

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

CARLOS ALBERTO PEREZ-FULGENCIO,)	
Petitioner,)	
)	
v.)	Case No. 7:05-CV-00235
)	
UNITED STATES OF AMERICA,)	By: Michael F. Urbanski
Respondent.)	United States Magistrate Judge

REPORT AND RECOMMENDATION

Petitioner Carlos Alberto Perez-Fulgencio brings this action under 28 U.S.C. § 2255, alleging that his counsel provided ineffective assistance by abandoning him, failing to appeal his conviction, and failing to explain the advantages and disadvantages of filing an appeal. By Order dated July 20, 2005, the court referred this matter to the undersigned and directed that an evidentiary hearing be held to determine whether petitioner requested that his attorney, David Parker, file an appeal. Such a hearing was conducted on November 28, 2005. Following the evidentiary hearing, the court concludes that there is no credible evidence to suggest that petitioner's counsel was ineffective so as to deprive petitioner of his right to appeal. Therefore, it is recommended that the petition be dismissed.

I

On June 7, 2004, petitioner pled guilty to one count of conspiracy to distribute fifty (50) grams or more of crack cocaine in violation of 21 U.S.C. § 846. The plea agreement limited the drug weight attributed to petitioner, and the United States agreed not to oppose a reduction in the base offense level for acceptance of responsibility and not to seek any enhancements. Transcript of Guilty Plea Hearing (hereinafter, Guilty Plea Tr.) June 7, 2004, at 3-4. Both the government

and the court explained at the guilty plea hearing that Perez-Fulgencio was waiving his right to appeal any sentencing guideline issue and to collaterally attack the conviction under 28 U.S.C. § 2255. Guilty Plea Tr. 4, 11; see also Plea Agreement 3.

The Presentence Investigation Report (hereinafter, Presentence Report) prepared by the United States Probation Office recommended a total offense level of 37, including a three point downward adjustment for acceptance of responsibility, and a four point enhancement for being an organizer or leader in the offense. Plea Agreement 2; Transcript of Sentencing Hearing (hereinafter, Sentencing Tr.) August 23, 2004, at 3-4; Guilty Plea Tr. 4.

At the August 23, 2004 sentencing hearing, Perez-Fulgencio's counsel stated: "We had an objection regarding the adjustment for the role in the offense giving a plus four. I believe Government counsel and I have come to an agreement on that and we would stipulate it would be a plus two instead of a plus four." Sentencing Tr. 3. The court accepted that agreement as to the two point adjustment, which resulted in a custody range from 168 to 210 months. Sentencing Tr. 4. Perez-Fulgencio was sentenced to 168 months of imprisonment followed by five years of supervised release. Sentencing Tr. 7. Immediately following the sentencing, the court advised petitioner:

You have waived the right to appeal your sentence and that waiver is binding unless the sentence exceeds the statutory maximum or is based on a constitutionally impermissible factor. If you undertake to appeal despite your waiver, you may lose the benefits of your plea agreement.

Any notice of appeal must be filed within 10 days of the entry of judgment or within ten days of the notice of appeal by the Government.

If requested, the clerk will prepare and file a notice of appeal on your behalf.

Sentencing Tr. 9.

Perez-Fulgencio did not indicate at the hearing any interest in an appeal. Nor did he file a notice of appeal or make any request to have the clerk do so. Now, in his habeas corpus petition, petitioner claims that he requested his attorney to appeal his sentence, and that his attorney provided ineffective assistance by failing to comply with the request.

At the November 28, 2005 evidentiary hearing, petitioner testified to the following. Petitioner stated that when shown the Presentence Report by his counsel, David Parker, he objected to the four point enhancement for his role as a leader in the drug conspiracy. Petitioner testified that he told his attorney to file “a paper” stating that he was not the boss. Petitioner claims Parker said he would argue the point in front of the judge, but according to Perez-Fulgencio, Parker said nothing about it at sentencing. Petitioner believes that at sentencing, he received a four point enhancement for being a leader in the conspiracy. Petitioner stated that he never said anything about his objection to the court because he thought his attorney had presented a paper to the court on the subject. After the sentencing, petitioner claims to have again asked his attorney about presenting a paper. Perez-Fulgencio testified that he did not know what an appeal was but that he wanted to challenge the four points he believes he was given. He also testified that he does not remember whether his attorney talked to him about appeal options.

