explained to you both in English and in Spanish what it means?

Mr. Rivera: Yes, it was explained to me.

The Court: And do you agree to it?

Mr. Rivera: We are in agreement...

...

The Court: And do you agree that it's not necessary therefore to put in any further evidence about family circumstances?

Mr. Rivera: No, it's not necessary.

The Court: And you do not challenge any further the 1993 Puerto Rican conviction; is that right?

Mr. Rivera: Yes, we agree.

Mr. Glenn: I guess just to be explicit could we be sure that Mr. Rivera understands that if the Court sentences him to 151 months he is giving up his right to appeal any aspect of this case or to file a motion under Section 2255.

The Court: ... let me read paragraph three of the agreement. The agreement reads: "In exchange for this agreement... if the Court imposes a custody sentence of 151 months or less, defendant Rivera voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution... Do you understand?

Mr. Rivera: I understand.
...

The Court: Is there anything that you would like – anything more, Mr. Rivera, that you'd like to say to the Court this morning?
...

Mr. Rivera: I am conscious of my mistake and I accept it. And I thank the Government of the United States because this has taught me to recognize what I was doing. That's all.

The Court: Thank you, sir.

June 15, 2004 Hearing Tr. at 6-8; 23-26.

As the above colloquy reveals, the two bases of Petitioner's ineffective assistance claim – defense counsel's alleged failure to investigate the Puerto Rico conviction and introduce evidence of Petitioner's family circumstances – were explicitly addressed by the Court during the resentencing hearing. Petitioner was given the opportunity to present any additional evidence

regarding his family circumstances, and was directly asked whether he wished to further challenge his Puerto Rico convention. He expressly declined.

As a narrow exception to the general rule that waivers of the right to collateral attack are enforceable, courts have held that such waivers do not foreclose the right to argue ineffective assistance of counsel with respect to the negotiation of the waiver agreement. See Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1998); DeRoo v. United States, 223 F.3d 919, 924 (8th Cir. 2000) (holding that waiver does not foreclose the right to argue that the decision to enter into the plea was not voluntary due to ineffective assistance of counsel); Fagan, 2004 WL 2577553, at *3.[1] Because Petitioner challenges his attorney's alleged failure to investigate the Puerto Rico conviction, the Court will review Petitioner's ineffective assistance claim on the merits, but only as it relates to the voluntariness of the waiver agreement.

B. Ineffective Assistance of Counsel

A defendant claiming ineffective assistance of counsel must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 688-92 (1984). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. In evaluating counsel's performance, the Court should be "highly deferential" and "indulge 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

[1] The Third Circuit has not ruled on the effect of waivers of the right to collateral attack.

trial strategy.'" Id. at 689 (citation omitted).

During the October 24, 2002 sentencing, Assistant United States Attorney Albert S. Glenn provided the Court with a copy of a certified judgment of conviction issued by the Puerto Rican court. Petitioner's counsel at the time, Eric Vos, challenged the validity of the conviction, stating that his client believes the case was eventually dropped. During the June 15, 2004 resentencing hearing, the Government and the Probation Officer presented additional documentation in support of the validity of the 1993 conviction:[2]

> The Court: As I understand it in the course of its investigation Probation confirmed the 1993 conviction and also determined that Mr. Rivera was on escape status at the time he committed the instant offense. This could result in an increase of three criminal history points and one criminal history category. Also, if we were to find that the 1993 charges ... hadn't been dropped ... [this could] constitut[e] an obstruction of justice and the offense level could be increased by two levels pursuant to United States sentencing Guidelines Section 3C1.1.

June 15, 2004 Hearing Tr. at 5.

A defendant alleging that he was improperly advised to accept a plea agreement must show that "counsel's performance fell below the wide range of professionally competent assistance." U.S. v. Stokes, 2006 WL 2620399, at *5 (W.D. Pa. Sept. 11, 2006) (citing Strickland, 466 U.S. at 687). A defense attorney's recommendation that his client accept an agreement reducing his exposure to a higher sentence falls well within the broad range of

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[2] As part of its Supplemental Memorandum for Resentencing (docket no. 77), the Government submitted a letter dated December 3, 2003 from Assistant Probation Officer Susan Santiago Bello, a representative of the federal probation office in Puerto Rico, stating that she examined Petitioner's record and found that he was sentenced in absentia and has been on escape status since August 8, 1995. See United States' Supplemental Memorandum for Resentencing (hereinafter, "Resentencing Memo"), Exhibit A. The Government also submitted a letter dated March 20, 1996 from the Parole Board that reviewed Petitioner's case and found that he has been a fugitive since August 8, 1995. See Resentencing Memo, Exhibit B.

professional competence. See Black, 2006 WL 759691, at *5. In this case, had the Government sought enhancements of the offense level and criminal history categories on the basis of the information the Probation Officer had obtained in the course of the investigation, Petitioner would have faced a significantly higher sentence. Petitioner therefore benefitted from the agreement – a fact which undercuts his claim that he was prejudiced by his counsel's alleged ineffective assistance.[3]

Finally, Petitioner's claim that counsel was ineffective for failing to introduce evidence of his family circumstances does not withstand scrutiny. At the October 24, 2002 sentencing hearing, Petitioner's counsel moved for a downward departure pursuant to Guideline Section 5H1.6 on the basis of Petitioner's difficult family circumstances, including his mother's mental illness and his siblings' autism. After hearing the arguments and testimony of Petitioner's father-in-law, the Court concluded that the evidence presented was insufficient to warrant a downward departure and denied the motion. Petitioner was granted another opportunity to present evidence of his family circumstances during the June 15, 2004 resentencing hearing, but declined to do so. Petitioner has failed to overcome the strong presumption that his counsel's performance fell within an "objective standard of reasonableness." Strickland, 466 U.S. at 688.

III. CONCLUSION

For the foregoing reasons, the Court finds that Petitioner knowingly and voluntarily waived his right to collateral attack. Moreover, Petitioner has failed to show that the

[3] Absent the Puerto Rico conviction, Petitioner's criminal history category would be III, which would have yielded a sentencing range of 135 to 168 months. Petitioner's sentence of 151 months is well within this range.

enforcement of the waiver would result in a miscarriage of justice. Accordingly, the Petition will be denied and dismissed. Because Petitioner has not made the requisite showing of the denial of a constitutional right, a certificate of appealability should not issue.

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ORDER

AND NOW, this 25th day of October, 2006 upon consideration of Petitioner Jeffrey Rivera's pro se Motion to Vacate, Set Aside, or Correct Sentence (docket no. 97), the Government's response thereto (docket no. 102), and Petitioner's reply (docket no. 103), it is **ORDERED** that:

(1) The Motion is **DENIED**.

(2) The Clerk of the Court shall mark the case **CLOSED**.

(3) Because there is no probable cause to issue a certificate of appealability, no certificate of appealability shall issue.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.