Petitioner stated he can understand English, but that he cannot read or write in English. He was assisted at the evidentiary hearing by an interpreter, and stated he was also assisted at both the guilty plea and sentencing hearings by an interpreter. Perez-Fulgencio acknowledged that a friend in prison wrote his § 2255 petition and translated it for him. He testified that this

friend explained the concept of an appeal to him.

Petitioner further testified that Parker went over the plea agreement with him via an interpreter, but that he did not understand much of it. However, when reminded on cross examination that he testified under oath at the guilty plea hearing as to his understanding of the plea agreement, Perez-Fulgencio insisted he only disagreed with the four points, and that the rest of the plea agreement was fine. See Guilty Plea Tr. 8. Though he testified that he did not know what an appeal was, Perez-Fulgencio admitted that he had previously indicated under oath that he knew what an appeal was and that he understood he was giving up his right to appeal. See Guilty Plea Tr. 11. Petitioner also admitted that nearly nine months after sentencing, he met a fellow prisoner who offered to help him by submitting a petition to the court.

Petitioner's counsel, David Parker, testified that Perez-Fulgencio was never difficult to deal with, that he was of at least average intelligence, and that he frequently asked questions and indicated that he understood the answers. According to Parker, petitioner was an active participant at hearings. Parker testified that they talked about the risks and benefits of going to trial, and he stated that it was petitioner's decision to offer the guilty plea. Parker said he presented the guilty plea option to petitioner as an opportunity, not a guarantee, in line with a strategy of reducing his sentence by cooperation. Parker stated he made it clear to petitioner that any recommendations as to sentencing were not binding on the court.

Parker stated that after sentencing, petitioner sent him letters and his family called Parker's office but spoke of nothing other than a substantial assistance motion. Parker produced two copies of such letters sent to him by petitioner, marked as government's exhibits 1 and 2. Parker testified that petitioner never asked him to appeal his sentence. Parker asserted he asked

Perez-Fulgencio whether he wanted to file an appeal despite his waiver of rights, and told petitioner that if so, he needed to tell Parker immediately. Parker testified that petitioner said no and shook his head accordingly. Parker further stated that there was no issue that could be raised on appeal, as petitioner was not given the four points for his role in the offense as recommended in the Presentence Report, but only two points as agreed upon by both parties.

Parker testified that he explained Perez-Fulgencio's waiver of his right to appeal all issues. Parker stated it was his practice generally to go over the issue of appeal with defendants after sentencing. He specifically remembers telling petitioner to contact him or the clerk of court to appeal this matter. Parker also stated that he did not see any advantage for Perez-Fulgencio to seek an appeal of his sentence in this case. On cross examination, Parker admitted that he could have raised an issue as to *any* point enhancements for petitioner's role in the conspiracy, but that Perez-Fulgencio had agreed to a two point enhancement. In the absence of the agreement, Parker stated, he would have argued for zero points.

While petitioner and Parker disagree as to whether Perez-Fulgencio requested his counsel to file an appeal following sentencing, the undersigned finds petitioner's account not to be credible. Parker testified that he asked Perez-Fulgencio whether he would like to appeal his sentence despite his waiver of rights, and petitioner shook his head and said no. While petitioner did write Parker post-sentencing, these letters do not mention an appeal, and instead, inquire about a possible substantial assistance motion. Even now, petitioner insists that the appeal would have concerned a four point enhancement which he never received.

As the evidence revealed, this § 2255 petition, drafted by petitioner's prison colleague, betrays a fundamental misconception as to the sentence actually imposed upon petitioner.

Petitioner testified that he wanted his counsel to object to the four point enhancement, which, in fact, his counsel did at sentencing. As a result of this objection, a two point enhancement was negotiated and agreed to by petitioner. The crux of this habeas petition is that counsel did not appeal a four point enhancement which petitioner never received. This petition, the product of a “jailhouse lawyer,” represents the proverbial square peg in a round hole as there is a substantial disconnect between the allegations in the petition, petitioner’s own testimony, and the events reflected in the transcript of the guilty plea and sentencing hearings.

Further, the fact that a reasonable defendant in petitioner’s circumstances would not have appealed his sentence lends weight to Parker’s assertion that petitioner never asked for an appeal. Indeed, it makes little sense for Perez-Fulgencio to have requested an appeal, as by his plea agreement he avoided a potential sentence of life imprisonment. Also, contrary to what petitioner claims, he received only a two point enhancement upon agreement by the government as opposed to the four point enhancement recommended in the Presentence Report.

Further, Perez-Fulgencio waived any appeal on any sentencing guideline issue in his plea agreement. As the court advised, if petitioner had undertaken to appeal despite his waiver, he could have lost the benefits of the plea agreement, including the avoidance of a possible life sentence. Sentencing Tr. 9. Finally, the court clearly explained to Perez-Fulgencio his right to appeal immediately following the sentence. Sentencing Tr. 9.

Thus, there is no credible evidence that Perez-Fulgencio requested his attorney to file an appeal. At most, Perez-Fulgencio’s testimony suggests that he asked his lawyer to file a “paper” about the four point enhancement, and his lawyer’s objection on the record to that enhancement resulted in the two point compromise agreed to by the government and the petitioner.

II

As to the issue whether counsel adequately consulted with petitioner regarding his right to an appeal, counsel Parker testified that he explained the plea agreement to petitioner, including the waiver of appeal provision. Further, at sentencing, the court specifically addressed Perez-Fulgencio's right to appeal in open court. Sentencing Tr. 9. Under these circumstances, no credible argument can be made that counsel was ineffective or that Perez-Fulgencio was not adequately consulted regarding his right to appeal.

In Strickland v. Washington, 466 U.S. 668, 687 (1984), the Supreme Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance. To establish ineffective assistance of counsel, a defendant must show first that counsel's representation fell below an objective standard of reasonableness, and second, that counsel's defective performance prejudiced defendant. Id. at 688, 694. In Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000), the Court held that this test was applicable to situations where trial counsel was allegedly ineffective by failing to file a notice of appeal.

Under Flores-Ortega, "[c]onsult" means "advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes." Flores-Ortega, 528 U.S. at 478. If counsel has consulted with defendant, the question of deficient performance is easily answered as counsel performs in a professionally unreasonable manner only by failing to follow defendant's express instructions with respect to an appeal. Id. If counsel has not consulted with defendant, the court must then ask whether counsel's failure to consult with defendant itself constitutes deficient performance. Id. As the Court held in Flores-

Ortega, “[w]e cannot say, as a *constitutional* matter, that in every case counsel’s failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. Such a holding would be inconsistent with both our decision in Strickland and common sense.” Id. at 479. Consultation with a defendant is constitutionally imposed where there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that the defendant reasonably demonstrated to counsel that he was interested in appealing. Id. at 480. Even where a defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea agreement waived appeal rights. Id. at 480.

The testimony at the evidentiary hearing clearly established that counsel went over the terms of the plea agreement with Perez-Fulgencio via an interpreter. Parker testified that he explained the waiver of appeal provisions in the plea agreement to petitioner. Perez-Fulgencio testified at the guilty plea hearing that he was satisfied with counsel. Guilty Plea Tr. 7. Though petitioner stated at the evidentiary hearing that he did not understand much of the plea agreement, he testified under oath at the guilty plea hearing on June 7, 2004 that he understood the agreement, as follows:

The Court:	Do you understand [the plea agreement]?
Defendant Perez-Fulgencio:	What was explained to me, yes.
The Court:	Anything about it you do not understand?
Defendant Perez-Fulgencio:	No, I understood everything that was explained to me.

Guilty Plea Tr. at 8. Petitioner later clarified his testimony at the evidentiary hearing that he did not understand much of the agreement by stating that he was in agreement with all but the four point enhancement he believes he was given.

Petitioner also testified at the guilty plea hearing that he understood he was waiving both his right to appeal and to collaterally attack his conviction, as follows:

The Court: Do you also understand that after it's been determined what guideline applies in your case, I might have the authority under certain circumstances to impose a sentence that is more severe or less severe than the one called for by the guidelines?

Defendant Perez-Fulgencio: Yes, sir.

The Court: Do you also understand that under certain circumstances, you or the Government would ordinarily have the right to appeal any sentence that I impose, but that pursuant to your plea agreement, you have waived, that is, given up your right to appeal guideline sentencing issues?

You have also given up your right to collaterally attack your plea and sentence. Do you understand those matters? Have they been fully explained to you by your counsel?

Defendant Perez-Fulgencio: Yes, sir.

Guilty Plea Tr. 10-11.

Not only did Perez-Fulgencio waive any appeal in the plea agreement, there does not appear to be any non-frivolous grounds for appeal. Indeed, as petitioner received only two instead of the recommended four points, a rational defendant would not have wanted to appeal a four point enhancement that was never imposed. The court clearly apprised Perez-Fulgencio at

sentencing of his right to appeal, and the circumstances of this case impose no additional requirement that counsel Parker consult any further with Perez-Fulgencio regarding an appeal after sentencing. See Flores-Ortega, 528 U.S. at 479-80.

There is no indication in the record that the plea was other than as reflected in the plea agreement. Petitioner received a reduction for acceptance of responsibility as outlined in the plea agreement. Petitioner also received the agreed upon two point adjustment instead of a four point adjustment for his role in the offense, after Parker raised petitioner's objection to the four points recommended in the Presentence Report. Given the mandatory statutory minimum of ten years, and other guidelines factors, the sentence of 168 months was to be expected.

In sum, this case presents no evidence of ineffective assistance of counsel. To the contrary, the record, including the statements of Perez-Fulgencio at the plea hearing and sentencing, make it plain that counsel's representation of Perez-Fulgencio was appropriate. Given counsel's review of the plea agreement via an interpreter, including the waiver of appeal, the discussion of waiver of appeal and collateral attack at the time of the guilty plea, and the explanation by the court of the rights to appeal at sentencing, no further consultation was constitutionally required. Flores-Ortega, 528 U.S. at 479-80.

Under the second prong of Strickland, a defendant must show prejudice from counsel's deficient performance. See Flores-Ortega, 528 U.S. at 481. Even had specific additional consultation regarding an appeal been required following sentencing, this case presents no suggestion of prejudice by not doing so. Given that Perez-Fulgencio expressly waived any appeal as to guidelines issues in the plea agreement, there can be no prejudice to petitioner by failing to note an appeal on an issue for which his appeal had been waived in the plea agreement.

III

In conclusion, the evidence is clear that Perez-Fulgencio was repeatedly advised about waiver of his rights to appeal and to collaterally attack his conviction, yet proceeded with his guilty plea. Further, the evidence establishes that Perez-Fulgencio's counsel consulted with him regarding the terms of the plea agreement, including waiver of his right to appeal. There is no credible evidence that counsel was requested to file an appeal, and Perez-Fulgencio was clearly reminded of his right to appeal at sentencing. At its core, petitioner's claim is that he received a four point enhancement to which his lawyer neither objected nor appealed. The transcript of the sentencing hearing demonstrates that petitioner is simply wrong on both scores - his lawyer objected to the four point enhancement, and he negotiated an agreed-upon two point enhancement instead. After successfully obtaining a reduction in the enhancement from four to two points, petitioner's contention that his counsel was ineffective for not appealing the four point enhancement is nonsense. Under these circumstances, Perez-Fulgencio is not entitled habeas corpus relief because his counsel did not file a notice of appeal. It is recommended, therefore, that this case be **DISMISSED**.

IV

The Clerk of the Court is directed immediately to transmit the record in this case to the Honorable Samuel G. Wilson, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by

law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court is hereby directed to send a certified copy of this Report and Recommendation to plaintiff and counsel of record.

ENTER: This 9th day of January, 2006.

/s/

Michael F. Urbanski
United States Magistrate Judge